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# federal register

Tuesday
October 31, 1989

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For information on briefings in San Francisco, CA, and Seattle, WA, see announcement on the inside cover of this issue.

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

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

**WHO:** The Office of the Federal Register.

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

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

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

### SAN FRANCISCO, CA

**WHEN:** November 29; at 9:00 a.m.
**WHERE:** Room 15138,
450 Golden Gate Avenue,
San Francisco, CA.
**RESERVATIONS:** Call Mary Walters at the San Francisco Federal Information Center,
415–556–6600.

### SEATTLE, WA

**WHEN:** November 30; at 1:00 p.m.
**WHERE:** South Auditorium, 4th Floor,
915 2nd Avenue,
Seattle, WA.
**RESERVATIONS:** Call Carmen Meler or Peggy Groff at the Portland Federal Information Center on the following numbers:
Seattle: 206–442–0570,
Tacoma: 206–383–7970,
Portland: 503–326–2222.

# Contents

Federal Register
Vol. 54, No. 209
Tuesday, October 31, 1989

---

**Separate Parts In This Issue**

---

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

## CFR PARTS AFFECTED IN THIS ISSUE

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

**3 CFR**
**Proclamations:**
6057 ..... 46041

**7 CFR**
1137 ..... 45891
1610 ..... 45729
**Proposed Rules:**
971 ..... 45737
984 ..... 45738

**9 CFR**
**Proposed Rules:**
85 ..... 45739

**12 CFR**
Ch. III ..... 45891
Ch. IV ..... 45891

**13 CFR**
120 ..... 45891

**14 CFR**
**Proposed Rules:**
75 ..... 45891

**25 CFR**
**Proposed Rules:**
61 ..... 45743

**26 CFR**
1926 ..... 45894

**29 CFR**
**Proposed Rules:**
1614 ..... 45747

**30 CFR**
**Proposed Rules:**
917 ..... 45767
935 ..... 45768

**31 CFR**
515 ..... 45730
**Proposed Rules:**
103 ..... 45769

**32 CFR**
**Proposed Rules:**
169a ..... 45771

**34 CFR**
**Proposed Rules:**
668 ..... 45994

**40 CFR**
180 ..... 45733
**Proposed Rules:**
372 ..... 45891

**47 CFR**
73 (3 documents) ..... 45735
90 ..... 45891
**Proposed Rules:**
73 (4 documents) ..... 45771–45773

**48 CFR**
5 ..... 46004
6 ..... 46004
19 ..... 46004
52 ..... 46004
815 ..... 45736
**Proposed Rules:**
29 ..... 46036
52 ..... 46036

**50 CFR**
**Proposed Rules:**
17 ..... 45773

# Rules and Regulations

Federal Register
Vol. 54, No. 209
Tuesday, October 31, 1989



## DEPARTMENT OF AGRICULTURE

### Rural Telephone Bank

### 7 CFR Part 1610

### Determination of the 1989 Fiscal Year Interest Rate on Rural Telephone Bank Loans

**AGENCY:** Rural Telephone Bank, USDA.

**ACTION:** Notice of 1989 fiscal year interest rate determination.

**SUMMARY:** In accordance with 7 CFR 1610.10, the Rural Telephone Bank's Fiscal Year 1989 cost of money rate has been established at 5.00 percent. Except for loans approved from October 1, 1987 through December 21, 1987 where borrowers elected to remain at interest rates set at loan approval, all loan advances made from October 1, 1988 through September 30, 1989 under Bank loans approved on or after October 1, 1987 shall bear interest at the rate of 5.00 percent.

The calculation of the Bank's cost of money rate for Fiscal Year 1989 is provided in Table 1. Since the calculated rate (4.87 percent) is less than the minimum rate allowed under 7 U.S.C. 948(b)(3)(A), the cost of money rate is set at the minimum rate of 5.00 percent. The methodology required to calculate the cost of money rate is established in 7 CFR 1610.10(c).

**FOR FURTHER INFORMATION CONTACT:** F. Lamont Heppe, Jr., Chief, Loans and Management Branch, Telecommunications Staff Division, Rural Electrification Administration, Room 2250, South Building, U.S. Department of Agriculture, Washington, DC 20250, telephone number (202) 382–9550.

**SUPPLEMENTARY INFORMATION:** The cost of money rate methodology develops a weighted average rate for the Bank's cost of money by considering total fiscal year loan advances; the excess of fiscal year loan advances over amounts received in the fiscal year from issuances of Class A, B, and C stocks, debentures and other obligations; and the costs to the Bank of obtaining funds from these sources. During Fiscal Year 1989, the Bank paid the following dividends: the dividend on Class A stock was 2.00 percent as established in amended section 406(c) of the Rural Electrification Act; no dividends were payable on Class B stock as specified in 7 CFR 1610.10(c); and the dividend on Class C stock was established by the Bank at 8.5 percent.

The total amount received by the Bank in Fiscal Year 1989 from the issuance of Class A stock was $28,710,000. Total advances for the purchase of Class B stock and cash purchases for Class B stock were $4,955,025. Rescissions of loan funds advanced for Class B stock amounted to $1,071,815. Thus, the amount received by the Bank from the issuance of Class B stock, per 7 CFR 1610.10(c), was $3,883,210 ($4,955,025 –$1,071,815). The total amount received by the Bank in Fiscal Year 1989 from the issuance of Class C stock was $11,614.

The Bank did not issue debentures or any other obligations during Fiscal Year 1989. Consequently, no cost was incurred related to the issuance of debentures subject to 7 U.S.C. 948(b)(3)(D).

The excess of Fiscal Year 1989 loan advances over amounts received from issuances of Class A, B, and C stocks and debentures and other obligations amounted to $64,442,123. The cost associated with this excess is the historical cost of money rate as defined in 7 U.S.C. 948(b)(3)(D)(v). The calculation of the Bank's historical cost of money rate is provided in Table 2. The methodology required to perform this calculation is described in 7 CFR 1610.10(c). The cost of money rates for fiscal years 1974 through 1987 are defined in section 408(b) of the RE Act, as amended by Public Law 100–203, and are listed in 7 CFR 1610.10(c) and Table 2 herein.

Dated: October 26, 1989.

**Jack Van Mark,**

*Acting Governor, Rural Telephone Bank.*

TABLE 1.—RURAL TELEPHONE BANK FY 1989 COST OF MONEY RATE

| Source of bank funds | Amount | Cost rate (percent) | Amount × cost rate | (Amount × rate) advances (percent) |
|---|---|---|---|---|
| FY 1989 issuance of Class A Stock | $28,710,000 | 2.00 | $574,200 | 0.5917 |
| FY 1989 issuance of Class B Stock | 3,883,210 | 0.00 | 0 | 0.0000 |
| FY 1989 issuance of Class C Stock | 11,614 | 8.50 | 987 | 0.0010 |
| FY 1989 issuance of debentures and other obligations | 0 | | 0 | 0.0000 |
| Excess of total advances over 1989 issuances | 64,442,123 | 6.44 | 4,150,073 | 4.2764 |
| Total FY 1989 advances | 97,046,947 | | | [1] 4.87 |
| | | | | [2] 5.00 |

[1] Calculated cost of money rate.
[2] Minimum cost rate allowable.

TABLE 2.—RURAL TELEPHONE BANK HISTORICAL COST OF MONEY

| Fiscal year | Bank cost of money (percent) | Bank loan advances | Advances × cost rate | (Advances × cost rate) total advances (percent) |
|---|---|---|---|---|
| 1974 | 5.01 | $111,022,574 | $5,562,231 | 0.336 |
| 1975 | 5.85 | 130,663,197 | 7,643,797 | 0.462 |
| 1976 | 5.33 | 99,915,066 | 5,325,473 | 0.322 |
| 1977 | 5.00 | 80,907,425 | 4,045,371 | 0.244 |
| 1978 | 5.87 | 142,297,190 | 8,352,845 | 0.504 |
| 1979 | 5.93 | 130,540,067 | 7,741,026 | 0.467 |
| 1980 | 8.10 | 199,944,235 | 16,195,483 | 0.978 |
| 1981 | 9.46 | 148,599,372 | 14,057,501 | 0.849 |
| 1982 | 8.39 | 112,232,127 | 9,416,275 | 0.569 |
| 1983 | 6.99 | 93,402,836 | 6,528,858 | 0.394 |
| 1984 | 6.55 | 90,450,549 | 5,924,511 | 0.358 |
| 1985 | 5.00 | 72,583,394 | 3,629,170 | 0.219 |
| 1986 | 5.00 | 71,852,383 | 3,592,619 | 0.217 |
| 1987 | 5.00 | 51,974,938 | 2,598,747 | 0.157 |
| 1988 | 5.00 | 119,488,367 | 5,974,418 | 0.361 |
| Total advances | | 1,655,873,720 | | [1] 6.44 |

[1] Cost of money rate.

[FR Doc. 89-25682 Filed 10-30-89; 8:45 am]
BILLING CODE 3410-15-M

## DEPARTMENT OF THE TREASURY

### Office of Foreign Assets Control

### 31 CFR Part 515

### Supplemental List of Specially Designated Nationals (Cuba) in Panama

**AGENCY:** Office of Foreign Assets Control, Department of the Treasury.

**ACTION:** Notice of Additions to the List of Specially Designated Nationals of Cuba.

**SUMMARY:** This notice provides the names of individuals and firms operating in Panama that have been added to the list of Specially Designated Nationals under the Treasury Department's Cuban Assets Control Regulations (31 CFR Part 515). Also provided is a complete current listing of known Specially Designated Nationals of Cuba in Panama.

**EFFECTIVE DATE:** October 31, 1989.

**FOR FURTHER INFORMATION CONTACT:** Richard J. Hollas, Chief, Enforcement Division, Office of Foreign Assets Control, Tel: (202) 376-0400. Copies of the list of Specially Designated Nationals are available upon request at the following location: Office of Foreign Assets Control, Department of the Treasury, 1331 G Street, NW., Room 300, Washington, DC 20220.

**SUPPLEMENTARY INFORMATION:** Under the Cuban Assets Control Relgulations, persons subject to the jurisdiction of the United States are prohibited from engaging, directly or indirectly, in transactions with any nationals or specially designated nationals of Cuba, or involving any property in which there exists an interest of any national or specially designated national of Cuba, except as authorized by law or by the Treasury Department's Office of Foreign Assets Control by means of a general or specific license.

Section 515.302 of Part 515 defines the term "national," in part, as (a) a subject or citizen domiciled in a particular country, or (b) any partnership, association, corporation, or other organization owned or controlled by nationals of that country, or that is organized under the laws of, or that has had its principal place of business in that foreign country since the effective date (for Cuba, 12:01 a.m., e.s.t., July 8, 1963), or (c) any person that has directly or indirectly acted for the benefit or on behalf of any designated foreign country. Section 515.305 defines the term "designated national" as Cuba or any national thereof, including any person who is a specially designated national. Section 515.306 defines "specially designated national" as any person who has been designated as such by the Secretary of the Treasury; any person who, on or since the effective date, has either acted for or on behalf of the government of, or authorities exercising control over, any designated foreign country; or any partnership, association, corporation or other organization that, on or since the applicable effective date, has been owned or controlled directly or indirectly by such government or authorities, or by any specially designated national

Section 515.201 prohibits any transaction, except as provided in Section 515.201 or as authorized by law or by the Secretary of the Treasury, involving property in which there exists an interest of any national or specially designated national of Cuba. The list of Specially Designated Cuban Nationals is a partial one, since the Department of the Treasury may not be aware of all the persons located outside Cuba that might be acting as agents or front organizations for Cuba, thus qualifying as specially designated nationals of Cuba. Also, names may have been omitted because it seemed unlikely that those persons would engage in transactions with persons subject to the jurisdiction of the United States. Therefore, persons engaging in transactions with foreign nationals may not rely on the fact that any particular foreign national is not on the list as evidence that it is not a specially designated national.

The Treasury Department regards it as incumbent upon all U.S. persons engaging in transactions with foreign nationals to take reasonable steps to ascertain for themselves whether such foreign nationals are specially designated nationals of Cuba, or other designated countries (at present, Cambodia, North Korea, and Vietnam). The list of Specially Designated Nationals was last published on December 10, 1986, in the **Federal Register** (51 FR 44459), and was amended on November 3, 1988 (53 FR 44397), January 24, 1989 (54 FR 3446), April 10, 1989 (54 FR 14215) and August 4, 1989 (54 FR 32064), and September 20, 1989 (54 FR 38811).

Please take notice that section 16 of the Trading with the Enemy Act as amended (the "Act"), 50 U.S.C. App. 16, provides in part that whoever willfully violates any provision of the Act or any license, rule or regulation issued thereunder:

"Shall, upon conviction, be fined not more than $50,000, or, if a natural

person, imprisoned for not more than ten years, or both; and the officer, director or agent of any corporation who knowingly participates in such violation shall be punished by a like fine, imprisonment, or both; and any property, funds, securities, papers, or other articles or documents, or any vessel, together with her tackle, apparel, furniture, and equipment, concerned in such violation shall be forfeited to the United States."

In addition, persons convicted of an offense under the Act may be fined a greater amount than set forth in the Act, as provided in 18 U.S.C. 3571 and 3581.

**Authority:** 50 U.S.C. App. 5(b) and 18 U.S.C. 3571 and 3581.

*Specially Designated Nationals of Cuba in Panama (New Additions at this Publication)*

Noriega, Manuel Antonio
Panama
Sieiro de Noriega, Felicidad
Panama
Atlantic Pacific, S.A. (APSA)
Panama
Calpar de Panama, S.A. (a.k.a. Zebetex International, S.A.)
Panama
Carbonica, S.A.
Panama
Casas de Cambio
Panama
Cia. Istmena de Aviacion
Panama
Club Villa Fenix
Panama
Duty Free Shop
Balboa Pier
Panama
Duty Free Shop
Cristobal Pier
Panama
Duty Free Shop
Paitilla Airport
Panama
Duty Free Shop
Torrijos Airport
Panama
Duty Free Shop
Port of Vacamonte
Panama
Econollantas
Panama
El Deposito
Panama
El Millon
Panama
Hotel Granada
Panama
Hotel Nacional
Panama
Hotel Riande Aeropuerto
Panama
Hotel Riande Continental
Panama
Hotel Suites Alvear
Panama
Joyeria y Boutique Pretelt
Panama
Marinexam
Panama
Melo y Cia.
Panama
Pan Canal Skipping Company
Panama
Piex
Panama
Procesos Metalicos. S.A.
Panama
Radio Verbo
Panama
Setraca, S.A.
Panama
Shahani Auto Supplier
Panama
Superseguros
Panama
Televisora Nacional Canal 2
Panama
Teneria Tauro, S.A.
Panama
Zebetex International, S.A. (a.k.a. Calpar de Panama, S.A.)
Panama

*Complete Current List of Specially Designated Nationals of Cuba in Panama*

Abastecadora Naval Y Industrial, S.A. (a.k.a. Anainsa)
Panama
Abdelnur, Nury De Jesus
Panama
Agencia de Viajes Guama (a.k.a. Viajes Guama Tours, Guamatur, S.A. and Guama Tour)
Bal Harbour Shopping Center, Via Italia, Panama City, Panama
Alfonso, Carlos, (a.k.a. Carlos Alfonso Gonzalez)
Panama
Alvarez, Manuel (Aguirre)
Panama
Anainsa (a.k.a. Abastecadora Naval Y Industrial, S.A.)
Panama
Angelini, Alejandro Abood
Panama
Atlantic Pacific, S.A. (APSA)
Panama
Avalon, S.A.
Colon Free Zone, Panama
Azrak, S.A.
Panama
Azrak, Victor
Panama
Batista, Miguel
Panama
Bewell Corporation, Inc.
Panama
Boutique La Maison
42 Via Brasil
Panama City, Panama
Bradfield Maritime Corp., Inc.
Panama
Calpar de Panama, S.A. (a.k.a. Zebetex International, S.A.)
Panama
Caballero, Roger Montanes (a.k.a. Roger Montanes and Roger Edward Dooley)
Panama
Canapel, S.A.
Panama
Carbonica, S.A.
Panama
Caribbean Happy Lines (a.k.a. Caribbean Happy Lines Co.)
Panama
Caribsugar, S.A.
Panama
Carisub, S.A.
Panama
Casa de Cambio
Panama
Casa del Respuesto
Panama
Castell, Osvaldo Antonio (Valdez)
Panama
Cecoex, S.A.
Panama City, Panama
Chamet Import, S.A.
Panama
Cia. Istmena de Aviacion
Panama
Cimex, S.A.
Panama
Club Villa Fenix
Panama
Duty Free Shop
Balboa Pier
Panama
Duty Free Shop
Cristobal Pier
Panama
Duty Free Shop
Paitilla Airport
Panama
Duty Free Shop
Torrijos Airport
Panama
Duty Free Shop
Port of Vacamonte
Panama
Coll, Gabriel (Prado)
Panama
Colon, Eduardo (Betancourt)
Panama
Colony Trading, S.A.
Panama
Comercial Cimex, S.A.
Panama
Comercial Muralla, S.A. (a.k.a. Muralla, S.A.)
Panama City, Panama
Compania Pesquera Internacional, S.A.
Panama
Contex, S.A.
Panama
Corporacion Cimex, S.A.
Panama
Cubana Airlines (a.k.a. Empresa Cubana de Aviacion)
Calle 29 y Avda Justo Arosemena
Panama City, Panama
Cuenca, Ramon Cesar
Panama
Delgado, Antonio (Arsenio)
Panama
Deprosa, S.A. (a.k.a. Desarrollo De Proyectos, S.A.)
Panama City, Panama
Desarrollo De Proyectos, S.A. (a.k.a. Deprosa, S.A.)
Panama City, Panama
Dooley, Michael P.
Panama
Dooley, Roger Edward (a.k.a. Roger Montanes Caballero and Roger Montanes)
Panama
Duque, Carlos
Panama
Echeverri, German
Panama

Econollantas
Panama
Edyju, S.A.
Panama
El Deposito
Panama
El Millon
Panama
Empresa Cubana de Aviacion (see Cubana Airlines)
Panama
Fabro Investment, Inc.
Panama
Facobata
Panama
Famesa International, S.A.
Panama
Fruni Trading, S.A.
Panama City, Panama
Gallo Import
Panama
Garcia Santamaria de la Torre, Alfredo Rafael (see also "Santamarina")
Panama
Global Marine Overseas, Inc.
Panama
Goldern Comet Navigation Co., Ltd.
Panama
Gonzalez, Carlos Alfonso (a.k.a. Carlos Alfonso)
Panama
Grete Shipping Co., S.A.
Panama
Guaco Export
Panama
Guama Tour (a.k.a. Agencia de Viajes Guama, Viajes Guama Tours and Guamatur, S.A.)
Bal Harbour Shopping Center, Via Italia
Panama City, Panama
Guamar Shipping Co., S.A.
Panama
Guamatur, S.A. (a.k.a. Agencia de Viajes Guama, Viajes Guama Tours and Guama Tour)
Bal Harbour Shopping Center, Via Italia
Panama City, Panama
Havanatur, S.A.
Panama City, Panama
Havinpex, S.A. (a.k.a. Transover, S.A.)
Panama City, Panama
Haya, Francisco
Panama
Hermann Shipping Corp., Inc.
Panama
Heywood Navigation Corp.
Panama
Hotel Granada
Panama
Hotel Nacional
Panama
Hotel Riande Aeropuerto
Panama
Hotel Riande Continental
Panama
Hotel Suites Alvear
Panama
Imprisa, S.A.
Panama
Interconsult
Panama
International Petroleum, S.A.
Colon Free Zone, Panama
International Transport Corporation
Colon Free Zone, Panama
Inversiones Lupamar, S.A. (a.k.a. The Lupamar Investment Company)
Panama
IPESCO (a.k.a. International Petroleum S.A.)
Colon Free Zone, Panama
Jiminez, Gillermo (Soler)
Panama
Joyeria y Boutique Pretelt
Panama
Kaspar Shipping, S.A.
Panama
Kave, S.A.
Panama
Lakshmi
Panama
Leybda Corporation, S.A.
Panama
Louth Holdings, S.A.
Panama
Manzper Corp.
Panama
Marine Registration Company
Panama
Marinexam
Panama
Marisco (or Mariscos de Farallon, S.A.
Panama
Marketing Associates Corporation
Calle 52 E, Campo Alegre
Panama City, Panama
Maryol Enterprises, Inc.
Panama
Median, Anita (a.k.a. Ana Maria Medina)
Panama
Melo y Cia.
Panama
Mercurius Import/Export Company, Panama, S.A.
Calle C, Edificio 18
Box 4048, Colon Free zone, Panama
Monet Trading Company
Panama
Montanes, Roger (a.k.a. Roger Montanes Caballero and Roger Edward Dooley)
Panama
Montanez, Michael
Panama
Moonex International, S.A.
Panama
Muralla, S.A. (a.k.a. Comercial Muralla, S.A.)
Panama City, Panama
Navigable Water Corp., Ltd.
Panama
Noriega, Manuel Antonio
Panama
Ortega, Dario (Pina)
Edificio Saldivar
Panama City, Panama
Panamerican Import and Export Commercial Corp.
Panama
Panoamericana
Panama
Pan Canal Shipping Company
Panama
Pena, Jose (Torres)
Panama
Pena, Victor
Panama
Perez, Alfonso
Panama
Perez, Manuel Martin
Panama
Perez, Osvaldo (Cruz)
Panama
Pescados Y Mariscos de Panama (a.k.a. Pesmar or Pezmar) S.A.
Panama City, Panama
Pesmar (or Pezmar), S.A. (a.k.a. Pescados y Mariscos de Panama)
Panama City, Panama
Piex
Panama
Piramide Internacional
Panama
Pons, Alberto
Executive Representative
Banco Nacional de Cuba
Federico Boyd Ave. & 51 St.
Panama City, Panama
Prado, Julio (a.k.a. Julio Lobato)
Panama
Presa, S.A.
Panama
Processos Metalicos, S.A.
Panama
Radio Service, S.A.
Panama
Radio Verbo
Panama
Reciclaje Industrial, S.A.
Panama
Rent-A-Car, S.A.
Panama
Reyes, Guillermo (Vergara)
Panama City, Panama
Rocha, Antonio
Panama City, Panama
Rodriquez, Jesus (Borges or Borjes)
Panama
Romeo, Charles (a.k.a. Charles Henri Robert Romeo)
Panama
Roque, Roberto (Perez)
Panama
Ruiz, Ramon Miguel (Poo)
Panama
Santamarina, de la Torre Rafael Garcia (see also "Garcia")
Panama
Servimpex, S.A.
Panama
Servinaves, S.A.
Panama
Setraca, S.A.
Panama
Shahani Auto Supplier
Panama
Shipley Shipping Corp.
Panama
Siboney Internacional, S.A.
Edificio Balmoral, 82 Via Argentina
Panama City, Panama
Sieiro de Noriega, Felicidad
Panama
Superseguros
Panama
Suplidora Latino Americana, S.A. (a.k.a. Suplilat, S.A.)
Panama City, Panama
Suplilat, S.A., (a.k.a. Suplidora Latino Americana, S.A.)
Panama City, Panama
Taller De Reparaciones Navales, S.A. (a.k.a. Tarena)
Panama City, Panama
Tarena, S.A. (a.k.a. Taller De Reparaciones Navales S.A.)
Panama
Technic Digemex Corp.
Calle 34 No. 4–50, Office 301
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Trust Import-Export, S.A.
Panama
Valletta Shipping Corp.
Panama
Vasquez, Oscar D. (a.k.a. Vazques, Oscar D.)
Panama
Viacon International, Inc.
Apartment 7B Torre Mar Building
Punta Paitilla Area, Panama City, Panama
France Field, Colon Free Zone, Panama
Viajes Guama Tours (a.k.a. Guamatur, S.A., Guama Tour and Agencia de Viajes Guama)
Bal Harbour Shopping Center, Via Italia
Panama City, Panama
Wittgreen, Carlos (a.k.a. Carlos Wittgreen Antinori, Carlos Wittgreen A., and Carlos Antonio Wittgreen)
Panama
Zebetex International, S.A. (a.k.a. Calpar de Panama S.A.)
Panama

Date: October 13, 1989.

**R. Richard Newcomb,**

*Director, Office of Foreign Assets Control.*

Approved: October 17, 1989.

**Salvatore R. Martoche,**

*Assistant Secretary (Enforcement).*

[FR Doc. 89–25717 Filed 10–27–89; 12:36 pm]

BILLING CODE 4810–25–M

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 180

**[PP 8F3630/R1039; FRL–3658–1]**

### Pesticide Tolerance for Fenarimol

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** This rule establishes a tolerance for residues of the fungicide fenarimol in or on the raw agricultural commodity cherries at 1.0 part per million (ppm). This regulation to establish the maximum permissible level for residues of fenarimol in or on the commodity was requested in a petition submitted by Elanco Products Co.

**EFFECTIVE DATE:** October 31, 1989.

**ADDRESSES:** Written objections, identified by the document control number [PP 8F3630/R1039], may be submitted to the: Hearing Clerk (A–110), Environmental Protection Agency, Rm. M–3708, 401 M St. SW., Washington, DC 20460.

**FOR FURTHER INFORMATION CONTACT:** Susan T. Lewis, Acting Product Manager (PM) 21, Registration Division (H7505C), Environmental Protection Agency, 401 M St. SW., Washington, DC 20460.

Office location and telephone number: Rm. 227, CM #2, 1921 Jefferson Davis Highway, Arlington, VA 22202, (703)–557–1900.

**SUPPLEMENTARY INFORMATION:** EPA issued a notice, published in the **Federal Register** of May 25, 1988 (53 FR 18898), which announced that Elanco Products Co., 740 South Alabama St., Indianapolis, IN 46285, had submitted pesticide petition (PP) 8F3630 to EPA requesting that the Administrator, pursuant to section 408(d) of the Federal Food, Drug, and Cosmetic Act, propose the establishment of tolerances for the fungicide fenarimol [alpha-(2-chlorophenyl)-alpha-(4-chlorophenyl)-5-pyrimidinemethanol] in or on the raw agricultural commodity cherries at 1.0 ppm.

There were no comments received in response to the notice of filing.

The data submitted in support of the petition and other relevant material have been evaluated. The pesticide is considered useful for the purpose for which the tolerance is sought. The toxicological data considered in support of the tolerance include the following:

1. A 1-year dog feeding study using doses of 0, 1.25, 12.5, and 125 milligrams/kilogram (mg/kg) body weight (bwt)/day. The no-observed-effect level (NOEL) is 12.5 mg/kg bwt/day. The 125 mg/kg bwt/day dose level caused increased serum alkaline phosphatase, increased liver weights, increase in *p*-nitroanisole *o*-demethylase activity, and mild hepatic bile stasis.

2. An initial 2-year chronic feeding/oncogenicity study in rats using dietary concentrations of 0, 50, 130, and 350 ppm (equivalent to doses of 0, 2.5, 6.5, and 17.5 mg/kg bwt/day). In a previous **Federal Register** Notice (51 FR 7567; March 5, 1986), the Agency indicated fenarimol to be oncogenic. In that Notice, the Agency's initial conclusion that fenarimol was oncogenic was based on a finding in the 2-year rat study of a statistically significant increase in hepatic lesions (adenomas and hyperplastic nodules) at the highest dose tested (17.5 mg/kg bwt/day), when data for male and female rats were combined.

Since that time, the compound has been reevaluated. The Agency now considers it more appropriate to separate data for males and females and also to separate hyperplastic nodules from tumors (adenomas and carcinomas). When a reevaluation of the hepatic lesions for males and females was performed separately with the elimination of hyperplastic nodules, the data did not demonstrate a statistically significant increased incidence in adenomas and/or carcinomas in either sex. Moreover, the mouse oncogenicity study did not demonstrate oncogenic potential at dose levels up to and including a dose level of 85.7 mg/kg bwt/day (the highest dose level tested).

Because of the appearance of a low incidence of fatty change of the liver (nonneoplastic pathological lesions) in the low-dose groups in this study, it was unclear if a NOEL for fatty change of the liver was established in this study.

3. Additional 2-year chronic feeding/oncogenicity studies in rats using dietary concentrations of 0, 12.5, 25, and 50 ppm (equivalent to doses of 0, 0.63, 1.25, and 2.5 mg/kg bwt/day). The purpose of these additional studies was to assist in determining a NOEL for fatty liver changes. The first of these two studies was compromised, however, by an outbreak of chronic respiratory disease which reduced survival in all experimental groups, including control. The study was then repeated with the same dose levels. In the second study, no fatty liver changes or oncogenic effects were observed at the doses tested under the conditions of the study. Using data from all three 2-year studies, a NOEL for fatty liver change of 6.5 mg/kg bwt/day was established.

4. A 2-year oncogenicity study in mice using dietary concentrations of 0, 50, 170, and 600 ppm (equivalent to doses of 0, 7, 24.3, and 85.7 mg/kg bwt/day) that was negative for oncogenic effects at all doses tested under the conditions of the study. At 600 ppm, an increase in fatty change of the liver was demonstrated. The NOEL for this effect was 170 ppm (24.3 mg/kg bwt/day).

5. A rabbit teratology study that was negative for teratogenic effects at all doses tested (0, 5, 10, and 35 mg/kg).

6. A rat teratology study that demonstrated hydronephrosis at 35 mg/kg (doses tested were 0, 5, 13, and 35 mg/kg). A second study in rats (with a postpartum evaluation) again demonstrated hydronephrosis at 35 mg/kg, but also indicated that the dose level

of 35 mg/kg was associated with a maternal toxic effect (decreased body weight gain during treatment). The Agency considers the NOEL for hydronephrosis and for maternal toxicity to be 13 mg/kg.

7. A multigeneration reproduction study in rats that demonstrated decreased fertility in males and delayed parturition and dystocia in females at 5 mg/kg bwt/day. The NOEL for reproductive effects in this study was 2.5 mg/kg bwt/day.

8. Multigeneration reproduction studies in guinea pigs and mice that were negative for reproductive effects at doses up to 35 mg/kg bwt/day (highest dose tested) and 20 mg/kg bwt/day, respectively.

9. An aromatase inhibition study in rats that showed fenarimol to be a moderately weak inhibitor of aromatase activity.

The adverse reproductive effects observed in the rat multigeneration reproduction study are considered to be a species-specific effect caused by aromatase inhibition. This enzyme promotes normal sexual behavior in rats and mice, but not in guinea pigs, primates, or man. A NOEL of 35 mg/kg bwt/day for reproductive effects relevant to humans was established in the multigeneration reproduction study in guinea pigs.

10. A mouse lymphoma forward mutation assay; a DNA repair synthesis study in rat liver culture systems; gene mutation assays in *Salmonella typhimurium* (Ames test) and in *Escherichia coli*; a dominant lethal assay in Wistar rats; an assay for transformation activity in the C3H/10T ½ embryonic mouse fibroblast; and an *in vivo* assay for chromosome aberration in the Chinese hamster. Fenarimol did not demonstrate mutagenic activity in any of these studies.

The mutagenic potential of fenarimol has been evaluated in several assay systems (see item 10 above). Fenarimol did not demonstrate a mutagenic effect in any of these studies. Furthermore, fenarimol did not induce altered foci or neoplastic nodules in an initiation and promotion study in rat liver tissue.

Based on the above findings, the Agency concludes that fenarimol was not oncogenic in long-term studies in rats and mice under test conditions in which the highest dose tested for both species approached a maximum tolerated dose as evidenced by increased fatty change in the liver.

Data currently lacking is additional field trial data from California. The Agency expects the additional data to be submitted by October 1989.

The acceptable daily intake (ADI) based on the 2-year rat chronic feeding study (NOEL of 6.5 mg/kg bwt/day), and using a hundredfold safety factor, is calculated to be 0.065 mg/kg bwt/day. The theoretical maximum residue contribution from previously established tolerances and the tolerances established here is 0.0004 mg/kg bwt/day and utilizes 0.6 percent of the ADI. Previous tolerances have been established for fenarimol in pecans, pears, apples, apple pomace, milk, meat and meat byproducts of cattle, goats, hogs, horses, and sheep; and fat and liver of cattle, goats, hogs, horses, and sheep.

The nature of the residue is adequately understood, and adequate analytical methods are available for enforcement purposes. Because of the long lead time from establishing this tolerance to publication of the enforcement methodology in the *Pesticide Analytical Manual*, Vol. II, the analytical methodology is being made available in the interim to anyone interested in pesticide enforcement when requested from: Calvin Furlow, Public Information Branch, Field Operation Division (H7506C), 401 M Street SW., Washington, DC 20460.

Office location and telephone number: Room 242, CM #2, 1921 Jefferson Davis Highway, Arlington, VA 22202, (703)–557–4432.

The pesticide is considered useful for the purposes for which the tolerances are sought. Based on the information and data considered, the Agency concludes that the establishment of the tolerances will protect the public health. Therefore, the tolerances are established as set forth below.

This tolerance will expire 1 year after the date of publication of this final rule. Based on the reviews of the California residue data, the Agency will determine whether establishing a permanent tolerance is appropriate.

Any person adversely affected by this regulation may, within 30 days after publication of this document in the **Federal Register**, file written objections with the Hearing Clerk, at the address given above. Such objections should specify the provisions of the regulation deemed objectionable and the grounds for the objections. If a hearing is requested, the objections must state the issues for the hearing and the grounds for the objections. A hearing will be granted if the objections are supported by grounds legally sufficient to justify the relief sought.

Pursuant to the requirement of the Regulatory Flexibility Act (Pub. L. 96–354, 94 Stat. 1164, 5 U.S.C. 601–612), the Administrator has determined that regulations establishing new tolerances or raising tolerance levels or establishing exemptions from tolerance requirements do not have a significant economic impact on a substantial number of small entities. A certification statement to this effect was published in the **Federal Register** of May 4, 1981 (46 FR 24950).

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

### List of Subjects in 40 CFR Part 180

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

Dated: September 27, 1989.

**Douglas D. Campt,**

*Director, Office of Pesticide Programs.*

Therefore, 40 CFR part 180 is amended as follows:

## PART 180—[AMENDED]

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

**Authority:** 21 U.S.C. 346a and 371.

2. In § 180.421, by revising paragraph (b) by adding the raw agricultural commodity cherries and putting the paragraph in tabular format, to read as follows:

### § 180.421 Fenarimol; tolerances for residues.

* * * * *

(b) A tolerance is established for combined residues of the fungicide fenarimol [alpha-(2-chlorophenyl)-alpha-(4-chlorophenyl)-5-pyrimidinemethanol] and its metabolites [alpha-(2-chlorophenyl)-alpha-(4-chlorophenyl)-1,4-dihydro-5-pyrimidinemethanol and 5-[(2-chlorophenyl) (4-chlorophenyl)methyl]-3,4-dihydro-4-pyrimidinol measured as the total of fenarimol and 5-[(2-chlorophenyl)-(4-chlorophenyl)methyl]pyrimidine (calculated as fenarimol)], in or on the following raw agricultural commodities:

| Commodities | Parts per million | Expiration date |
|---|---|---|
| Cherries | 1.0 | October 31, 1990. |
| Grapes | 0.2 | None. |

[FR Doc. 89–25478 Filed 10–30–89; 8:45 am]

BILLING CODE 6560–50–M

## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 73

**[MM Docket No. 89-61; RM-6521]**

### Radio Broadcasting Services; Strasburg, CO

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** This document allots FM Channel 272A to Strasburg, Colorado, as that community's first local broadcast service, in response to a petition for rule making filed on behalf of Express Communications. See 54 Fed. Reg. 12249, March 24, 1989. Coordinates used for Channel 272A at Strasburg are 39-39-37 and 104-15-25. With this action, the proceeding is terminated.

**DATES:** Effective November 30, 1989; the window period for filing applications on Channel 272A at Strasburg, Colorado, will open on December 1, 1989, and close on January 2, 1990.

**FOR FURTHER INFORMATION CONTACT:** Nancy Joyner, Mass Media Bureau, (202) 634-6530.

**SUPPLEMENTARY INFORMATION:** This is a synopsis of the Commission's Report and Order, MM Docket No. 89-61, adopted September 26, 1989, and released October 16, 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, D.C. The complete text of this decision may also be purchased from the Commission's copy contractors, International Transcription Service, (202) 857-3800, 2100 M Street, NW., Suite 140, Washington, DC 20037.

**List of Subjects in 47 CFR Part 73**

Radio broadcasting.

### PART 73—[AMENDED]

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

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

**§ 73.202 [Amended]**

2. Section 73.202(b), the Table of FM Allotments is amended under Colorado, by adding Strasburg, Channel 272A.

Federal Communications Commission.

**Karl A. Kensinger,**

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

[FR Doc. 89-25575 Filed 10-30-89; 8:45 am]

BILLING CODE 6712-01-M

### 47 CFR Part 73

**[MM Docket No. 88-367; RM-6221, RM-6530]**

### Radio Broadcasting Services; Selma and Georgiana, AL

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** This document substitutes Channel 261C2 for Channel 261A at Selma, AL, and modifies the Class A license of Holder Communications Corp. for Station WDXX(FM), as requested, to specify operation on the higher class channel, thereby providing that community with an additional expanded coverage FM service (RM-6221). See, 53 FR 30076, August 10, 1988. Additionally, Channel 299A is allotted to Georgiana, AL, as that community's first local broadcast service in response to a counterproposal filed on behalf of Alabama Broadcasting Service Company (RM-6530). Coordinates used for Channel 261C2 at Selma are 32-26-02 and 87-00-40. Coordinates used for Channel 299A at Georgiana are 31-39-31 and 86-44-22. With this action, the proceeding is terminated.

**DATES:** Effective December 4, 1989, the window period for filing applications on Channel 299A at Georgiana, AL, will open on December 5, 1989, and close on January 4, 1990.

**FOR FURTHER INFORMATION CONTACT:** Nancy Joyner, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process at Georgiana, AL, should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 632-0394.

**SUPPLEMENTARY INFORMATION:** This is a synopsis of the Commission's Report and Order, MM Docket No. 88-367, adopted September 29, 1989, and released October 17, 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 for Alabama, is amended by adding Georgiana, Channel 299A, and for Selma, by removing Channel 261A and adding Channel 261C2.

Federal Communications Commission.

**Karl A. Kensinger,**

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

[FR Doc. 89-25574 Filed 10-30-89; 8:45 am]

BILLING CODE 6712-01-M

### 47 CFR Part 73

**[MM Docket No. 88-599; RM-6501]**

### Radio Broadcasting Services; Salem, IN

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** This document allots FM Channel 250A to Salem, Indiana, as that community's second local FM broadcast service, in response to a petition for rule making filed on behalf of Gary Albarez. See 54 FR 4862, January 31, 1989. Coordinates used for Channel 250A at Salem are 38-38-13 and 86-09-47. With this action, the proceeding is terminated.

**DATES:** Effective December 4, 1989. The window period for filing applications on Channel 250A at Salem, Indiana, will open on December 5, 1989, and close on January 4, 1990.

**FOR FURTHER INFORMATION CONTACT:** Nancy Joyner, Mass Media Bureau, (202) 634-6530.

**SUPPLEMENTARY INFORMATION:** This is a synopsis of the Commission's Report and Order, MM Docket No. 88-599, adopted September 29, 1989, and released October 17, 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.

### 47 CFR PART 73—[AMENDED]

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

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

**§ 73.202 [Amended]**

2. Section 73.202(b), the Table of FM Allotments is amended under Indiana, by adding Channel 250A to the entry for Salem.

Federal Communications Commission.

**Karl A. Kensinger,**

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

[FR Doc. 89-25573 Filed 10-30-89; 8:45 am]

BILLING CODE 6712-01-M

## DEPARTMENT OF VETERANS AFFAIRS

### 48 CFR Part 815

**RIN 2900-AE18**

### Acquisition Regulation; Contracting by Negotiation

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Final rule; correction.

**SUMMARY:** The Department of Veterans Affairs (VA) is correcting previously published information concerning Department-issued procurement-related regulations.

**EFFECTIVE DATE:** October 10, 1989.

**FOR FURTHER INFORMATION CONTACT:** Charles A. Fountaine, III, Chief, Directives Management Division (70Y731), Paperwork Management and Regulations Service, Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC (202) 233-2073.

**SUPPLEMENTARY INFORMATION:** In the **Federal Register** of October 17, 1989, (54 FR 42507), VA published its regulations to eliminate procurement-related regulations not essential to implement Governmentwide policies and procedures within the Department, to specify the VA control point for all unsolicited proposals, to delegate authority to permit correction of mistakes in proposals before award, and to authorize the use of option clauses in acquisitions with medical schools, clinics, and any other group or individual providing scarce medical specialist and sharing services at VA facilities. In that final regulation, a citation was incorrectly stated and is corrected.

**List of Subjects in 48 CFR Part 815**

Government procurement.

Dated: October 25, 1989.

**Donald R. Howell,**

*Acting Chief, Directives Management Division.*

For the foregoing reason, the Department of Veterans Affairs hereby corrects FR Doc. 89-24492 in the issue of October 17, 1989, on page 42508 middle column, to read as follows:

### PART 815—[AMENDED]

* * * * *

3. Subpart 815.6 consisting of 815.607, is added to read as follows:

### Subpart 815.6—Source Selection

**815.607 Disclosure of mistakes before award.**

The Head of the Contracting Activity (as defined in 802.1) is delegated authority to permit correction of mistakes in proposals before award consistent with FAR 15.607.

[FR Doc. 89-25548 Filed 10-30-89; 8:45 am]

BILLING CODE 8320-01-M

# Proposed Rules

Federal Register
Vol. 54, No. 209
Tuesday, October 31, 1989

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

### 7 CFR Part 971

[Docket No. FV-89-110]

### South Texas Lettuce; Expenses and Assessment Rate

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

**ACTION:** Proposed rule.

**SUMMARY:** This proposed rule would authorize expenditures and establish an assessment rate under Marketing Order 971 for the 1989–90 fiscal period. Authorization of this budget would allow the South Texas Lettuce Committee to incur expenses that are reasonable and necessary to administer the program. Funds to administer this program would be derived from assessments on handlers.

**DATES:** Comments must be received by November 10, 1989.

**ADDRESSES:** Interested persons are invited to submit written comments concerning this proposal. Comments must be sent in triplicate to the Docket Clerk, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, Room 2525–S, Washington, DC 20090–6456. Comments should reference the docket number and the date and page number of this issue of the **Federal Register** and will be available for public inspection in the Office of the Docket Clerk during regular business hours.

**FOR FURTHER INFORMATION CONTACT:** Kenneth G. Johnson, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, Room 2525–S, Washington, DC 20090–6456, telephone 202–447–5331.

**SUPPLEMENTARY INFORMATION:** This rule is proposed under Marketing Agreement No. 144 and Marketing Order No. 971 [7 CFR part 971], regulating the handling of lettuce grown in the Lower Rio Grande Valley of South Texas. The marketing agreement and order are effective under the Agricultural Marketing Agreement Act of 1937, as amended [7 U.S.C. 601–674], hereinafter referred to as the Act.

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

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

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

There are approximately 10 handlers and 20 producers of South Texas lettuce covered under this marketing order. Small agricultural producers have been defined by the Small Business Administration [13 CFR 121.2] as those having annual gross revenues for the last three years of less than $500,000, and small agricultural service firms are defined as those whose gross annual receipts are less than $3,500,000. The majority of the handlers and producers may be classified as small entities.

The budget of expenses for the 1989–90 fiscal year was prepared by the South Texas Lettuce Committee (committee), the agency responsible for local administration of the marketing order, and submitted to the Department of Agriculture for approval. The members of the committee are handlers and producers of lettuce. They are familiar with the committee's needs and with the costs for goods, services and personnel in their local area and are thus in a position to formulate an appropriate budget. The budget was formulated and discussed in a public meeting. Thus, all directly affected persons have had an opportunity to participate and provide input.

The assessment rate recommended by the committee was derived by dividing anticipated expenses by expected shipments of lettuce. Because that rate is applied to actual shipments, it must be established at a rate which will produce sufficient income to pay the committee's expected expenses.

The committee met on October 3, 1989, and unanimously recommended a 1989–90 budget of $51,531.49. Last season's budget was $34,305. Major expense items include increases in committee staff salaries, travel and marketing development and production research projects.

The committee also unanimously recommended an assessment rate of $0.05 per carton, the same rate as last season's. This rate, when applied to anticipated shipments of 1,011,500 cartons of lettuce, would yield $50,575 in assessment revenue. This amount when added to $956.49 from the reserve fund would be adequate to cover budgeted expenses.

While this proposed action would impose some additional costs on handlers, the costs are in the form of uniform assessments on all handlers. Some of the additional costs may be passed on to producers. However, these costs would be offset by the benefits derived from the operation of the marketing order. Therefore, the Administrator of the AMS has determined that this action would not have a significant economic impact on a substantial number of small entities.

This action should be expedited because the committee needs to have sufficient funds to pay its expenses which are incurred on a continuous basis. The 1989–90 fiscal period began in August, and the marketing order requires that the rate of assessment apply to all assessable lettuce handled during the fiscal period. In addition, handlers are aware of this action which was recommended by the committee at a public meeting. Therefore, it is found and determined that a comment period of less than 30 days is appropriate because the budget and assessment rate approval for this program needs to be expedited. The committee needs to have sufficient funds to pay its expenses which are incurred on a continuous basis.

**List of Subjects in 7 CFR Part 971**

Lettuce, Marketing agreements and orders, South Texas.

For the reasons set forth in the preamble, it is proposed that 7 CFR Part 971 be amended as follows:

## PART 971—LETTUCE GROWN IN LOWER RIO GRANDE VALLEY IN SOUTH TEXAS

1. The authority citation for 7 CFR Part 971 continues to read as follows:

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

2. A new section 971.229 is added to read as follows :

**§ 971.229 Expenses and assessment rate.**

Expenses of $51,531.49 by the South Texas Lettuce Committee are authorized and an assessment rate of $0.05 per carton of lettuce is established for the fiscal period ending July 31, 1990. Unexpended funds may be carried over as a reserve.

Dated: October 25, 1989.

**William J. Doyle,**

*Acting Deputy Director, Fruit and Vegetable Division.*

[FR Doc. 89–25569 Filed 10–30–89; 8:45 am]

BILLING CODE 3410–02–M

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## 7 CFR Part 984

**[FV–89–108PR]**

## Expenses and Assessment Rate for Walnuts Grown in California for 1989–90

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

**ACTION:** Proposed rule.

**SUMMARY:** This proposed rule would authorize expenditures and establish an assessment rate under Marketing Order No. 984 for the 1989–90 marketing year established under the walnut marketing order. This action is needed for the Walnut Marketing Board (Board), the agency responsible for the local administration of the order, to operate during the 1989–90 marketing year. The Board incurs expenses on a continuous basis and needs to collect funds during the year to pay those expenses. Funds to administer this program are derived from assessments on handlers.

**DATES:** Comments must be received by November 10, 1989.

**ADDRESSES:** Interested persons are invited to submit written comments concerning this proposal. Comments must be sent in triplicate to the Docket Clerk, F&V, AMS, USDA, P.O. Box 96456, Washington, DC 20090–6456. All comments should reference the docket number and the date and page number of this issue of the **Federal Register** and will be made available for public inspection in the Office of the Docket Clerk during regular business hours.

**FOR FURTHER INFORMATION CONTACT:** Beatriz Rodriguez, Marketing Specialist, Marketing Order Administration Branch, F&V, AMS, USDA, P.O. Box 96456, Room 2524–S, Washington, DC 20090–6456; telephone: (202) 447–5120.

**SUPPLEMENTARY INFORMATION:** This rule is issued under Marketing Agreement and Order No. 984 [7 CFR part 984], both as amended, regulating the handling of walnuts grown in California. The marketing agreement and order are effective under the Agricultural Marketing Agreement Act of 1937, as amended [7 U.S.C. 601–674], hereinafter referred to as the Act.

This proposed rule has been reviewed under Executive Order 12291 and Departmental Regulation 1512–1 and has been determined to be a "nonmajor" rule under criteria contained therein.

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

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

There are approximately 65 handlers of walnuts grown in California who are subject to regulation under the walnut marketing order, and approximately 5,000 producers of walnuts in the production area. Small agricultural producers have been defined by the Small Business Administration [13 CFR 121.2] as those having average gross annual revenues for the last three years of less than $500,000, and small agricultural service firms are defined as those whose gross annual receipts are less than $3,500,000. The majority of walnut producers and handlers may be classified as small entities.

The walnut marketing order requires that the assessment rate for a particular marketing year shall apply to all assessable walnuts handled from the beginning of such year. An annual budget of expenses is prepared by the Board and submitted to the U.S. Department of Agriculture for approval. The Board consists of handlers, producers, and a non-industry member. They are familiar with the Board's needs and with the costs for goods, services, and personnel in their local areas and are thus in a position to formulate an appropriate budget. The budget is formulated and discussed in public meetings. Thus, all directly affected persons have an opportunity to participate and provide input.

The assessment rate recommended by the Board is derived by dividing anticipated expenses by expected shipments of walnuts. Because that rate is applied to actual shipments, it must be established at a rate which will produce sufficient income to pay the Board's expected expenses. The recommended budget and rate of assessment is usually acted upon by the Board shortly before a season starts, and expenses are incurred on a continuous basis. Therefore, the budget and assessment rate approval must be expedited so that the Board will have funds to pay its expenses.

The Board met on September 15, 1989, and unanimously recommended 1989–90 marketing order expenditures of $1,463,782 and an assessment rate of $0.0085 per kernelweight pound of walnuts. In comparison, 1988–89 marketing year budgeted expenditures were $1,475,294, and the assessment rate was $0.0085 per kernelweight pound of walnuts. Budget categories for 1989–90 are $79,436 for administrative expenses, $300,000 for production research, $700,000 for the domestic market research and development program, and $37,000 for the 1990 crop estimate. Comparable actual expenditures for the 1988–89 crop were $75,999, $244,968, $688,554, and $30,500, respectively. Assessment income for 1989–90 is estimated to total as much as $1,539,707 based on an estimated crop of 181,142,000 kernelweight pounds of walnuts.

While this proposed action would impose some additional costs on handlers, the costs are in the form of uniform assessments on all handlers. Some of the additional costs may be passed on to producers. However, these costs would be significantly offset by the benefits derived from the operation of the marketing order. Therefore, the Administrator of the AMS has determined that this action would not have a significant economic impact on a substantial number of small entities.

Based on the foregoing, it is found and determined that a comment period of less than 30 days is appropriate because the budget and assessment rate approval for the program need to be expedited. The Board needs to have sufficient funds to pay its expenses, which are incurred on a continuous basis.

**List of Subjects in 7 CFR Part 984**

California, Marketing agreements and order, Walnuts.

For the reasons set forth in the preamble, it is proposed that a new § 984.341 be added as follows:

1. The authority citation for 7 CFR part 984 continues to read as follows:

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

## PART 984—WALNUTS GROWN IN CALIFORNIA

2. New § 984.341 is added to read as follows:

**§ 984.341 Expenses and assessment rate.**

Expenses of $1,463,782 by the Walnut Marketing Board are authorized, and an assessment rate of $0.0085 per kernelweight pound of merchantable walnuts is established for the 1989–90 marketing year ending July 31, 1990.

Dated: October 25, 1989.

**William J. Doyle,**

*Acting Deputy Director, Fruit and Vegetable Division.*

[FR Doc. 89–25570 Filed 10–30–89; 8:45 am]

BILLING CODE 3410-02-M

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## Animal and Plant Health Inspection Service

## 9 CFR Part 85

**[Docket No. 89–022]**

## Pseudorabies

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

**ACTION:** Proposed rule.

**SUMMARY:** We are proposing to amend the pseudorabies regulations to allow certain interstate movements of swine based on compliance with new herd vaccination and testing procedures. The effect of this action would be to allow an additional option for the interstate movement of swine without presenting a significant risk of pseudorabies being spread interstate.

**DATE:** Consideration will be given only to comments received on or before November 30, 1989.

**ADDRESSES:** To help ensure that your comments are considered, send an original and three copies to Chief, Regulatory Analysis and Development, PPD, APHIS, USDA, Room 866, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782. Please state that your comments refer to Docket No. 89–022. Comments received may be inspected at Room 1141 of the South Building, 14th Street and Independence Avenue SW., Washington, DC, between 8 a.m. and 4:30 p.m., Monday through Friday, except holidays.

**FOR FURTHER INFORMATION CONTACT:** Dr. William Stewart, Chief Staff Veterinarian, Swine Diseases Staff, VS, APHIS, USDA, Room 736, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782, 301–436–7767.

**SUPPLEMENTARY INFORMATION:**

### Background

Pseudorabies, also known as Aujeszky's disease, mad itch, and infectious bulbar paralysis, is caused by a herpes virus and is primarily a disease of swine. The regulations in 9 CFR part 85 (referred to below as the regulations) govern the interstate movement of swine and other livestock in order to help prevent the spread of pseudorabies. Swine are allowed to be moved interstate under specific conditions, as provided in §§85.3 through 85.13 of the regulations.

The specific conditions that apply depend, in part, upon whether the swine are known to be infected with or exposed to pseudorabies. Swine known to be infected with or exposed to the disease may be moved interstate under very restrictive conditions to prevent the interstate spread of the disease. Swine not known to be infected with or exposed to pseudorabies may be moved interstate under less restrictive conditions.

Within the latter category, swine vaccinated for pseudorabies are subject to tighter controls than unvaccinated swine. There are two related reasons for this. First, the pseudorabies vaccines that have been developed do not confer immunity from the disease; vaccinated swine can become infected and spread pseudorabies. The advantages of vaccination are that it increases the swine's resistance to the disease and, if infection occurs, lessens the severity of the illness and facilitates recovery. Also, vaccinated swine that become infected with pseudorabies generally shed less virus than nonvaccinated swine, making them less likely to spread the disease. The drawback is that vaccinated swine produce antibodies to the vaccine that cannot be distinguished by traditional pseudorabies tests from antibodies produced in response to the field strain of the virus that causes pseudorabies infection. Thus, the second reason for restricting the interstate movement of vaccinated swine is that the pseudorabies status of these swine cannot be determined by traditional tests.

A test has been developed that, when used in conjunction with a new vaccine, can distinguish between antibodies produced in response to the field strain of the pseudorabies virus and antibodies produced in response to the new vaccine. The new test is called the "HardChek® anti-pseudorabies virus glycoprotein X enzyme-linked immunosorbent assay test" (referred to below and in the proposed regulations as "HardChek® anti-PRV-gpX ELISA test"). The complementary vaccine is called the "PRV/Marker ™ vaccine."

The PRV/Marker ™ vaccine is a vaccine from which a nonessential glycoprotein (gpX) has been deleted. Swine vaccinated with the gpX-deleted vaccine would not produce antibodies to that gpX unless they were infected with the pseudorabies field virus or vaccinated with vaccines containing the gpX antigen. The HardChek® anti-PRV-gpX ELISA test is specific for antibodies to the gpX deleted from the PRV/Marker ™ vaccine, that is, it recognizes those antibodies but ignores others. Thus, the HardChek® anti-PRV-gpX ELISA test, when used in combination with the PRV/Marker ™ vaccine, can distinguish between swine vaccinated with the PRV/Marker ™ vaccine and swine infected with pseudorabies.

Data submitted to the Animal and Plant Health Inspection Service by the producers of the new vaccine and test, including results of field trials on these products, and other relevant literature are available for inspection at the Hyattsville, Maryland, offices of the Animal and Plant Health Inspection Service (Room 736, Federal Building, 6505 Belcrest Road, Hyattsville, Maryland 20782).

Based on this information, it appears that swine from a herd vaccinated and tested with these products could, under certain conditions, be moved interstate with fewer restrictions than swine vaccinated in the traditional manner, without increasing the risk of spreading pseudorabies interstate. We therefore propose to revise the regulations accordingly.

We anticipate that the proposed changes to the regulations would provide swine producers with a greater incentive to vaccinate their herds, thereby reducing pseudorabies in the United States. The American Association of Veterinary Laboratory Diagnosticians and the U.S. Animal Health Association recommend that we allow use of the PRV/Marker ™ vaccine and the associated HardChek® anti-PRV-gpX ELISA test.

### Herd Status

To ensure that swine from herds vaccinated and tested with the PRV/

Marker ™ vaccine and the HardChek® anti-PRV-gpX ELISA test can be moved interstate as proposed in this document (see "Interstate Movements" in this Supplementary Information) without increasing the risk of spreading pseudorabies interstate, the herd would have to meet certain conditions to ensure the swine are free of pseudorabies. Herds that meet these conditions would be designated as "qualified PRV/Marker vaccinated/gpX nagative herds." We propose the following requirements for achieving the maintaining this herd status:

*Initial Qualifying Tests*

(1) All swine in the herd over 6 months of age must be tested with an official pseudorabies serologic test. For a minimum of 30 days before the test, the herd must not have been a known infected herd. During the 90 days before the test, at least 90 percent of the swine in the herd either must have been on the premises and a part of the herd or must have entered the herd directly from a qualified pseudorabies nagative herd. If any of the tested swine are found positive on this or any other official pseudorabies test prior to vaccination with the PRV/Marker ™ vaccine, the requirements in paragraph (2) must be met.

These requirements appear necessary to establish that the herd is free of swine infected with or exposed to pseudorabies. Requiring a 30-day waiting period for herds that have had pseudorabies would ensure that the disease, if incubating in the herd, would be detectable by an official pseudorabies serologic test. Tests of more recently exposed swine may not yield a positive result because the swine would not have had time to develop sufficient antibodies to the virus. Placing restrictions on additions to the herd during the 90 days before the qualifying test would further reduce the chances of the herd containing swine that are in the initial stages of developing pseudorabies. Our experience with herds subject to these identical qualifying conditions (qualified pseudorabies negative herds) indicates that testing all swine in the herd over 6 months of age would be adequate to detect pseudorabies if it exists in the herd.

(2) If any swine in the herd test positive on the official pseudorabies test, those swine must be removed from the herd, and the premises on which the herd is kept must be disinfected in accordance with the regulations (see 9 CFR 85.13). No less than 30 days after the positive swine are removed and the premises are disinfected, all swine in the herd except swine nursing from their mothers must be tested with an official pseudorabies serologic test and found negative. Within 30 to 60 days after this first negative test, the herd must be tested again in accordance with paragraph (1), above.

These requirements appear necessary to establish that the herd no longer contains swine infected with or exposed to pseudorabies. Requiring that positive swine be removed from a herd is the only way to remove sources of infection from a herd; there are no effective treatments for pseudorabies. Cleaning and disinfection of premises in accordance with the regulations has been shown to destroy pseudorabies virus that may be present on inanimate objects. Follow-up testing of all remaining swine in the herd, except swine nursing from their mothers, is necessary to determine whether the herd is free of pseudorabies infection. Nursing swine would not need to be tested since the result of a pseudorabies test on the mother would be sufficient indication of the disease status of the nursing swine. Swine nursing from a dam infected with pseudorabies would become infected. Swine nursing from a dam free of pseudorabies would be unlikely to contract the disease since they would normally not come in contact with swine other than their dam or other swine in the same litter. Based on our experience with herds that have had pseudorabies, it appears that all swine other than those nursing from their mothers must be subjected to an official pseudorabies serologic test to determine whether the herd is free of pseudorabies. The 30-day waiting period before this test would help ensure that swine incubating the disease have had time to develop detectable levels of antibodies. If all tested swine are negative, then negative results on a second official pseudorabies serologic test 30 to 60 days later would establish that the herd is free of pseudorabies.

*Vaccination and Follow-up Tests*

(1) No more than 15 days after test results show the herd to be negative for pseudorabies in accordance with paragraph (1) under "Initial Qualifying Tests," all swine in the herd over 6 months of age must be vaccinated with the PRV/Marker™ vaccine.

We are proposing a 15-day time period to allow herd owners time to have the herd vaccinated, yet minimize the chances for exposure to pseudorabies between testing and vaccination. Based on our experience with pseudorabies controlled vaccinated herds, 15 days appears to be an appropriate amount of time.

(2) Not less than 35 days after vaccination with the PRV/Marker™ vaccine, all swine in the herd over 6 months of age must be tested with an official pseudorabies serologic test. All serological samples that are positive must be tested with the HerdChek® anti-PRV-gpX ELISA test and found negative.

Testing the vaccinated swine with an official pseudorabies serologic test would identify all swine in the herd that have antibody titers for pseudorabies. Testing those positive swine with the HerdChek® anti-PRV-gpX ELISA test would be necessary to show that the positive reaction to the official pseudorabies serologic test was in response to the PRV/Marker™ vaccine and not pseudorabies infection. We are proposing an interval of at least 35 days between vaccination with the PRV/Marker™ vaccine and the official pseudorabies serologic test to ensure that the vaccinated swine have sufficient time to develop detectable levels of antibodies to the PRV/Marker™ vaccine.

*Maintaining Herd Status*

We propose that qualified PRV/Marker vaccinated/gpX negative herds meet the following requirements to maintain their status:

(1) All swine over 6 months of age in the herd must be tested at least once a year with the HerdChek® anti-PRV-gpX ELISA test and found negative. This requirement could be met by testing 25 percent of the swine over 6 months of age every 80–105 days, or by testing 10 percent of the swine over 6 months of age each month and finding them negative. No swine could be tested twice in 1 year to comply with the 25 percent requirement, or twice in 10 months to comply with the 10 percent requirement.

Continued testing would be required to ensure that the herd remains free of pseudorabies. Testing all swine over 6 months of age has been found to be a sufficient method of monitoring for pseudorabies in herds not known to be infected with or exposed to the disease. Testing a certain percentage of the swine on a rotating basis throughout the year is desirable to find infection as early as possible if it develops in a herd.

(2) Swine may be added to a qualified PRV/Marker vaccinated/gpX negative herd only under one of the following conditions:

(i) The swine are moved to the qualified PRV/Marker vaccinated/gpX negative herd from another qualified PRV/Marker vaccinated/gpX negative herd, or from a qualified pseudorabies negative herd, without having any

contact en route with swine other than those from a qualified PRV/Marker vaccinated/gpX negative herd or a qualified pseudorabies negative herd.

(ii) The swine are moved to the qualified PRV/Marker vaccinated/gpX negative herd from a qualified pseudorabies negative herd, have contact en route with swine other than those from a qualified PRV/Marker vaccinated/gpX negative herd or a qualified pseudorabies negative herd, and, before being added, are isolated until they are found negative to an official pseudorabies serologic test conducted 30 days or more after the swine are isolated.

(iii) The swine are moved to the qualified PRV/Marker vaccinated/gpX negative herd from another qualified PRV/Marker vaccinated/gpX negative herd, have contact en route with swine other than those from a qualified PRV/Marker vaccinated/gpX negative herd or a qualified pseudorabies negative herd, and, before being added, are isolated until they are found negative to a HerdChek® anti-PRV-gpX ELISA test conducted 35 days or more after the swine are isolated.

(iv) The swine are moved to the qualified PRV/Marker vaccinated/gpX negative herd from a herd other than a qualified PRV/Marker vaccinated/gpX negative herd or a qualified pseudorabies negative herd, and, before being added, are isolated until they are found negative to two official pseudorabies serologic tests, one conducted at the time the swine are isolated, and the second conducted 30 days or more after the swine are isolated.

These conditions are designed to ensure that any swine added to the herd are free of pseudorabies.

Swine from qualified pseudorabies negative herds or qualified PRV/Marker vaccinated/gpX negative herds would present an insignificant risk of carrying pseudorabies infection, given the existing and proposed standards for achieving and maintaining herd status. If swine from these herds have no contact, en route, with swine from other types of herds, it is unlikely that they will be exposed to pseudorabies infection. There does not appear to be any need to isolate and test these swine before adding them to the herd.

If swine from a qualified pseudorabies negative herd do have contact, en route to their new herd, with swine from other than a qualified PRV/Marker vaccinated/gpX negative herd or a qualified pseudorabies negative herd, the risk of exposure to infection would be increased. That is why we are proposing to isolate the swine until they are found negative to an official pseudorabies serologic test conducted 30 days or more after the swine are isolated. The same rationale applies to swine that are moved from another qualified PRV/Marker vaccinated/gpX negative herd and have contact with swine from other than a qualified PRV/Marker vaccinated/gpX negative herd or a qualified pseudorabies negative herd. The only difference is that these swine, vaccinated with the PRV/Marker™ vaccine, would need to be tested with the HerdChek® anti-PRV-gpX ELISA test rather than an official pseudorabies serologic test.

Swine from other than a qualified PRV/Marker vaccinated/gpX negative herd or a qualified pseudorabies negative herd would present the greatest risk of carrying and spreading pseudorabies infection. Requiring that the swine be isolated until they are found negative to two official pseudorabies serologic tests, one conducted at the time the swine are isolated, and the second conducted 30 days or more after the swine are isolated, would help ensure that only swine free of pseudorabies are added to the herd.

**Interstate Movement of Swine From a Qualified PRV Marker Vaccinated/gpX Negative Herd**

We propose to allow swine that are from a qualified PRV/Marker vaccinated/gpX negative herd, and that are not known to be infected or exposed to pseudorabies, to be moved interstate without further restriction under the pseudorabies regulations if:

(1) The swine are moved directly to a recognized slaughtering establishment, or directly through one or more slaughter markets and then directly to a recognized slaughtering establishment; or

(2) The swine are moved from a qualified PRV/Marker vaccinated/gpX negative herd directly to a feedlot, quarantined feedlot, or approved livestock market; or

(3) The swine are moved from an approved livestock market to a feedlot, quarantined feedlot, or other approved livestock market.

These interstate movements represent market channels for moving swine to slaughter, either directly or through markets or feedlots. Swine from a qualified PRV/Marker vaccinated/gpX negative herd would present an insignificant risk of carrying pseudorabies infection, given the proposed standards for achieving and maintaining herd status. If any of these swine became exposed to pseudorabies at any point along the way to slaughter, they would be unlikely, in most cases, to develop and spread the infection before being slaughtered, and, in any case, would not have contact with any swine other than those also moving to slaughter. Thus, these interstate movements would not present a significant risk of spreading pseudorabies interstate.

The regulations in 9 CFR part 71 contain identification and recordkeeping requirements for swine moved in interstate commerce, including swine moved in accordance with the pseudorabies regulations. These requirements appear adequate to allow the swine to be traced through market channels.

For all other interstate movements of swine from a qualified PRV/Marker vaccinated/gpX negative herd, we proposed to require that the swine be accompained by a certificate, and that the certificate be delivered to the consignee. In addition to other information routinely required on a certificate (see 9 CFR 85.1), the certificate would have to state that the swine are from a qualified PRV/Marker vaccinated/gpX negative herd and the date of the last qualifying test, and list the identification for the swine to be moved, in accordance with 9 CFR 71.19. Swine moved interstate for purposes other than slaughter, sale for slaughter, or feeding would be breeder swine or could have opportunity for contact with breeder swine. Breeder swine that become exposed to or infected with pseudorabies present a significant risk of spreading pseudorabies. Requiring the swine to be accompained by a certificate would provide the consignee with certification by a Veterinary Services representative, a State representative, or an accredited veterinarian that the swine are from a qualified PRV/Marker vaccinated/gpX negative herd and are not infected with or exposed to pseudorabies.

**Executive Order 12291 and Regulatory Flexibility Act**

We are issuing this proposed rule in conformance with Executive Order 12291, and we have determined that it is not a "major rule." Based on information compiled by the Department, we have determined that this rule would have an effect on the economy of less than $100 million; would not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; and would not cause a significant adverse effect on competition, employment, investment, productivity, innovation, or

on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

According to the United States Department of Agriculture (USDA) Agricultural Statistics Board, in 1988 hogs were raised on 333,500 farms in the United States. This includes all farms that raised hogs of any type. The vast majority of producers raise hogs for the slaughter market, but a small number of farms raise hogs to produce breeding stock, which is sold to other hog producers. Very few, if any, producers who raise hogs for the slaughter market maintain qualified pseudorabies negative herds. It appears, from tabulating the membership rolls of hog breed associations, that about 12,000 farmers raise hog breeding stock. Of these producers' herds, 3,182 are listed by USDA and State regulatory officials as qualified pseudorabies-negative herds. These herds supply most of the U.S. hog seedstock.

We believe that under the proposed rule qualified pseudorabies negative herds are the only viable market for the PRV/Marker™ vaccine and the HerdChek® anti-PRV-gpX test kits. However, we believe these products will be used as a risk management tool by only a small number of these specialized hog producers. Their use would be optional. Producers' decisions to adopt this technology will depend on current disease exclusion costs, producers' perceptions of the risk of their herds' being infected with pseudorabies, and their personal preferences about assuming risk.

We estimate that owners of no more than 5 percent of the qualified pseudorabies negative herds will use the Marker vaccine and its companion test instead of or in addition to the management practices they currently use to prevent pseudorabies from entering their herds. Assuming an average of 100 sows and 10 boars in a herd and an annual production of 18 pigs weaned per sow per year, and that all breeding animals and their offspring are vaccinated annually, the estimated annual use of the vaccine would be 310,000 doses.

Some small businesses may realize a modest economic benefit through the sale of the PRV/Marker™ vaccine and the HerdChek® anti-PRV-gpX test kits. Other marker vaccines and tests for pseudorabies may be developed. When appropriate, APHIS would propose to amend the regulations to include these vaccines and tests. Of the dozen or so businesses that market pseudorabies vaccines and related products, we are aware of only one that currently markets the "HardChek® anti-PRV-gpX test kit, and another that markets the PRV/Marker™ vaccine. Both businesses appear to be small entities.

However, the two affected firms are working in a niche within a small part of a very large market. USDA records indicate that approximately 25.2 million doses of pseudorabies vaccine were produced in the United States in 1988. These records also indicate that about 65 percent of annual production (19.8 million doses) is for domestic use. The approximate annual value of the United States pseudorabies vaccine market, at $10 million, is just 2 percent of the United States $500 million-a-year veterinary biologics market. The estimated use of the Marker vaccine under the proposed regulations would expand the pseudorabies vaccine market by only 1.5 percent. Thus any strategic advantage gained by these firms, while important to them, would not be significant compared with the total veterinary biologics market.

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

### Paperwork Reduction Act

The regulations in this proposal contain no new information collection or recordkeeping requirements under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*).

### Executive Order 12372

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

### List of Subjects in 9 CFR Part 85

Animal diseases, Livestock, Pseudorabies, Quarantine, Reporting and recordkeeping requirments, Transportation.

Accordingly, 9 CFR part 85 would be amended as follows:

## PART 85—PSEUDORABIES

1. The authority citation for part 85 would continue to read as follows:

Authority: 21. U.S.C. 111–112, 113, 115, 117, 120, 121, 123–126, 134b, 134f; 7 CFR 2.17, 2.51, and 3.71.2(d).

### § 85.1 [Amended]

2. In § 85.1, in the definition of "Official pseudorabies serologic test" the words "paragraph (q) of" would be removed.

3. In § 85.1, in the definition of "official pseudorabies test", the semicolon immediately after "(ELISA) Test" would be replaced by a comma, and the phrase "except for the HerdChek® anti-pseudorabies virus glycoprotein X enzyme-linked immunosorbent assay test (Herdchek® anti-PRV/gpX ELISA test);" would be added immediately after "(ELISA) Test,".

4. In § 85.1, in the definition of "Certificate", the phrase "are not pseudorabies vaccinates" would be removed and the phrase "are not vaccinated for pseudorabies with any vaccine other than the PRV/Marker™ vaccine" would be added in its place.

5. In § 85.1, two new definitions would be added, in alphabetical order, to read as follows:

### § 85.1 [Amended]

* * * * *

*PRV/Marker vaccinate swine.* Swine vaccinated with the PRV/Marker™ vaccine.

* * * * *

*Qualified PRV/marker vaccinated/gpX negative herd.* (a) Qualified PRV/marker vaccinated/gpX negative herd status is attained under the following conditions:

(1) All swine in the herd over 6 months of age must be tested with an official pseudorabies serologic test. For a minimum of 30 days before the test, the herd must not have been a known infected herd. During the 90 days before the test, at least 90 percent of the swine in the herd either must have been on the premises and a part of the herd or must have entered the herd directly from a qualified pseudorabies negative herd. If any of the tested swine are found positive on this or any other official pseudorabies test prior to vaccination with the PRV/Marker™ vaccine, the requirements in paragraph (a)(2) of this definition must be met.

(2) If any swine in the herd test positive on the official pseudorabies test, those swine must be removed from the herd, and the premises on which the herd is kept must be disinfected in accordance with § 85.13 of this part. No less than 30 days after the positive swine are removed and the premises are disinfected, all swine in the herd except swine nursing from their mothers must be tested with an official pseudorabies serologic test and found negative. Within 30 to 60 days after this first negative test, the herd must be tested again in accordance with paragraph (a)(1) of this definition.

(3) No more than 15 days after test results show the herd to be negative for pseudorabies in accordance with paragraph (a)(1) of this definition, all swine in the herd over 6 months of age must be vaccinated with the PRV/Marker™ vaccine.

(4) Not less than 35 days after vaccination with the PRV/Marker™ vaccine, all swine in the herd over 6 months of age must be tested with an official pseudorabies serologic test. All serological samples that are positive must be tested with the Herdchek® anti-PRV/gpX ELISA test and found negative.

(b) Qualified PRV/Marker vaccinated/gpX negative herd status is maintained under the following conditions:

(1) All swine over 6 months of age in the herd must be tested at least once a year with the Herdchek® anti-PRV/gpX ELISA test and found negative. This requirement may be met by testing 25 percent of the swine over 6 months of age every 80–105 days, or by testing 10 percent of the swine over 6 months of age each month and finding them negative. No swine may be tested twice in 1 year to comply with the 25 percent requirement, or twice in 10 months to comply with the 10 percent requirement.

(2) Swine may be added to a qualified PRV/Marker vaccinated/gpX negative herd only under one of the following conditions:

(i) The swine are moved to the qualified PRV/Marker vaccinated/gpX negative herd from another qualified PRV/Marker vaccinated/gpX negative herd, or from a qualified pseudorabies negative herd, without having any contact en route with swine other than those from a qualified PRV/Marker vaccinated/gpX negative herd or a qualified pseudorabies negative herd.

(ii) The swine are moved to the qualified PRV/Marker vaccinated/gpX negative herd from a qualified pseudorabies negative herd, have contact en route with swine other than those from a qualified PRV/Marker vaccinated/gpX negative herd or a qualified pseudorabies negative herd, and, before being added, are isolated until they are found negative to an official pseudorabies serologic test conducted 30 days or more after the swine are isolated.

(iii) The swine are moved to the qualified PRV/Marker vaccinated/gpX negative herd from another qualified PRV/Marker vaccinated/gpX negative herd, have contact en route with swine other than those from a qualified PRV/Marker vaccinated/gpX negative herd or a qualified pseudorabies negative herd, and, before being added, are isolated until they are found negative to a HerdChek® anti-PRV-gpX ELISA test conducted 35 days or more after the swine are isolated.

(iv) The swine are moved to the qualified PRV/Marker vaccinated/gpX negative herd from a herd other than a qualified PRV/Marker vaccinated/gpX negative herd or a qualified pseudorabies negative herd, and, before being added, are isolated until they are found negative to two official pseudorabies serologic tests, one conducted at the time the swine are isolated, and the second conducted 30 days or more after the swine are isolated.

* * * * *

**§ 85.6 [Amended]**

6. In § 85.6, remove the phrase "pseudorabies vaccinate swine" and add the phrase "pseudorabies vaccinate swine, except PRV/Marker vaccinate swine," in the following places:

(a) The section heading;

(b) The heading for paragraph (a); and

(c) The heading for paragraph (b).

7. In § 85.6, remove the phrase "Pseudorabies vaccinate swine" and add the phrase "Pseudorabies vaccinate swine, except PRV/Marker vaccinate swine," in the following places:

(a) In the introductory text to § 85.6;

(b) In the introductory text to paragraph (a); and

(c) In the introductory text to paragraph (b).

**§§ 85.9, 85.10, and 85.11 [Redesignated from §§ 85.8, 85.9, and 85.10]**

5. Sections 85.8, 85.9, and 85.10 would be redesignated as §§ 85.9, 85.10, and 85.11, respectively.

6. A new § 85.8 would be added to read as follows:

**§ 85.8 Interstate movement of swine from a qualified PRV/Marker vaccinated/gpX negative herd and not known to be infected with or exposed to pseudorabies.**

Swine that are from a qualified PRV/Marker vaccinated/gpX negative herd, and that are not known to be infected or exposed to pseudorabies, may be moved interstate only in accordance with the following provisions:

(a) Without further restriction under this part if:

(1) The swine are moved directly to a recognized slaughtering establishment, or directly through one or more slaughter markets and then directly to a recognized slaughtering establishment; or

(2) The swine are moved from a qualified PRV/Marker vaccinated/gpX negative herd directly to a feedlot, quarantined feedlot, or approved livestock market; or

(3) The swine are moved from an approved livestock market to a feedlot, quarantined feedlot, or other approved livestock market.

(b) For all interstate movements other than those set forth in paragraph (a) of this section, the swine must be accompanied by a certificate, and the certificate must be delivered to the consignee. In addition to the information required by § 85.1, the certificate must state that the swine are from a qualified PRV/Marker vaccinated/gpX negative herd and the date of the herd's last qualifying test, and must list the identification for the swine to be moved interstate, in accordance with § 71.19 of this chapter.

Done in Washington, DC, this 25th day of October 1989.

**Larry B. Slagle,**

*Acting Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. 89–25567 Filed 10–30–89; 8:45 am]

BILLING CODE 3410-34-M

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## DEPARTMENT OF THE INTERIOR

## Bureau of Indian Affairs

## 25 CFR Part 61

**RIN 1076–AC11**

## Preparation of Rolls of Indians

September 8, 1989.

**AGENCY:** Bureau of Indian Affairs, Interior.

**ACTION:** Proposed rule.

**SUMMARY:** The Bureau of Indian Affairs (BIA) is proposing to amend the regulations contained in 25 CFR part 61 governing the preparation of rolls of Indians. The Cow Creek Band of Umpqua Tribe of Indians Distribution of Judgment Funds Act of 1987 directs the Secretary of the Interior to prepare a tribal membership roll in accordance with the regulations contained in 25 CFR part 61. The regulations in Part 61 provide general enrollment procedures that can be made applicable to the preparation of a specific roll of Indians by amending the regulations to include the qualifications for enrollment and the deadline for filing applications for the particular roll. The BIA is proposing to amend Part 61 by adding a paragraph (e) to § 61.4 to include the qualifications for enrollment and the deadline for filing applications so that the procedures contained in part 61 will govern the preparation of the tribal membership

roll of the Cow Creek Band of Umpqua Tribe of Indians.

**DATE:** Comments must be received on or before November 30, 1989.

**ADDRESS:** Written comments should be directed to the Chief, Division of Tribal Government Services, Bureau of Indian Affairs, Mail Stop 4627 MIB, 18th & C Streets, NW., Washington, DC 20240.

**FOR FURTHER INFORMATION CONTACT:** Kathleen L. Slover, Branch of Tribal Enrollment Services, Division of Tribal Government Services, Bureau of Indian Affairs, Mail Stop 4627 MIB, 18th & C Streets, NW., Washington, DC 20240, telephone number: (202) 343–1702 (FTS 343–1702).

**SUPPLEMENTARY INFORMATION:** This proposed amendment to a rule is published in exercise of rulemaking authority delegated by the Secretary of the Interior to the Assistant Secretary—Indian Affairs in the Departmental Manual at 209 DM 8.

A proposed rule to amend the regulations contained in Part 61 to include the qualifications for enrollment and the deadline for filing applications for the tribal membership roll of the Cow Creek Band of Umpqua Tribe of Indians was previously published for public comment in the **Federal Register** on Friday, June 3, 1988, 53 FR 20335. An editorial correction was published in the **Federal Register** on Wednesday, June 29, 1988, 53 FR 24551.

The Cow Creek Band of Umpqua Tribe of Indians was awarded judgment funds in docket numbered 53–81L by the United States Claims Court. Funds to satisfy the award were appropriated by Congress. The Cow Creek Band of Umpqua Tribe of Indians Distribution of Judgment Funds Act of October 26, 1987, Pub. L. 100–139 (Judgment Act), authorized the use and distribution of the judgment funds.

Section 5 of the Judgment Act, which amended the Cow Creek Band of Umpqua Tribe of Indians Recognition Act of December 29, 1982 (Recognition Act), directs the Secretary to prepare a tribal membership roll of the Cow Creek Band of Umpqua Tribe of Indians in accordance with the regulations contained in 25 CFR part 61. The Act further directs that the tribal membership roll be published in the **Federal Register.**

Language was included in the Fiscal Year 1989 Interior Appropriations Act of September 27, 1988, Public Law 100–446, to amend the Cow Creek Band of Umpqua Tribe of Indians Recognition Act. The amendment to the Recognition Act affects the qualifications for enrollment on the tribal membership roll that were in the proposed rule published in the **Federal Register** on June 3, 1988. Because the effect, which will be discussed below under COMMENTS AND CHANGES, is significant, the BIA is again issuing a proposed rule to amend the regulations contained in part 61.

The policy of the Department of the Interior is, whenever practical, to afford the public an opportunity to participate in the rulemaking process. Accordingly, interested persons may submit written comments, suggestions or objections regarding this proposed amendment.

The regulations in part 61 provide general enrollment procedures and contain provisions which are not applicable in the preparation of all rolls. As a matter of clarification, because the BIA is preparing a tribal membership roll of the Cow Creek Band of Umpqua Tribe of Indians under this proposed amendment, review of applications by tribal authorities under section 61.10 will be applicable to provide for maximum tribal participation in the enrollment process.

Also, in addition to general public notice, to provide actual notice of the preparation of the roll to as many potentially eligible beneficiaries as possible, the Superintendent, Siletz Agency, Bureau of Indian Affairs, shall send notices in accordance with section 61.5(c) to all persons whose names appear on the so-called Interrogatory No. 14 roll and all descendants, whose names have been furnished to the BIA, of persons named on the so-called Interrogatory No. 14 roll at their last available address. The notice shall advise individuals of the preparation of the roll and the relevant procedures to be followed, including the qualifications for enrollment and the deadline for filing application forms. It should be noted, however, that the ability of the Superintendent to send notices will be dependent upon the availability of addresses furnished either by the individuals or the tribe. An application form will be mailed with each notice.

The primary author of this document is Kathleen L. Slover, Tribal Enrollment Specialist, Division of Tribal Government Services, Mail Stop 4627 MIB, Bureau of Indian Affairs, 18th and C Streets, NW., Washington, DC 20240.

## Comments and Changes

The period for commenting on the previously proposed amendment to 25 CFR part 61 to add paragraph (e) to section 61.4 to include the qualifications for enrollment and a deadline for filing applications for the tribal membership roll of the Cow Creek Band of Umpqua Tribe of Indians closed on July 5, 1988. Comments were received from 46 individuals and the Cow Creek Band of Umpqua Tribe of Indians through its General Counsel within the public comment period. Basically only three provisions were addressed by the commenters: (1) The requirement that all individuals must establish Cow Creek Indian ancestry to be included on the membership roll of the Cow Creek Band of Umpqua Tribe of Indians, (2) the deadline date for filing applications that was published in the proposed rule document and (3) the requirement that all individuals have to file applications by the deadline date to establish eligibility for enrollment.

1. Section 5 of the Judgment Act states that the Secretary is to prepare a tribal membership roll comprised of "Indian individuals" who were not members of any other federally recognized Indian tribe on July 30, 1987, and (1) who are named on a tribal roll dated September 13, 1980 (the so-called Interrogatory No. 14 roll); (2) who were born on or prior to October 26, 1987, and are descendants of persons named on the so-called Interrogatory No. 14 roll; or (3) who are descendants of persons considered to be members of the Cow Creek Band of Umpqua Tribe of Indians for the purposes of the treaty entered between such Band and the United States on September 19, 1853.

The Department had concluded that the enrollment requirements stated in the Judgment Act were ambiguous, in particular it was not clear what was meant by "Indian individuals" in the context of the Judgment and Recognition Acts. A review of the legislative history found no clear intent that when Congress recognized the Cow Creek Band of Umpqua Tribe of Indians it was recognizing a tribal entity comprised of individual Indians, irrespective of tribal affiliation, rather than a tribe comprised of Cow Creek descendants.

If all individuals were not required to establish Cow Creek Indian ancestry, the Secretary might be in the position of preparing and approving a tribal membership roll comprised of individuals who did not meet the current membership requirements or the membership requirements under which the so-called Interrogatory No. 14 roll was prepared. The Judgment Act provided that until the tribe adopted and the Secretary approved a new governing document, the interim governing document would "be the tribal bylaws entitled 'Bylaws of Cow Creek Band of Umpqua Tribe of Indians' which bear an 'approved' date of '9–10–78.' " The 1978 Bylaws were also the document under which the so-called Interrogatory No. 14 roll was prepared. The membership

article of the Bylaws states that no person "shall be a member * * * unless he shall be able to trace his ancestry to the members of the Cow Creek Band who claimed and lived upon the land described in the treaty of September 19, 1853, with the United States Government."

The BIA was reluctant to expand administratively the membership of the Cow Creek Band of Umpqua Tribe of Indians beyond clear Congressional intent. Consequently, the proposed rule published on June 3, 1988, to govern the preparation of the tribal membership roll of the Cow Creek Band of Umpqua Tribe of Indians required all persons, including those whose names appeared on the so-called Interrogatory No. 14 roll and their descendants, to establish that they were of Cow Creek Indian ancestry to qualify for enrollment.

During Congressional consideration of the Fiscal Year 1989 Interior Appropriations Act, disapproval of the BIA's interpretation was expressed and the Secretary was directed to revise the proposed rule to include all members on the so-called Interrogatory No. 14 roll who satisfy basic Indian ancestry requirements. Accordingly, the Fiscal Year 1989 Interior Appropriations Act amended the Recognition Act by striking out "Indian individuals" and inserting "Cow Creek descendants or other Indian individuals."

As a result of the amendment to the Recognition Act, the BIA has determined that when Congress recognized the Cow Creek Band of Umpqua Tribe of Indians, it was recognizing the tribe and its members, irrespective of their tribal affiliation, rather than a tribe comprised exclusively of Cow Creek descendants.

Section 3 of the Restoration Act, codified at 25 U.S.C. 712a, in part, provides:

(a) Federal Recognition.—Notwithstanding any provision of the Act approved August 13, 1954 (25 U.S.C. 691 et seq.) [Western Oregon Indians Termination of Federal Supervision Act], or any other law, Federal recognition is extended to the Cow Creek Band of Umpqua Tribe of Oregon. * * *

(b) Restoration of Rights and Privileges.—All rights and privileges of *the tribe and the members of the tribe* under any Federal treaty, Executive order, agreement, or statute, or under any other authority, which may have been diminished or lost under the Act approved August 13, 1954 (25 U.S.C. 691 et seq.), are restored, and the provisions of such Act shall be inapplicable to *the tribe and to members of the tribe* after the date of enactment [December 29, 1982] of this Act. (Italic supplied.)

The Restoration Act, as amended, defines "member" as a person enrolled on the membership roll of the tribe in accordance with the membership provisions that are contained in the Judgment Act. Under the Judgment Act until a permanent roll is prepared by the Secretary the membership shall consist of all persons named on the so-called Interrogatory No. 14 roll and their descendants.

When Congress restored the Cow Creek Band of Umpqua Tribe of Indians, it was restoring not only the tribe, but individual members, i.e., those persons named on the so-called Interrogatory No. 14 roll and their descendants. Consequently, "other Indian individuals" named on the so-called Interrogatory No. 14 roll and their descendants, irrespective of their tribal affiliation, have been effectively restored and may "satisfy basic Indian ancestry requirements." Appropriate changes have been made to the proposed amendment.

Consistent with a generally accepted legal definition of Indian and absent any specific statutory language to the contrary, individuals, in addition to being recognized as Indian by their tribe or community, must possess aboriginal ancestry indigenous to the United States. [*See* F. Cohen, HANDBOOK OF FEDERAL INDIAN LAW, pp. 19–20 (1982 ed.)] Although persons named on the so-called Interrogatory No. 14 roll and their descendants may be recognized as Indians by the tribe, they will, nevertheless, be required to establish that they possess Indian ancestry indigenous to the United States to qualify for inclusion on the tribal membership roll of the Cow Creek Band of Umpqua Tribe of Indians being prepared. Appropriate changes have been made to the proposed amendment to part 61 from what was previously proposed.

2. As, the proposed amendment to part 61 was published in the **Federal Register**, the date of August 2, 1988, was inserted in paragraph (e)(2) of section 61.4, as the deadline for filing applications to establish eligibility for inclusion on the roll of the Cow Creek Band of Umpqua Tribe of Indians being prepared under the regulations. Most of the commenters believed that the deadline of August 2, 1988, was not a reasonable or adequate length of time. The insertion of August 2, 1988, in the proposed amendment when it was published was, however, an editorial error. The deadline in the proposed amendment should have been published to read as "60 days from the effective date of the final rule." A document was published in the **Federal Register** on Wednesday, June 29, 1988 (53 FR 24551), to make that correction. The commenters did not suggest an alternate deadline or specify a particular length of time for the filing of applications. Consequently, no change is being made. A deadline date of 60 days from the effective date of the final rule is being proposed.

3. As the amendment to part 61 to govern the preparation of the membership roll of the Cow Creek Band of Umpqua Tribe of Indians was previously proposed, all persons including those named on the so-called Interrogatory No. 14 roll and their descendants were required to file application forms by the deadline date to establish eligibility for enrollment. One of the commenters, the General Counsel on behalf of the tribe, objected strongly and found this requirement directly contrary to the Judgment Act. It is presumed that this is a twofold objection, both to the requirement that individuals named on the so-called Interrogatory No. 14 roll and their descendants must file application forms and that they must file before the deadline date to establish eligibility for enrollment.

The commenter argued that section 5 of the Judgment Act directs that only the third category of potentially eligible individuals, i.e., those who are descendants of persons considered to be members of the Cow Creek Band of Umpqua Tribe of Indians for the purposes of the treaty entered between such Band and the United States on September 19, 1853, must apply for inclusion on the membership roll, while mandating the inclusion of all Indian individuals, or as amended, all Cow Creek descendants or other Indian individuals named on the so-called Interrogatory No. 14 roll and their descendants. The commenter found that the Congressionally-established distinction in the Judgment Act between the section 5(b) (1) and (2) enrollees, i.e., so-called Interrogatory No. 14 enrollees and their descendants, on one hand and section 5(b)(3) enrollees, i.e., descendants of persons considered to be members of the historical Cow Creek Band, on the other is confirmed by section 5(c) which mandates regulations covering the enrollment process for section 5(b)(3) enrollees only. Further, these group-specific regulations are necessary because only section 5(b)(3) enrollees must actually apply to the Secretary for inclusion on the tribal membership roll.

Section 5(c) is not the only reference in section 5 of the Judgment Act to regulations for enrollment purposes. Section 5(b) directs the Secretary to prepare the tribal membership roll of the Cow Creek Band of Umpqua Tribe of Indians "in accordance with the

regulations contained in part 61 of title 25 of the Code of Federal Regulations." Thus, the enrollment process of all categories of eligibles is, in fact, subject to Secretarial regulations.

An early version of the proposed Cow Creek legislation contained specific language granting a "rebuttable presumption" of eligibility for those persons whose names were listed on the so-called Interrogatory No. 14 roll, but that provision was removed from the Judgment Act as enacted. Furthermore, recent considerations of the Judgment and Restoration Acts still indicate a Congressional intent that persons named on the so-called Interrogatory No. 14 roll must satisfy basic Indian ancestry requirements. Consequently, the real issue here is the appropriateness of requiring the filing of application forms to meet the burden of proof.

The so-called Interrogatory No. 14 roll is basically a listing of names. It does not contain sufficient information on which to base a determination of eligibility for enrollment on the tribal membership roll being prepared under this amendment. The most suitable manner in which to ensure that adequate information and documentation is submitted is to require that all persons including those named on the Interrogatory No. 14 roll and their descendants submit application forms for enrollment on the tribal membership roll being prepared under this amendment to part 61.

The regulations contained in part 61 provide in section 61.6(c) that "[a]pplication forms may be filed by sponsors on behalf of other persons." Under section 61.1 "sponsor" is defined as "any person who files an application for enrollment or appeal on behalf of another person." Consequently, under the regulations the tribe can file applications on behalf of their members and relieve the individuals of the burden.

No alternative manner for the BIA to obtain the necessary Indian ancestry information about the individuals named on the so-called Interrogatory No. 14 roll and their descendants was offered by the commenter. Consequently, the proposed rule to amend part 61 requires the submission of application forms for all persons including those named on the so-called Interrogatory No. 14 roll and their descendants to establish eligibility for enrollment on the tribal membership roll being prepared.

As indicated above, the requirement that applications be filed and the requirement that applications be filed by a deadline are considered two issues. The proposed amendment imposed both requirements on all persons including those named on the so-called Interrogatory No. 14 roll and their descendants.

The BIA has found that if a roll is ever to be completed, there must be a deadline for filing applications. Although the class of persons named on the so-called Interrogatory No. 14 roll is a matter of record, such persons must still establish their eligibility for enrollment. If a deadline is not imposed on this class of persons, there might then be confusion as to whether applications had to be filed at all. Also, if a deadline is not set, there would be no reasonable basis for determining when the BIA could take actions rejecting persons for failure to establish that they met the requirements for enrollment. As far as descendants of persons named on the so-called Interrogatory No. 14 roll, that class of individuals is not a matter of record. Although the BIA has received listings from time to time of "supplemental enrollees," BIA's records may not be complete. To avoid any confusion as to who has to file applications and when the applications have to be filed, the proposed rule to amend part 61 requires all persons including those named on the so-called Interrogatory No. 14 roll and their descendants to submit applications by the deadline specified to establish eligibility for enrollment. Furthermore, such persons can be rejected solely for failure to file on time regardless of whether they otherwise meet the qualifications for enrollment. Therefore, no change has been made to the amendment from what was previously proposed.

It should be noted the Judgment Act does provide that after completion and publication in the **Federal Register**, membership in the Cow Creek Band of Umpqua Tribe of Indians shall be limited to persons listed on the tribal membership roll being prepared and their descendants. However, the Judgment Act further provides that the Cow Creek Band of Umpqua Tribe of Indians, at its discretion, may subsequently grant tribal membership to any person of Cow Creek Band of Umpqua ancestry who under tribal procedures applies to the tribe for membership and is determined to meet the tribal requirements for membership.

**Other Changes**

No other changes have been made to the text of the amendment adding a new paragraph (e) to § 61.4 of part 61 to govern the preparation of a tribal membership roll of the Cow Creek Band of Umpqua Tribe of Indians from what was published in the proposed rule. However, the proposed rule does not revise the authority citation for Part 61 as previously proposed. Section 6 of the Judgment Act directed the Secretary to determine the eligibility of two additional categories of Cow Creek descendants. On Wednesday, April 6, 1988, 53 FR 11271, a final rule was published amending Part 61 to govern processing of applications from the two other categories of Cow Creek Indian descendants. The final rule revised the authority citation for part 61 and no further revision is necessary.

**Paperwork Reduction Act**

The Office of Management and Budget has informed the Department of the Interior that the information collection requirements contained in this part 61 need not be reviewed by them under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

**Executive Order 12291**

The Department of the Interior has determined that this is not a major rule under E.O. 12291 because only a limited number of individuals will be affected and those individuals who are determined eligible to be enrolled on the tribal membership roll will be participating in the programs of one tribal entity funded by a relatively small judgment award granted the Cow Creek Band by the United States Claims Court.

**Compliance With Other Laws**

The Department of the Interior has determined that this rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) because of the limited applicability as stated above.

The Department of Interior has determined that this rule is not a major Federal action significantly affecting the quality of the human environment and that neither an environmental assessment nor an environmental impact statement is required.

**List of Subjects in 25 CFR Part 61**

Indians—claims, Indians—enrollment.

Accordingly, it is proposed that part 61 of Subchapter F of Chapter I of Title 25 of the Code of Federal Regulations be amended as shown.

1. The authority citation for part 61 continues to read as follows:

**Authority:** 5 U.S.C. 301; 25 U.S.C. 2 and 9; 25 U.S.C. 1401 et seq., as amended; Pub. L. 100–139; Pub. L. 100–580.

2. Section 61.4 is amended by adding a new paragraph (e) to read as follows:

**§ 61.4 Qualifications for enrollment and the deadline for filing application forms.**

* * * * *

(e) *Cow Creek Band of Umpqua Tribe of Indians.* (1) Pursuant to Section 5 of the Cow Creek Band of Umpqua Tribe of Indians Distribution of Judgment Funds Act of October 26, 1987, Pub. L. 100–139, a tribal membership roll is to be prepared comprised of all persons who are able to establish that they are of Cow Creek or other Indian ancestry indigenous to the United States based on any rolls or records acceptable to the Secretary and were not members of any other Federally recognized Indian tribe on July 30, 1987; and:

(i) Who are named on the tribal roll dated September 13, 1980, the so-called Interrogatory No. 14 roll;

(ii) Who are descendants of individuals named on the tribal roll dated September 13, 1980, the so-called Interrogatory No. 14 roll, and were born on or prior to October 26, 1987; or

(iii) Who are descendants of individuals who were considered to be members of the Cow Creek Band of Umpqua Tribe of Indians for the purposes of the treaty entered between such Band and the United States on September 18, 1853.

(2) Application forms for enrollment must be filed with the Superintendent, Siletz Agency, Bureau of Indian Affairs, P.O. Box 539, Siletz, Oregon 97380, by (60 days from the effective date of the Final rule). Application forms filed after that date will be rejected for inclusion on the tribal membership roll for failure to file on time regardless of whether the applicant otherwise meets the qualifications for enrollment.

* * * * *

Eddie F. Brown,

*Assistant Secretary—Indian Affairs.*

[FR Doc. 89–25564 Filed 10–30–89; 8:45 am]

BILLING CODE 4310–02–M

## EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

### 29 CFR Part 1614

**RIN 3046–AA11**

### Federal Sector Equal Employment Opportunity

**AGENCY:** Equal Employment Opportunity Commission.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Equal Employment Opportunity Commission is proposing a fundamental restructuring of the Federal sector EEO complaint process in this new part 1614 to its regulations. The new regulations will result in quicker, more efficient processing and will promote administrative fairness in the process of Federal sector EEO complaints.

**DATES:** Written comments on the proposed regulations must be received on or before January 2, 1990. The Commission proposes to consider any comments received and thereafter adopt final regulations.

**ADDRESSES:** Comments should be addressed to the Office of the Executive Secretariat, Room 10402, Equal Employment Opportunity Commission, 1801 L Street, NW., Washington, DC 20507. Copies of comments submitted by the public will be available for review at the Commission's library, Room 6502, 1801 L Street, NW., Washington, DC between the hours of 9:30 a.m. and 5:00 p.m.

**FOR FURTHER INFORMATION CONTACT:** Nicholas M. Inzeo, Assistant Legal Counsel, at (202) 663–4669, Thomas J. Schlageter, Senior Attorney at (202) 663–4669, or Kathleen Oram, Staff Attorney at (202) 663–4669.

**SUPPLEMENTARY INFORMATION:** Pursuant to Reorganization Plan No. 1 of 1978, 43 FR 19807 (May 9, 1978), and Executive Order 12106, 44 FR 1053 (December 28, 1978), authority for the administration and enforcement of equal opportunity in Federal employment, previously vested in the Civil Service Commission, was transferred to the Equal Employment Opportunity Commission. The Commission is specifically granted the authority to issue rules, regulations, orders and instructions pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e–16(b); the Age Discrimination in Employment Act of 1967, 29 U.S.C. 633a(b); the Rehabilitation Act of 1973, 29 U.S.C. 794a(a)(1); the Fair Labor Standards Act, 29 U.S.C. 201 *et seq.*, and E.O. 12067.

Pursuant to the foregoing authorities, the Commission is publishing a proposed part 1614 that fundamentally restructures the Federal sector equal employment opportunity complaint process. Part 1614 represents the Commission's response to numerous commentaries on the existing Federal sector complaint process, located at 29 CFR part 1613, that was created by the Civil Service Commission in 1972, 37 FR 22,717 (October 21, 1972). Recent commentaries on part 1613 include a Government Accounting Office Audit Report, comments by the Assistant Secretaries for Management Group, and the latest in the series, the House Employment and Housing Subcommittee's Report, "Overhauling the Federal EEO Complaint Processing System: A New Look at a Persistent Problem." H.R. Rep. No. 456, 100th Cong., 1st Sess. (1987).

The new part will apply to all counseling efforts pending on or commencing after the effective date of the regulations as well as to all complaints filed after the effective date of the regulations; complaints previously filed will continue to be processed under part 1613. The major differences between part 1613 and proposed part 1614 are discussed below.

#### A. Organization

Proposed part 1614 is organized differently than part 1613. Part 1613 is organized according to the type of discrimination complaint at issue; it has separate subparts for Title VII complaints, mixed case complaints, age complaints, class complaints, handicap complaints, and old mixed case complaints. Proposed part 1614 eliminates the repetition and cross-references inherent in the part 1613 scheme by consolidating the complaint processing procedures as much as possible. It is organized into six subparts. Subpart A concerns the agencies' programs for promoting equal employment opportunity and the procedures for agency processing of individual complaints of discrimination. Subpart B provides additional provisions that are applicable to the processing of particular types of complaints (i.e., ADEA, Equal Pay Act, Rehabilitation Act, class). Subpart C explains the relationship between the EEO process and the negotiated grievance process and between the EEO process and appeals to MSPB. Subpart D describes the right and method by which a complainant can appeal to EEOC and the right to file civil actions under each statute administered by EEOC. Subpart E sets forth EEOC's policy on remedies and corrective action when discrimination has occurred. Subpart F contains miscellaneous provisions of general applicability to agency EEO programs.

#### B. Individual Complaint Process

Proposed part 1614 also changes the complaint process for individual complaints. As under part 1613, a person who believes he or she has been retaliated against or discriminated against on the basis of race, color, religion, sex, national origin, age, or handicap must first seek counseling from the alleged discriminating agency and then file a written complaint with that agency. The agency must

acknowledge receipt and, if properly filed, investigate. Proposed part 1614, however, eliminates the hearing from the agency investigation stage and requires the agency to investigate, attempt resolution and issue a notice of final action within 180 days. (A complainant's right to a hearing is being shifted from the agency investigation process to the EEOC appeal process; only the timing of the request, not the right to a hearing itself, is being modified by the proposal.) Because agencies' responsibilities in the 180-day period are limited to investigation and settlement attempts, it is anticipated that agencies will be able to complete investigations within that time limit.

The new procedure allows a large degree of flexibility in the investigation of complaints. The agency can use an exchange of letters, position papers, interrogatories, investigation, fact-finding conference or any other method or combination of methods that will lead to the development of a complete factual record. Agencies can incorporate alternative dispute resolution techniques into their investigations in order to facilitate early resolution of complaints. The Commission encourages agencies to explore the possibility of tailoring their investigative procedures to the issue(s) raised in a complaint and to adopt procedures that emphasize prompt resolution.

If the complainant wishes to pursue the matter beyond the agency level, he or she may file a civil action in federal district court or may appeal the notice of final action to the EEOC. In an appeal, EEOC will review the agency record to determine if it is adequate for decision. If it is not, EEOC will supplement the agency investigation by various methods. It may remand part or all of the matter to the agency for further investigation and may draw an adverse inference if the agency fails to supplement the record within the time specified by the Commission or it may refer the matter to an EEOC field office for investigation and require that the agency reimburse the Commission for the investigation. Although § 1613.216(c) of the current regulations provides for reimbursement, it has seldom been used; the Commission intends to make full use of the reimbursement provision in the proposed process. If an agency fails to develop an adequate record, the Commission may also send notice of this deficiency to an appropriate agency official or Congressional committee or take other appropriate action.

Once EEOC has determined the record is complete, it will so notify the parties and the complainant will have 15 days within which to request a hearing. A party may request that the Administrative Judge issue recommended findings and conclusions without a hearing if there are not genuine issues of fact or of credibility. After the Administrative Judge issues recommended findings and conclusions, or after the complainant fails to timely request a hearing, the EEOC will issue a decision on the appeal and the appellant can then seek reopening or file a civil action in federal court. By shortening the agency processing time, independently reviewing the agency's investigation and, when appropriate, conducting its own investigation, EEOC has attempted to make the federal sector process more like its private sector charge process.

By providing for EEOC review of agency investigations early in the process and for EEOC supplementation of agency investigations when necessary, the proposed part should correct any perceived conflict of interest or unfairness in the current part 1613 practice of agency self-investigation. The proposed part should also eliminate the time delays and backlogs frequently associated with part 1613 agency complaint processing by limiting agency processing to 180 days and by reducing the number of decision-making levels (proposed part 1614 eliminates the proposed disposition).

**C. The Rehabilitation Act and Reassignment**

In proposed section 1614.103, the Commission defines the scope of the part. In a change from § 1613.701(b), § 1614.103 states that for purposes of the Rehabilitation Act, the part applies to military departments as defined in 5 U.S.C. 102, executive agencies as defined in 5 U.S.C. 105, the U.S. Postal Service, the Postal Rate Commission and the Tennessee Valley Authority. This definition of charge processing jurisdiction is based on the plain language of section 501 of the Rehabilitation Act which limits coverage to departments, agencies and instrumentalities in the executive branch, and brings the regulation into conformance with a recent decision of a United States Court of Appeals. In *Judd* v. *Billington*, 863 F.2d 103 (D.C. Cir. 1988), the court held that section 791 of the Rehabilitation Act "applies only to employees in the executive branch. *See* 29 U.S.C. 791(b)." 863 F.2d at 105. The Commission recently acknowledged and adopted the *Judd* decision in *Faucette* v. *Kennickell*, Request No. 05880886 (March 1, 1989).

The former Civil Service Commission had authority to issue regulations covering competitive positions in legislative and judicial branch agencies, 5 U.S.C. 7153, however, that authority passed, not to EEOC, but to the Office of Personnel Management in 5 U.S.C. 7203. EEOC has requested that the Office of Personnel Management issue a regulation under section 7203 extending regulatory coverage of the Rehabilitation Act to competitive positions in the legislative and judicial branches. In addition, EEOC has asked the Interagency Committee on Handicapped Employees to recommend a legislative change to section 501 of the Rehabilitation Act to provide competitive employees of legislative and judicial branch agencies with a remedy under the Rehabilitation Act.

The Commission has taken the position that, under certain circumstances, an agency is required by section 501 of the Rehabilitation Act of 1973, 5 U.S.C. 791, and the Commission's implementing regulations to consider reassignment as a reasonable accommodation. *See Ignacio* v. *United States Postal Service*, Petition No. 03840005 (Sept. 4, 1984), upheld, 30 M.S.P.R. 471 (Spec. Panel 1986). The courts have not embraced this position. Congress intended the Federal government to be a model employer of the handicapped and the Commission believes that reassignment of employees with handicaps who can no longer perform in their positions is a necessary component of that responsibility. The Commission is, therefore, proposing a new § 1614.203(g), which imposes a duty to consider reassignment as part of an agency's affirmative action obligation under section 501.

The Supreme Court has recognized a distinction in the Rehabilitation Act's civil rights provisions between nondiscrimination and affirmative action. In *Southeastern Community College* v. *Davis*, 442 U.S. 397, 410 (1979), the Court contrasted the "evenhanded treatment of qualified handicapped persons" required by section 504 with the "affirmative efforts to overcome the disabilities caused by handicaps" required by section 501 and noted the requirements of the latter section for affirmative action program plans that describe how the special needs of handicapped employees are being met. The Court reiterated in *Alexander* v. *Choate*, 469 U.S. 287, 300 n.20 (1985), the distinction between the nondiscriminatory reasonable accommodations required by section 504 and the affirmative action required by section 501 to effect substantial changes, adjustments and modifications in existing personnel practices. Section 501 requires each agency to submit an

affirmative action program plan for the hiring, placement and advancement of handicapped individuals including a description of the extent to which and methods whereby the special needs of handicapped individuals are being met.

The Commission can require that such plans include reassignment as a method of meeting the special needs of handicapped employees. As a special affirmative action requirement, the reassignment obligation would not be a component of the statute's reasonable accommodation requirement and would not be subject to the undue hardship limitation. Because this would be a new provision implementing the affirmative action requirements of section 501 only, the case law interpreting reasonable accommodation would be inapplicable. Thus, cases involving reassignment would rely on this new provision and not the reasonable accommodation case law in determining the proper legal standards for such reassignments under section 501.

The proposed paragraph does not require the Postal Service to reassign an employee to a position in a different craft or to make any other reassignment that would be inconsistent with the terms of a collective bargaining agreement covering an employee. This except for the Postal Service in included in order to be consistent with the reassignment requirements of 5 U.S.C. 8337 and 5 U.S.C. 8451. The Commission seeks comment on this new proposal.

**D. Opting Out of Class Complaints**

The Commission proposes to delete the opting out provisions contained in § 1613.605(b). The class complaint regulations are based on Rule 23 of the Federal Rules of Civil Procedure. *See* 41 FR 8081 (Feb. 24, 1976); 42 FR 11807 (March 1, 1977). Rule 23 governs class action lawsuits; among other things, it defines the different types of class actions and states the required notice provisions and opting out provisions for each. In court, employment discrimination class actions are generally treated under subsection (b)(2) of Rule 23, *Holmes* v. *Continental Can Co.*, 706 F.2d 1144, 1152 (11th Cir. 1983). A prerequisite of a "(b)(2)" class is that the defendant "acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2). The right to opt out of such a class could be inconsistent with the prerequisite of a (b)(2) class that relief is appropriate for the class as a whole. Some courts have permitted class members to opt out of a (b)(2) class but only at the settlement or relief stage. *Cox* v. *American Cast Iron Pipe Co.*, 784 F.2d 1546, 1554 (11th Cir. 1986). In *Cox*, the court held that it would be an abuse of discretion for a district court to permit a right to opt out at the certification stage, i.e., before the class is identified or before the merits of the class claim are considered or resolved.

Permitting class members to opt out would make the class action mechanism less effective. It would make possible the repeated litigation of pattern and practice issues, a consequence that the class action procedure was designed to prevent. *Cox*, 784 F. 2d at 1554. Use of an opt out procedure at the commencement of a class action "force[s] class members to take a stand against their employers in order to stay in a controversial lawsuit." *Cox*, 784 F. 2d at 1554–55. It also discourages settlement by making it impossible to resolve all claims at once and would subject the defendant to the risk that class members will settle only the questionable claim and opt for separate treatment of the stronger claims. *Kincade* v. *General Tire & Rubber Co.*, 635 F. 2d 501, 507 (5th Cir. 1981). An opt out provision is thus inconsistent with the Title VII goal of encouraging settlement of claims.

If the opt-out provision is eliminated from the regulation, all class members will still receive notice that the class complaint has been filed and notice of any settlement or decision on the class complaint. If they do not wish to participate in the class or to file a claim for individual relief, they do not have to do so. Those who wish to participate will have the opportunity to object to any proposed settlement and to file claims for individual relief if discrimination is found. The Commission believes that class members' rights are sufficiently protected by the notice provisions and that the opt-out provision is both inconsistent and unnecessary. Therefore, the proposed regulation omits it.

**E. Negotiated Grievance Procedure.**

Under 29 CFR 1613.219, employees of agencies covered by 5 U.S.C. 7121(d) must elect initially to pursue a matter that is both grievable and allegedly discriminatory either through the negotiated grievance procedure or through the EEO complaint process, but not both. This regulatory provision also states that allegations of discrimination by employees of agencies not subject to 5 U.S.C. 7121(d) will not be subject to an election and should be processed as complaints under part 1613. The Commission proposes to continue this processing distinction between agencies that are and are not covered by 5 U.S.C. 7121(d). In view of the dual filing and processing responsibilities that can arise in agencies that are not covered by 5 U.S.C. 7121(d), however, the Commission proposes to toll the new 180-day processing limit for such complaints. If an employee of an agency not covered by 5 U.S.C. 7121(d) files an EEO complaint on a matter which is the subject of a negotiated grievance, the 180-day processing time contained in § 1614.106 shall be held in abeyance during the processing of the grievance. This will permit efficient processing of the EEO complaint without undercutting the grievance procedure.

**F. Time limit For Seeking Counseling**

Part 1613 provides that unless the time limits should be extended in accordance with certain criteria, an agency may only accept a complaint if the complainant previously sought counseling for the matter within 30 calendar days of the date of the alleged discriminatory event, of the effective date of the alleged discriminatory personnel action or of the date that the aggrieved person knew or reasonably should have known of the discriminatory event or personnel action. Part 1614 continues this 30-day rule and the provision for extension of the time limit under certain circumstances. The Commission, however, is aware of concerns expressed by some people that this 30-day time limit does not provide sufficient time for a potential claimant to evaluate the situation or to decide if he or she wants to pursue the matter in the EEO process, and of suggestions that this period be extended to as much as 180 days. The Commission solicits comment on whether this time limit should be lengthened, and if so, what the appropriate period for seeking counseling should be.

**G. ADEA Statute of Limitations**

The Commission proposes in § 1614.409(a) to address the absence of an explicit statute of limitations period in section 15 of the Age Discrimination in Employment Act, 29 U.S.C. 633a, which creates a right of action against Federal agencies for violations of the ADEA. The absence of an express limitations period in a statute does not mean that there is no time limitation for filing suits under that statue. *DelCostello* v. *International Brotherhood of Teamsters*, 462 U.S. 151, 158 (1983). When a statute is silent, courts borrow a limitations period from a closely analogous statute. *Johnson* v.

*Railway Express Agency, Inc.*, 421 U.S. 454, 466 (1975).

The courts have split on the issue of the correct statute of limitations applicable to ADEA lawsuits by federal employees. One court found that the two-and three-year limitations period for private sector ADEA cases was the most analogous limitations period for federal sector ADEA cases. *Weirsema* v. *Tennessee Valley Authority*, 41 Fair Empl. Prac. Cas. (BNA) 1588 (E.D. Tenn. 1986). *But see Lehman* v. *Nakshian*, 453 U.S. 156 (1981) (the Court held that the federal sector provisions of the ADEA are self-contained and looked to Title VII rathern than the private sector provisions of the ADEA for guidance in interpreting the ADEA's federal sector provisions). Other courts have borrowed the Title VII limitations period as the most analogous. *See Carraway* v. *Postmaster General of the United States*, 678 F. Supp. 125 (D. Md. 1988); *Strazdos* v. *Baker*, No. 88–1520 (S.D.N.Y. July 5, 1988); *DiCamillo* v. *U.S. Postal Service*, No. 87–6028 (D. Conn. April 22, 1988); *Ramachandran* v. *U.S. Postal Service*, No. CV–86–7690 WDK (C.D. Cal. April 15, 1987), *aff'd*, No. 87–6028 (9th Cir. May 26, 1988); *White* v. *Department of the Air Force*, No. CA–3–87–1452–R (N.D. Tex. Oct. 14, 1987) *aff'd*, 835 F. 2d 871 (Fed. Cir. 1987); *Healy* v. *U.S. Postal Service, 677 F. Supp. 1284 (E.D.N.Y. 1987); see also Rivera* v. *U.S. Postal Service*, 830 F. 2d 1037, 1039 (9th Cir. 1987) (dismissing ADEA claims for failure to file within 30 days), *cert. denied*, 180 S. Ct. 1737 (1988). Three courts have refused to borrow the 30-day limitations period of Title VII for ADEA actions without stating what limitations period should be borrowed. *See Coleman* v. *Nolan*, 49 Fair Empl. Prac. Cas. (BNA) 285 (S.D.N.Y. 1988); *Wetzel* v. *U.S. Postal Service*, No. 87–4–CIV–5 (E.D.N.C. Aug. 14, 1987); *Tkac* v. *Veterans Administration*, 610 F. Supp. 1075 (W.D. Mich. 1985). One court applied the six-year statute of limitations contained in 28 U.S.C. 2401(a) to a Federal sector ADEA suit. *Marks* v. *Turnage*, 46 Fair Empl. Prac. Cas. (BNA) 382 (N.D. Ill. 1988).

The Commission finds the reasoning of the cases applying the two- or three-year limitations period of the private sector ADEA provisions or the six-year limitations periods of 28 U.S.C. 2401(a) upersuasive and the use of those limitations periods to be inconsistent with the administrative process utilized for federal sector ADEA complaints. The Commission believes that the most closely analogous statutes to the Federal sector provisions of the ADEA are section 717 of Title VII and the Civil Service Reform Act and that their 30-day limitations periods should be borrowed for federal sector ADEA lawsuits.

Although there are differences between the federal sector provisions of Title VII and the ADEA, courts have nevertheless looked to Title VII for analogous procedures to use in Federal employees' ADEA lawsuits. *See, e.g., Lehman* v. *Nakshian*, 453 U.S. 156 (1981) (as in Title VII action, plaintiff is not entitled to trial by jury); *Ellis* v. *United States Postal Service*, 784 F.2d 835, 838 (7th Cir. 1986) (as in Title VII action, the only proper defendant in an ADEA suit is the head of the Federal agency); *Smith* v. *Office of Personnel Management*, 778 F.2d 258, 262 (5th Cir. 1985) (like Title VII, the ADEA does not allow recovery of compensatory damages). The use of different statutes of limitations for Federal sector Title VII and ADEA cases could lead to attempts to split complaints that allege violations of both statutes or premature departure from the administrative process in order to timely file a lawsuit on the ADEA issue.

Further support for a 30-day limitations period is found in the Civil Service Reform Act (CSRA) and its legislative history. The CSRA provides a 30-day limitations period for Federal employees to file suit when a claim of age discrimination is based on an action that is appealable to the MSPB, i.e., a mixed case involving a claim of age discrimination. *See* 5 U.S.C. 7703(b)(2). This may indicate that Congress intended or understood that the 30-day limitations period from Title VII applied as well to ADEA lawsuits. *See* S. Rep. No. 969, 95th Cong., 2d Sess. 63, reprinted in 1978 U.S. Code Cong. & Admin. News 2723, 2785 ("Under the anti-discrimination laws an employee has 30 days from the final agency action to initiate a de novo court proceeding"). Apart from any indication of legislative intent, it also constitutes another analogous statute of limitations that is available for borrowing. It can be argued that it is the most analogous limitations period since it applies not only to employment discrimination actions by Federal employees like Title VII but more specifically to those alleging age discrimination. In the alternative, it can be argued that it is at least as analogous as the Title VII limitations period to which it is identical. Thus, the CSRA supports the use of a 30-day limitations period for ADEA lawsuits either because its legislative history indicates that Congress intended the Title VII limitations period be applied to ADEA actions, or because the CSRA limitations period is the most analogous statute of limitations, or because the limitations periods common to both Title VII and the CSRA should both be borrowed as the most analogous statutes of limitations. Failure to use the 30-day limitations period for all civil actions under the ADEA would result in some age complaints having a 30-day limitations period (i.e., mixed case complaints that raise age discrimination) and others having a different limitations period (i.e., non-mixed case complaints).

The Commission, therefore, proposes that the limitations period applicable to suits brought under Title VII and the CSRA be borrowed and applied to suits brought under section 15 of the ADEA by individuals who have filed administrative complaints.

There are, however, two methods for a Federal employee to pursue an ADEA claim, i.e., by filing an administrative complaint or by filing a notice of intent to sue. Where an individual files a complaint, the Commission believes that the 30-day suit period is appropriate. Where, however, an individual files a notice of intent to sue, the Commission believes that the two- or three-year limitations period applicable to private sector ADEA lawsuits is appropriate. The notice of intent to sue procedure clearly comes from the private sector ADEA process and adopting that limitations period for this purpose is consistent with the case law on borrowing and our approach.

**H. Exhaustion of Remedies Under the ADEA**

In § 1614.409(b), the Commission proposes to address the exhaustion of remedies problem raised by the decisions in *Purtill* v. *Harris*, 658 F.2d 134, 137 (3d Cir. 1981), *cert. denied*, 462 U.S. 1131 (1983); *Bunch* v. *United States*, 548 F.2d 336, 340 (9th Cir. 1977), and other cases. These cases hold that once a Federal complainant under the Age Discrimination in Employment Act initiates administrative procedures, he or she must exhaust these procedures before filing a civil action. As the agency responsible for interpretation and enforcement of the ADEA in the Federal sector, the Commission believes that a complainant exhausts administrative remedies either 180 days after filing a complaint (the time period during which the agency is required to issue a notice of final action), or 180 days after filing an appeal with the EEOC, if EEOC has not issued a decision, or after EEOC issues a decision on an appeal. This exhaustion requirement is the same as the Title VII

exhaustion requirement and will permit those complainants alleging age discrimination as well as Title VII discrimination to bring the entire complaint to court at the same time.

The Commission believes that this proposed fundamental restructuring of the complaint process will provide more efficient resolution of federal sector employment discrimination complaints while, at the same time, ensuring administrative fairness.

In the process of developing proposed part 1614, the Commission considered proposals to require payment of interest on back pay in discrimination cases and to provide for awards of attorneys fees in Age Discrimination in Employment Act cases. The Office of Legal Counsel at the Department of Justice has advised us, however, of its opinion that the Back Pay Act of 1966, 5 U.S.C. 5596, does not serve as a waiver of sovereign immunity for those purposes. We are now providing in § 1614.501, therefore, that interest on back pay may not be awarded to federal applicants or employees who prevail in discrimination claims. Proposed § 1614.501(e) will remain unchanged from its counterpart in part 1613; that is, the attorneys fees awards provisions shall apply to allegations of discrimination or retaliation prohibited by Title VII and the Rehabilitation Act.

In addition to these proposed regulations, the Commission invites comment on whether the Supreme Court's recent decision in *Price Waterhouse* v. *Hopkins*, 57 U.S.L.W. 4469 (May 1, 1989), requires that the Commission change its regulation on remedial action, found currently at 29 CFR 1613.271. Section 1613.271 states that full relief should be provided to an individual when discrimination is found unless the record contains clear and convincing evidence that the individual would not have been selected even absent discrimination. During the public comment and interagency coordination of the latest amendments to part 1613, published at 52 FR 41919 (October 30, 1987), commenters suggested that the burden of proof be changed from "clear and convincing evidence" to "a preponderance of the evidence" standard. As a result of these suggestions and comments, the Commission solicits comment on what effect, if any, the Hopkins decision should have on proposed § 1614.501, which is patterned on 29 CFR 1613.271.

The Commission also invites comments on whether any of the substantive changes proposed for part 1614 should also be applied to complaints being processed under part 1613.

These regulations have been coordinated with affected federal agencies pursuant to E.O. 12067 and have been reviewed by the Office of Management and Budget pursuant to E.O. 12291. The Commission hereby publishes these proposed rules for public comment. The proposed rules appear below.

**List of Subjects in 29 CFR Part 1614**

Equal employment opportunity, Government employees.

For the Commission,

**Clarence Thomas,**

*Chairman.*

For the reasons set forth in the preamble, it is proposed to amend title 29, chapter XIV of the Code of Federal Regulations by adding part 1614 to read as follows:

## PART 1614—FEDERAL SECTOR EQUAL EMPLOYMENT OPPORTUNITY

### Subpart A—Agency Program To Promote Equal Employment Opportunity

Sec.



### Subpart B—Provisions Applicable To Particular Complaints



### Subpart C—Related Processes



### Subpart D—Appeals And Civil Actions



### Subpart E—Remedies And Corrective Action



### Subpart F—Matters Of General Applicability



**Authority:** 42 U.S.C. 2000e–16; 29 U.S.C. 633a; 29 U.S.C. 791 and 794a; 29 U.S.C. 206(d); E.O. 10577; 3 CFR 218 (1954–1958 Comp.); E.O. 11222, 3 CFR 306 (1964–1965 Comp.); E.O. 11478, 3 CFR 133 (1969 Comp.); E.O. 12106, 44 FR 1053 (1978); Reorg. Plan No. 1 of 1978, 43 FR 19807 (1978), unless otherwise noted.

## Subpart A—Agency Program To Promote Equal Employment Opportunity

### § 1614.101 General policy.

(a) It is the policy of the Government of the United States to provide equal opportunity in employment for all persons, to prohibit discrimination in employment because of race, color, religion, sex, national origin, age or handicap and to promote the full realization of equal employment opportunity through a continuing affirmative program in each agency.

(b) No person shall be subject to retaliation for opposing any practice made unlawful by Title VII of the Civil Rights Act (Title VII), the Age Discrimination in Employment Act (ADEA), the Equal Pay Act or the Rehabilitation Act or for participating in any stage of administrative or judicial proceedings under those statutes.

### § 1614.102 Agency program.

(a) Each agency shall maintain a continuing affirmative program to promote equal opportunity and to identify and eliminate discriminatory practices and policies. In support of this program, the agency shall:

(1) Provide sufficient resources to its equal employment opportunity program to ensure efficient and successful operation;

(2) Provide for the prompt, fair and impartial processing of complaints in accordance with this part and the instructions contained in the Commission's Management Directives;

(3) Conduct a continuing campaign to eradicate every form of prejudice or discrimination from the agency's personnel policies, practices and working conditions;

(4) Communicate the agency's equal employment opportunity policy and program and its employment needs to all sources of job candidates without regard to race, color, religion, sex, national origin, age or handicap, and solicit their recruitment assistance on a continuing basis;

(5) Review, evaluate and control managerial and supervisory performance in such a manner as to insure a continuing affirmative application and vigorous enforcement of the policy of equal opportunity, and provide orientation, training and advice to managers and supervisors to assure their understanding and implementation of the equal employment opportunity policy and program;

(6) Take appropriate disciplinary action against employees who engage in discriminatory practices;

(7) Make reasonable accommodation to the religious needs of applicants and employees when those accommodations can be made without undue hardship on the business of the agency;

(8) Provide recognition to employees, supervisors, managers and units demonstrating superior accomplishment in equal employment opportunity;

(9) Establish a system for periodically evaluating the effectiveness of the agency's overall equal employment opportunity effort;

(10) Provide the maximum feasible opportunity to employees to enhance their skills through on-the-job training, work-study programs and other training measures so that they may perform at their highest potential and advance in accordance with their abilities;

(11) Inform its employees and recognized labor organizations of the affirmative equal employment opportunity policy and program and enlist their cooperation; and

(12) Participate at the community level with other employers, with schools and universities and with other public and private groups in cooperative action to improve employment opportunities and community conditions that affect employability.

(b) In order to implement its program, each agency shall:

(1) Develop the plans, procedures and regulations necessary to carry out its program;

(2) Appraise its personnel operations at regular intervals to assure their conformity with its program, part 1614 and the instructions contained in the Commission's Management Directives;

(3) Designate a Director of Equal Employment Opportunity (EEO Director), EEO Officer(s) and such Special Emphasis Program Managers (including but not necessarily limited to a Handicapped Program Coordinator, a Federal Women's Program Manager and a Hispanic Employment Program Manager), clerical and administrative support as may be necessary to carry out the functions described in this part in all organizational units of the agency and at all agency installations. The EEO Director shall be under the immediate supervision of the agency head. The responsibility for regulating the government-wide Special Emphasis Program continues with the Office of Personnel Management;

(4) Make written materials available to all employees and applicants informing them of the variety of equal employment opportunity programs and administrative and judicial remedial procedures available to them and prominently post such written materials in all personnel and EEO offices and throughout the workplace;

(5) Ensure that full cooperation is provided by all agency employees to EEO Counselors and agency EEO personnel in the processing and resolution of pre-complaint matters and complaints within an agency and that full cooperation is provided to the Commission in the course of appeals, including granting the Commission routine access to personnel records of the agency when required in connection with an investigation;

(6) Publicize to all employees and permanently post the names and addresses of the EEO Director, EEO Officer, Special Emphasis Program Managers and EEO Counselors and a notice of the time limits and necessity of contacting a Counselor before filing a complaint; and

(c) Under each agency program, the EEO Director shall be responsible for:

(1) Advising the head of the agency with respect to the preparation of national and regional equal employment opportunity plans, procedures, regulations, reports and other matters pertaining to the policy in § 1614.101 and the agency program;

(2) Evaluating from time to time the sufficiency of the total agency program for equal employment opportunity and reporting to the head of the agency with recommendations as to any improvement or correction needed, including remedial or disciplinary action with respect to managerial, supervisory or other employees who have failed in their responsibilities;

(3) When authorized by the head of the agency, making changes in programs and procedures designed to eliminate discriminatory practices and improve the agency's program for equal employment opportunity;

(4) Providing for counseling of aggrieved individuals and for the receipt and processing of individual and class complaints of discrimination; and

(5) Assuring that individual complaints are properly and thoroughly investigated and that notices of final action are issued in a timely manner in accordance with this part.

**§ 1614.103 Complaints of discrimination covered by this part.**

(a) Individual and class complaints of employment discrimination and retaliation prohibited by title VII (discrimination on the basis of race, color, religion, sex and national origin), the ADEA (discrimination on the basis of age when the aggrieved individual is at least 40 years of age), the Rehabilitation Act (discrimination on the basis of handicap) or the Equal Pay Act (sex-based wage discrimination) are covered by this part unless the complainant has elected to grieve the matter through a negotiated grievance procedure or to appeal the matter to the Merit Systems Protection Board.

(b) This part applies to:

(1) Military departments as defined in 5 U.S.C. 102;

(2) Executive agencies as defined in 5 U.S.C. 105;

(3) The United States Postal Service, Postal Rate Commission and Tennessee Valley Authority, except for complaints under the Equal Pay Act; and

(4) All units of the legislative and judicial branches of the Federal Government having positions in the competitive service, except for complaints under the Rehabilitation Act. This part does not apply to the General Accounting Office or the Library of Congress.

(c) Within the covered departments, agencies and units, this part applies to all employment policies or practices affecting employees or applicants for employment including employees and applicants who are paid from nonappropriated funds but does not apply to the employment of aliens outside the limits of the United States.

**§ 1614.104 Agency processing.**

(a) Each agency subject to this part shall adopt procedures for processing individual and class complaints of

discrimination and retaliation that include the provisions contained in §§ 1614.105 through 1614.107 and that are consistent with all other applicable provisions of this part and the instructions for complaint processing contained in the Commission's Management Directives.

(b) The Commission shall periodically review agency resources and procedures to ensure that an agency makes reasonable efforts to resolve complaints informally, to process complaints in a timely manner, to develop adequate factual records, to issue findings which are consistent with acceptable legal standards, to explain the reasons for its findings, and to give complainants adequate and timely notice of their rights.

**§ 1614.105 Counseling.**

(a) Aggrieved persons who believe they have been discriminated against on the basis of race, color, religion, sex, national origin, age or handicap or retaliated against must consult a Counselor prior to filing a complaint in order to try to informally resolve the matter. Contact with a Counselor must be initiated by the aggrieved person within 30 days of the date of the matter alleged to be discriminatory, within 30 days of the effective date of a personnel action or within 30 days of the date that the aggrieved person knew or reasonably should have known of the matter or personnel action alleged to be discriminatory.

(b) At the initial counseling session, Counselors must advise individuals in writing of their rights and responsibilities, including election rights pursuant to § 1614.301 and § 1614.302, the right to file a notice of intent to sue pursuant to § 1614.201(a) and a lawsuit under the ADEA instead of an administrative complaint of age discrimination under this part, the duty to mitigate damages, administrative and court time frames, and that only the matter(s) raised in pre-complaint counseling may be alleged in a subsequent complaint filed with the agency. Counselors must advise individuals of their duty to keep the agency and Commission informed of their current address. If the aggrieved person informs the Counselor that he or she wishes to file a class complaint, the Counselor shall explain the class complaint procedures and the responsibilities of a class agent and include in the notice required by paragraphs (d) or (e) of this section a notice of the right to file a class complaint.

(c) Counselors shall conduct counseling activities in accordance with instructions contained in Commission Management Directives. When advised that a complaint has been filed by an aggrieved person, the Counselor shall submit a written report to the agency's EEO Officer and the aggrieved person concerning the issues discussed and actions taken during counseling.

(d) Unless the aggrieved person agrees to a longer counseling period under paragraph (e) of this section, the Counselor shall conduct the final interview with the aggrieved person within 30 days after the date the aggrieved person brought the matter to the Counselor's attention. If the matter has not been resolved to the satisfaction of the aggrieved person, that person shall be informed in writing by the Counselor, not later than the thirtieth day after contacting the Counselor, of the right to file a discrimination complaint. The notice shall inform the complainant of the right to file a discrimination complaint at any time up to 15 days after receipt of the notice, of the appropriate official with whom to file a complaint and of the complainant's duty to assure that the agency is informed immediately if the complainant retains counsel or a representative.

(e) Prior to the end of the 30-day period, the aggrieved person may agree in writing with the Counselor to postpone the final interview and extend the counseling period for an additional period of no more than 60 days. If the matter has not been resolved to the satisfaction of the aggrieved person before the conclusion of the agreed extension, the notice described in paragraph (d) shall be issued.

(f) The Counselor shall not attempt in any way to restrain the aggrieved person from filing a complaint. The Counselor shall not reveal the identity of an aggrieved person who consulted the Counselor, except when authorized to do so by the aggrieved person, until the agency has received a discrimination complaint under this part from that person involving that same matter.

(g) The agency shall ensure that full cooperation is provided by all employees to the Counselor in the performance of the duties under this section.

**§ 1614.106 Individual complaints.**

(a) Complainants or their representatives must file complaints with the agency that allegedly discriminated against them.

(b) Complainants must file complaints within 15 days after receipt of the notice required by § 1614.105(d) or (e).

(c) Complaints must contain a signed statement from the person claiming to be aggrieved. This statement must be sufficiently precise to identify the aggrieved individual and the agency and to describe generally the action(s) or practice(s) that form the basis of the complaint.

(d) The agency shall acknowledge receipt of a complaint and inform the complainant of the date on which the complaint was filed. Such acknowledgement shall also advise the complainant that:

(1) The agency is required to complete processing of the complaint within 180 days after filing unless the parties agree in writing to extend that period; and

(2) If the agency has not issued a notice of final agency action within 180 days of filing or within the agreed period of extension, the complainant can file a civil action or appeal to EEOC in accordance with subpart D.

(e) In accordance with instructions contained in Commission Management Directives, the agency shall develop a complete factual record upon which to make findings on the matters raised by the written complaint. Agencies may use an exchange of letters or memoranda, interrogatories, investigations, fact-finding conferences or any other fact-finding conferences or any other fact-finding methods that efficiently and thoroughly address the matters at issue. Agencie are encouraged to incorporate alternative dispute resolution techniques into their investigative efforts in order to promote early resolution of complaints.

(f) The agency shall issue a notice of final action within 180 days from the date of filing of an individual complaint. By written agreement within the 180-day period, the complainant and the agency may voluntarily extend this 180-day period for not more than an additional 90 days. The notice of final action shall consist of:

(1) Findings by the agency on the merits of each issue in the complaint that is not rejected or cancelled pursuant to § 1614.107; and

(2) Appropriate remedial and corrective action in accordance with Subpart E of this part when discrimination is found; and

(3) A statement of supporting reasons for rejection or cancellation of each issue not considered on the merits; or

(4) A statement that the agency has been unable to resolve the matter or issue findings within the time limits of this paragraph.

The notice of final action shall include notice of the right to appeal to the Commission with the applicable time limitations, EEOC Form 573, Notice Of

Appeal/Petition, and notice of the right to file a civil action in Federal district court with the applicable time limitations. A copy of the agency's investigative file shall be attached to the notice.

(g) An agency's failure to issue a notice of final action after 180 days or any period of extension shall constitute final action and the agency shall cease processing the complaint.

**§ 1614.107 Rejections or cancellations of complaints.**

The agency shall reject or cancel a complaint or part of a complaint:

(a) That fails to state a claim under § 1614.103 or § 1614.106(a) or states the same claim that is pending before or has been decided by the agency or Commission;

(b) That fails to comply with the applicable time limits contained in §§ 1614.105, 1614.106 and 1614.204(c), unless the agency extends the time limits in accordance with § 1614.604(c), or that raises a matter which has not been brought to the attention of a Counselor;

(c) That is the basis of a pending civil action in a United States District Court in which the complainant is a party provided that at least 180 days have passed since the filing of the administrative complaint, or that was the basis of a civil action decided by a United States District court in which the complainant was a party;

(d) Where the complainant has raised the matter in a negotiated grievance procedure that permits allegations of discrimination or in an appeal to the Merit Systems Protection Board and § 1614.301 or § 1614.302 indicates that the complainant has elected to pursue the non-EEO process;

(e) That alleges that an agency is proposing to take a personnel action that may be dicriminatory;

(f) Where the complainant cannot be located, provided that reasonable efforts have been made to locate the complainant and the complainant has not responded within 15 days to a notice of proposed cancellation sent to his or her last known address;

(g) That the complainant has failed to cooperate, where the agency has provided the complainant with a written request to provide relevant information or otherwise proceed with the complaint, and the complainant has failed to satisfy the request within 15 days of its receipt, provided that the request included a notice of the proposed cancellation; or

(h) If the complainant refuses within 15 days of receipt of an offer of settlement to accept an agency offer of full relief in adjustment of the complaint, provided that the agency's EEO Director, Chief Legal Officer or a designee reporting directly to the EEO Director or Chief Legal Officer, has certified in writing that the agency's written offer constitutes full relief. An offer of full relief under this subsection is the appropriate relief in § 1614.501.

## Subpart B—Provisions Applicable to Particular Complaints

**§ 1614.201 Age Discrimination in Employment Act.**

(a) As an alternative to filing a complaint under this part, an aggrieved individual may file a civil action to obtain a judicial determination of his or her rights under the ADEA after giving the Commission not less than 30 days notice of the intent to file such an action. Such notice must be filed in writing with EEOC, Federal Sector Programs, 1801 L St. NW., Washington, DC 20507 within 180 days after the alleged unlawful practice occurred.

(b) The Commission may exempt a position from the provisions of the ADEA if the Commission establishes a maximum age requirement for the position on the basis of a determination that age is a bona fide occupational qualification necessary to the performance of the duties of the position.

**§ 1614.202 Equal Pay Act.**

(a) In its enforcement of the Equal Pay Act, the Commission has the authority to investigate an agency's employment practices on its own initiative at any time in order to determine compliance with the provisions of the Act.

(b) Complaints alleging violations of the Equal Pay Act shall be processed under this part unless they are brought against the United States Postal Service, Postal Rate Commission or the Tennessee Valley Authority. These three entities will be treated by the Commission as private employers. Alleged violations by these agencies may be filed with an appropriate Commission office listed in 29 CFR 1610.4(c).

**§ 1614.203 Rehabilitation Act.**

(a) *Definitions.* (1) "*Individual with handicaps*" is defined for this section as one who:

(i) Has a physical or mental impairment which substantially limits one or more of such person's major life activities.

(ii) Has a record of such an impairment, or

(iii) Is regarded as having such an impairment.

(2) "*Physical or mental impairment*" means:

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

(ii) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

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

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

(5) "*Is regarded as having such an impairment*" means has a physical or mental impairment that does not substantially limit major life activities but is treated by an employer as constituting such a limitation; has a physical or mental impairment that substantially limits major life activities only as a result of the attitude of an employer toward such impairment; or has none of the impairments defined in Paragraph (a)(2) of this section but is treated by an employer as having such an impairment.

(6) "*Qualified individual with handicaps*" means with respect to employment, an individual with handicaps who, with or without reasonable accommodation, can perform the essential functions of the position in question without endangering the health and safety of the individual or others and who, depending upon the type of appointing authority being used:

(i) Meets the experience or education requirements (which may include passing a written test) of the position in question, or

(ii) Meets the criteria for appointment under one of the special appointing authorities for individuals with handicaps.

(b) The Federal Government shall become a model employer of individuals with handicaps. Agencies shall give full consideration to the hiring, placement, and advancement of qualified individuals with mental and physical handicaps. An agency shall not discriminate against a qualified

individual with physical or mental handicaps.

(c) *Reasonable accommodation.* (1) An agency shall make reasonable accommodation to the known physical or mental limitations of an applicant or employee who is a qualified individual with handicaps unless the agency can demonstrate that the accommodation would impose an undue hardship on the operations of its program.

(2) Reasonable accommodation may include, but shall not be limited to:

(i) Making facilities readily accessible to and usable by individuals with handicaps, and

(ii) Job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, appropriate adjustment or modification of examinations, the provision of readers and interpreters, and other similar actions.

(3) In determining whether, pursuant to paragraph (c)(1) of this section, an accommodation would impose an undue hardship on the operation of the agency in question, factors to be considered include:

(i) The overall size of the agency's program with respect to the number of employees, number and type of facilities and size of budget;

(ii) The type of agency operation, including the composition and structure of the agency's work force; and

(iii) The nature and the cost of the accommodation.

(d) *Employment criteria.* (1) An agency may not make use of any employment test or other selection criterion that screens out or tends to screen out qualified individuals with handicaps or any class of individuals with handicaps unless:

(i) The test score or other selection criterion, as used by the agency, is shown to be job-related for the position in question, and

(ii) Alternative job-related tests or criteria that do not screen out or tend to screen out as many individuals with handicaps are not shown by the Office of Personnel Management to be available.

(2) An agency shall select and administer tests concerning employment so as to insure that, when administered to an applicant or employee who has a handicap that impairs sensory, manual, or speaking skills, the test results accurately reflect the applicant's or employee's ability to perform the position or type of positions in question rather than reflecting the applicant's or employee's impaired sensory, manual, or speaking skill (except where those skills are the factors that the test purports to measure).

(e) *Preemployment inquiries.* (1) Except as provided in paragraphs (e)(2) and (e)(3) of this section, an agency may not conduct a preemployment medical examination and may not make preemployment inquiry of an applicant as to whether the applicant is an individual with handicaps or as to the nature or severity of a handicap. An agency may, however, make preemployment inquiry into an applicant's ability to meet the medical qualification requirements, with or withour reasonable accommodation, of the position in question, i.e., the minimum abilities necessary for safe and efficient performance of the duties of the position in question. The Office of Personnel Management may also make an inquiry as to the nature and extent of a handicap for the purpose of special testing.

(2) Nothing in this section shall prohibit an agency from conditioning an offer of employment on the results of a medical examination conducted prior to the employee's entrance on duty, provided that:

(i) All entering employees are subjected to such an examination regardless of handicap or when the preemployment medical questionnaire used for positions that do not routinely require medical examination indicates a condition for which further examination is required because of the job-related nature of the condition, and

(ii) The results of such an examination are used only in accordance with the requirements of this part. Nothing in this section shall be construed to prohibit the gathering of preemployment medical information for the purposes of special appointing authorities for individuals with handicaps.

(3) To enable and evaluate affirmative action to hire, place or advance individuals with handicaps, the agency may invite applicants for employment to indicate whether and to what extent they are handicapped, if:

(i) The agency states clearly on any written questionnaire used for this purpose or makes clear orally if no written questionnaire is used, that the information requested is intended for use solely in conjunction with affirmative action, and

(ii) The agency states clearly that the information is being requested on a voluntary basis, that refusal to provide it will not subject the applicant or employee to any adverse treatment, and that it will be used only in accordance with this part.

(4) Information obtained in accordance with this section as to the medical condition or history of the applicant shall be kept confidential except that:

(i) Managers, selecting officials, and others involved in the selection process or responsible for affirmative action may be informed that the applicant is an individual with handicaps eligible for affirmative action;

(ii) Supervisors and managers may be informed regarding necessary accommodations;

(iii) First aid and safety personnel may be informed, where appropriate, if the condition might require emergency treatment;

(iv) Government officials investigating compliance with laws, regulations, and instructions relevant to equal employment opportunity and affirmative action for individuals with handicaps shall be provided information upon request; and

(v) Statistics generated from information obtained may be used to manage, evaluate, and report on equal employment opportunity and affirmative action programs.

(f) *Physical access to buildings.* (1) An agency shall not discriminate against applicants or employees who are qualified individuals with handicaps due to the inaccessibility of its facility.

(2) For the purpose of this subpart, a facility shall be deemed accessible if it is in compliance with the Architectural Barriers Act of 1968.

(g) Reassignment. When a nonprobationary employee becomes unable to perform the essential functions of his or her position even with reasonable accommodation due to a handicap, an agency shall reassign the individual to a vacant position within the same commuting area and at the same grade or level, whose essential functions the individual would be able to perform with reasonable accommodation if necessary. In the absence of a position at the same grade or level, reassignment to a vacant lower graded position shall be required, but availability of such a vacancy shall not affect the employee's entitlement, if any, to disability retirement pursuant to 5 U.S.C. 8337 or 5 U.S.C. 8451. For the purpose of this paragraph, an employee of the United States Postal Service shall not be considered qualified for reassignment to a position in a different craft or for any reassignment that would be inconsistent with the terms of a collective bargaining agreement covering the employee.

**§ 1614.204 Class complaints.**

(a) *Definitions.* (1) A "*class*" is a group of employees, former employees or applicants for employment who, it is

alleged, have been or are being adversely affected by an agency personnel management policy or practice which discriminates against the group on the basis of their race, color, religion, sex, national origin, age or handicap.

(2) A "*class complaint*" is a written complaint of discrimination filed on behalf of a class by the agent of the class alleging that:

(i) The class is so numerous that a consolidated complaint of the members of the class is impractical;

(ii) There are questions of fact common to the class;

(iii) The claims of the agent of the class are typical of the claims of the class;

(iv) The agent of the class, or, if represented, the representative, will fairly and adequately protect the interests of the class.

(3) An "*agent of the class*" is a class member who acts for the class during the processing of the class complaint.

(b) Pre-complaint processing. An employee or applicant who wishes to file a class complaint must seek counseling and be counseled in accordance with § 1614.105.

(c) Filing and presentation of a class complaint.

(1) A class complaint must be signed by the agent and must identify the policy or practice adversely affecting the class as well as the specific action or matter affecting the class agent.

(2) The complaint must be filed with the agency that allegedly discriminated not later than 15 days after the agent's receipt of the notice of right to file a class complaint.

(3) The complaint shall be processed promptly; the parties shall cooperate and shall proceed at all times without undue delay.

(d) *Acceptance, rejection or cancellation.* (1) Within 15 days of an agency's receipt of a complaint, the agency shall forward the complaint, along with a copy of the Counselor's report and any other information pertaining to timeliness or other relevant circumstances related to the complaint, to the Commission. The Commission shall assign the complaint to a Commission Administrative Judge except in instances where the Commission finds it more practical to delegate this responsibility to a complaints examiner or Administrative Judge from another agency who is not an employee of the agency in which the complaint arose.

(2) The Administrative Judge may recommend that the agency reject the complaint, or any portion, for any of the reasons listed in § 1614.107 or because it does not meet the prerequisites of a class complaint under § 1614.204(a)(2).

(3) If an allegation is not included in the Counselor's report, the Administrative Judge shall afford the agent 15 days to state whether the matter was discussed with the Counselor and, if not, explain why it was not discussed. If the explanation is not satisfactory, the Administrative Judge shall recommend that the agency reject the allegation. If the explanation is satisfactory, the Administrative Judge shall refer the allegation to the agency for further counseling of the agent.

(4) If an allegation lacks specificity and detail, the Administrative Judge shall afford the agent 15 days to provide specific and detailed information. The Administrative Judge shall recommend that the agency reject the complaint if the agent fails to provide such information within the specified time period. If the information provided contains new allegations outside the scope of the complaint, the Administrative Judge shall advise the agent how to proceed on an individual or class basis concerning these allegations.

(5) The Administrative Judge shall recommend that the agency extend the time limits for filing a complaint and for consulting with a Counselor when the agent shows that he or she was not notified of the prescribed time limits and was not otherwise aware of them or that he or she was prevented by circumstances beyond his or her control from acting within the time limits.

(6) When appropriate, the Administrative Judge may recommend that a class be divided into subclasses and that each subclass be treated as a class, and the provisions of this section then shall be construed and applied accordingly.

(7) The Administrative Judge's recommendation to the agency on whether to accept, reject or cancel a complaint shall be transmitted in writing to the agency and the agent. The Administrative Judge's recommendation to accept, reject or cancel shall become the agency decision unless the agency accepts, rejects, cancels or modifies the recommended decision within 60 days of the receipt of the recommended decision and complaint file. The agency shall notify the agent and the Administrative Judge of its decision to accept, reject, modify or cancel a complaint. A decision to reject or cancel a class complaint shall inform the agent either that the complaint will be processed as an individual complaint of discrimination under subpart A or that the complaint is also rejected as an individual complaint in accordance with § 1614.107. In addition, it shall inform the agent of the right to appeal the final agency decision rejecting or cancelling the class complaint to the Office of Review and Appeals or to file a civil action and include EEOC Form 573, Notice Of Appeal/Petition.

(e) *Notification.* (1) Within 15 days of accepting a class complaint, the agency shall use reasonable means, such as delivery, mailing to last known address or distribution, to notify all class members of the acceptance of the class complaint.

(2) Such notice shall contain:

(i) The name of the agency or organizational segment, its location, and the date of acceptance of the complaint;

(ii) A description of the issues accepted as part of the class complaint; and

(iii) An explanation of the binding nature of the final decision or resolution of the complaint on class members.

(f) *Obtaining evidence concerning the complaint.* (1) Upon the acceptance of a complaint, the agency head shall designate an agency representative. The agency representative shall not be any of the individuals referenced in § 1614.102(b)(3).

(2) *Development of evidence.* (i) The Administrative Judge shall notify the agent and the agency representative of the time period that will be allowed both parties to prepare their cases. This time period may be extended by the Administrative Judge upon the request of either party. Both parties are entitled to reasonable development of evidence on matters relevant to the issues raised in the complaint. Evidence may be developed through interrogatories, depositions, and requests for production of documents. It shall be grounds for objection to producing evidence that the information sought by either party is irrelevant, overburdensome, repetitious, or privileged.

(ii) If mutual cooperation fails, either party may request to develop evidence. If a party refuses in bad faith or fails without adequate explanation to respond fully and in timely fashion to a request made or approved by the Administrative Judge for documents, records, comparative data, statistics or affidavits, and the information is solely in the control of one party, such failure may, in appropriate circumstances, cause the Administrative Judge:

(A) To draw an adverse inference that the requested information would have reflected unfavorably on the party refusing to provide the requested information;

(B) To consider the matters to which the requested information pertains to be

established in favor of the opposing party;

(C) To exclude other evidence offered by the party failing to produce the requested information; or

(D) To take such other actions as the Administrative Judge deems appropriate.

(iii) During the period for development of evidence, the Administrative Judge may, in his or her discretion, direct that an investigation of facts relevant to the complaint or any portion be conducted by an investigator trained or certified by the Commission.

(iv) Both parties shall furnish to the Administrative Judge copies of all materials that they wish to be examined and such other material as may be requested.

(g) *Opportunity for resolution of the complaint.* (1) The Administrative Judge shall furnish the agent and the representative of the agency a copy of all materials obtained concerning the complaint and provide opportunity for the agent to discuss materials with the agency representative and attempt resolution of the complaint.

(2) The complaint may be resolved by agreement of the agency and the agent at any time as long as the agreement is fair and reasonable.

(3) If the complaint is resolved, the terms of the resolution shall be reduced to writing and signed by the agent and the agency.

(4) Notice of the resolution shall be given to all class members in the same manner as notification of the acceptance of the class complaint and shall state the terms of corrective action, if any, to be granted by the agency. A resolution shall bind all members of the class. Within 30 days of the date of the notice of resolution, any member of the class may petition the EEO Director to vacate the resolution because it benefits only the class agent or is otherwise not fair and reasonable. Such a petition will be processed in accordance with § 1614.204(d) and if the Administrative Judge finds that the resolution does not comply with § 1614.204(g)(2), he or she shall recommend that the resolution be vacated and that the original class agent be replaced by the petitioner or some other class member who is eligible to be the class agent during further processing of the class complaint. Agency acceptance of a petition under this paragraph vacates any agreement between the former class agent and the agency. An agency decision on such a petition shall inform the former class agent or the petitioner of the right to appeal the adverse decision to the Office of Review and Appeals and include EEOC Form 573, Notice of Appeal/Petition.

(h) *Hearing.* On expiration of the period allowed for preparation of the case, the Administrative Judge shall set a date for hearing. The hearing shall be conducted in accordance with 29 CFR 1614.406.

(i) *Report of findings and recommendations.* (1) The Administrative Judge shall transmit to the agency a report of finding and recommendations on the complaint, including a recommended decision, corrective action pertaining to systemic relief for the class and any individual corrective action, where appropriate, with regard to the personnel action or matter that gave rise to the complaint.

(2) If the Administrative Judge finds no class relief appropriate, he or she shall determine if a finding of individual discrimination is warranted and, if so, shall recommend appropriate relief.

(3) The Administrative Judge shall notify the agent of the date on which the report of findings and recommendations was forwarded to the agency.

(j) *Agency decision.* (1) Within 60 days of receipt of the report of findings and recommendations issued under § 1614.204(h), the agency shall issue a decision to accept, reject, or modify the findings and recommendations of the Administrative Judge.

(2) The decision of the agency shall be in writing and shall be transmitted to the agent along with a copy of the report of findings and recommendations of the Administrative Judge.

(3) When the agency's decision is to reject or modify the findings and recommendations of the Administrative Judge, the decision shall contain specific reasons for the agency's action.

(4) If the agency has not issued a decision within 60 days of its receipt of the Administrative Judge's report of findings and recommendations, those findings and recommendations shall become the final agency decision. The agency shall transmit the final agency decision to the agent within five days of the expiration of the 60-day period.

(5) The decision of the agency shall require any remedial action authorized by law determined to be necessary or desirable to resolve the issue of discrimination.

(6) A final agency decision on a class complaint shall, subject to the provisions of § 1614.204(g)(4) and subpart D, be binding on all members of the class and the agency.

(7) The final agency decision shall inform the agent of the right to appeal or to file a civil action in accordance with subpart D and of the applicable time limits.

(k) *Notification of decision.* The agency shall notify class members of the decision and corrective action, if any, through the same media employed to give notice of the existence of the class complaint. The notice, where appropriate, shall include information concerning the rights of class members to seek individual relief, and of the procedures to be followed. Notice shall be given by the agency within 10 days of the transmittal of its decision to the agent.

(l) *Corrective action for individual class members.* (1) When discrimination is found, an agency must eliminate or modify the employment policy or practice out of which the complaint arose and provide individual corrective action, including an award of attorney's fees and costs, to the agent in accordance with § 1614.501.

(2) When class-wide discrimination is not found, but it is found that the class agent is a victim of discrimination, the remedial provisions of § 1614.501 shall apply.

(3) When discrimination is found in the final agency decision and a class member believes that he or she is entitled to individual relief, the class member may file a written claim with the head of the agency or its EEO Director within 30 days of notification by the agency of its decision. The claim must include a specific, detailed showing that the claimant is a class member who was affected by a personnel action or matter resulting from the discriminatory policy or practice, and that this discriminatory action took place within the period of time for which the agency found class-wide discrimination in its decision. The period of time for which the agency finds class-wide discrimination shall begin not more than 30 days prior to the agent's initial contact with the Counselor and shall end not laer than the date when the agency eliminates the policy or practice found to be discriminatory in the final agency decision. The agency shall issue a final decision on each such claim within 90 days of filing. Such decision must include a notice of the right to file an appeal or a civil action in accordance with subpart D of this part and the applicable time limits.

## Subpart C—Related Processes

### § 1614.301 Relationship to negotiated grievance procedure.

(a) When a person is employed by an agency subject to 5 U.S.C. 7121(d) and is covered by a collective bargaining agreement that permits allegations of

discrimination to be raised in a negotiated grievance procedure, a person wishing to file a complaint or a grievance on a matter of alleged employment discrimination must elect to raise the matter under either part 1614 or the negotiated grievance procedure, but not both. An election to proceed under this part is indicated only by the filing of a written complaint; use of the pre-complaint process as described in § 1614.105 does not constitute an election for purposes of this section. An aggrieved employee who files a complaint under this part may not thereafter file a grievance on the same matter. An election to proceed under a negotiated grievance procedure is indicated by the filing of a timely written grievance. An aggrieved employee who files a grievance with an agency whose negotiated agreement permits the acceptance of grievances which allege discrimination may not thereafter file a complaint on the same matter under part 1614 irrespective of whether the grievance has raised an issue of discrimination. Any such complaint filed after a grievance has been filed on the same matter shall be rejected without prejudice to the complainant's right to proceed through the negotiated grievance procedure including the right to appeal to the Commission from a final decision as provided in subpart D of this part. The notice of final action rejecting such a complaint shall advise the complainant of the right to appeal the final grievance decision to the Commission.

(b) When a person is not covered by a collective bargaining agreement that permits allegations of discrimination to be raised in a negotiated grievance procedure, allegations of discrimination shall be processed as complaints under this part.

(c) When a person is employed by an agency not subject to 5 U.S.C. 7121(d) and is covered by a negotiated grievance procedure, allegations of discrimination shall be processed as complaints under this part, except that the time limits for processing the complaint contained in § 1614.106 and for appeal to the Commission contained in § 1614.402 shall be held in abeyance during processing of a grievance covering the same matter as the complaint.

**§ 1614.302 Mixed case complaints.**

(a) *Definitions.* (1) *Mixed case complaint.* A mixed case complaint is a complaint of employment discrimination filed with a federal agency based on race, color, religion, sex, national origin, age, handicap or retaliation related to or stemming from an action that can be appealed to the Merit Systems Protection Board (MSPB). The complaint may contain only an allegation of employment discrimination or it may contain additional allegations that the MSPB has jurisdiction to address.

(2) *Mixed case appeals.* A mixed case appeal is an appeal filed with the MSPB that alleges that the appealable agency action was effected, in whole or in part, because of discrimination on the basis of race, color, religion, sex, national origin, handicap, age or retaliation.

(b) *Election.* An aggrieved person may initially file a mixed case complaint with an agency pursuant to this part or an appeal on the same matter with the MSPB pursuant to 5 CFR 1201.151, but not both. An agency shall inform every employee who is the subject of an action that is appealable to the MSPB and who has raised the issue of discrimination, either orally or in writing, during the processing of the action of the right to file either a mixed case complaint with the agency or to file a mixed case appeal with the MSPB. The person shall be advised that he or she may not initially file both a mixed case complaint and an appeal on the same matter and that whichever is filed first shall be considered an election to proceed in that forum. If a person files an appeal with the MSPB that is dismissed as untimely, he or she may, subject to § 1614.107, be able to file a mixed case complaint with the agency.

(c) *Cancellation or rejection.* An agency decision to cancel or reject a mixed case complaint on the basis of the complainant's prior election of the MSPB procedures shall be made as follows:

(1) Where the agency does not dispute the MSPB's jurisdiction over the appeal on the same matter, it shall cancel or reject the mixed case complaint pursuant to § 1614.107(d).

(2) Where the agency disputes the MSPB's jurisdiction over the appeal on the same matter, it shall hold the mixed case complaint in abeyance until the MSPB's Administrative Judge rules on the jurisdictional issue. During this period of time, all time limitations for processing or filing under this part and the statutes referenced in § 1614.103(a) will be tolled. If the MSPB's Administrative Judge finds that MSPB has jurisdiction over the matter, the agency shall cancel or reject the mixed case complaint pursuant to § 1614.107(d). If the MSPB's Administrative Judge finds that MSPB does not have jurisdiction over the matter, the agency shall recommence processing of the mixed case complaint. Any such mixed case complaint filed after an appeal has been filed on the same matter shall be rejected without affecting the complainant's right to raise the discrimination issue in the MSPB process and the complainant's right to petition the EEOC to review MSPB's decision on the discrimination allegation as provided in § 1614.303. The notice of final action rejecting such a complaint shall advise the complainant of the right to petition the EEOC to review the MSPB's final decision on the discrimination issue. An agency decision to hold a mixed case complaint in abeyance is not appealable to EEOC. An agency decision to cancel or reject a mixed case complaint is not appealable to the Commission except where § 1614.107(d) has been applied to a non-mixed case matter.

(d) Procedures for agency processing of mixed case complaints. When a complainant elects to proceed initially under this part rather than with the MSPB, the procedures set forth in subpart A shall govern the processing of the mixed case complaint with the following exceptions:

(1) At the time the agency advises a complainant of the acceptance of a mixed case complaint, it shall also advise the complainant that:

(i) If a notice of final action is not issued within 120 days of the date of filing of the mixed case complaint, the complainant may appeal the matter to the MSPB at any time thereafter as specified at 5 CFR 1201.154(a) or may file a civil action as specified at § 1614.310(g), but not both, and

(ii) If the complainant is dissatisfied with the agency's notice of final action on the mixed case complaint, the complainant may appeal the matter to the MSPB (not EEOC) within 20 days of receipt of the agency's notice of final action;

(2) At the time that the agency issues its notice of final action on a mixed case complaint, the agency shall advise the complainant of the right to appeal the matter to the MSPB (not EEOC) within 20 days of receipt and of the right to file a civil action as provided at § 1614.310(a).

**§ 1614.303 Petitions to the EEOC from MSPB decisions on mixed case appeals and complaints.**

(a) *Who may file.* Individuals who have received a final decision from the MSPB on a mixed case appeal or on the appeal of a notice of final action on a mixed case complaint under 5 CFR 1201.151 *et seq.* and 5 U.S.C. 7702 may petition EEOC to consider that decision.

The EEOC will not accept appeals from MSPB dismissals without prejudice.

(b) *Method of filing.* Filing shall be made by certified or registered mail return receipt requested to the Office of Review and Appeals, Equal Employment Opportunity Commission, 1801 L Street, NW., Washington, DC 20507.

(c) *Time to file.* A petition must be filed with the Commission either within 30 days after receipt of the final decision of the MSPB or within 30 days after the decision of a MSPB field office becomes final.

(d) *Service.* The petition for review must be served upon all individuals and parties on the MSPB's service list and the petitioner must certify as to the date and method of service.

**§ 1614.304 Contents of petition.**

(a) *Form.* Petitions must be written or typed, but may use any format including a simple letter format. Petitioners are encouraged to use EEOC Form 573, Notice of Appeal/Petition.

(b) *Contents.* Petitions must contain the following:

(1) The name and address of the petitioner;

(2) The name and address of the petitioner's representative, if any;

(3) A statement of the reasons why the decision of the MSPB is alleged to be incorrect, in whole or in part, with regard to issues of discrimination based on race, color, religion, sex, national origin, age, handicap or retaliation;

(4) A copy of the decision issued by the MSPB; and

(5) The signature of the petitioner and representative, if any.

**§ 1614.305 Consideration procedures.**

(a) Once a petition is filed, the Commission will examine it and determine whether the Commission will consider the decision of the MSPB. An agency may oppose the petition, either on the basis that the Commission should not consider the MSPB's decision or that the Commission should concur in the MSPB's decision, by filing any such argument with the Office of Review and Appeals and serving a copy on the petitioner within 15 days of the date of service of the petition.

(b) The Commission shall determine whether to consider the decision of the MSPB within 30 days after the Commission's Office of Review and Appeals receives the petition. A determination of the Commission not to consider the decision shall not be used as evidence with respect to any issue of discrimination in any judicial proceeding concerning that issue.

(c) If the Commission makes a determination to consider the decision, the Commission shall within 60 days after the date of its determination, consider the entire record of the proceedings of the MSPB and on the basis of the evidentiary record before the Board as supplemented in accordance with paragraph (d) of this section, either:

(1) Concur in the decision of the MSPB; or

(2) Issue in writing a decision that differs from the decision of the MSPB to the extent that the Commission finds that, as a matter of law:

(i) The decision of the MSPB constitutes an incorrect interpretation of any provision of any law, rule, regulation, or policy directive referred to in 5 U.S.C. 7702(a)(1)(B), or

(ii) The decision involving such provision is not supported by the evidence in the record as a whole.

(d) In considering any decision of the MSPB, the Commission, pursuant to 5 U.S.C. 7702(b)(4), may refer the case to the MSPB for the taking of additional evidence within such period as permits the Commission to make a decision within the 60-day period prescribed or provide on its own for the taking of additional evidence to the extent the Commission considers it necessary to supplement the record.

(e) Where the EEOC has differed with the decision of the MSPB under § 1614.305(c)(2), the Commission shall refer the matter to the MSPB.

**§ 1614.306 Referral of case to special panel.**

If the MSPB reaffirms its decision under 5 CFR 1201.162(a)(2) with or without modification, the matter shall be immediately certified to the Special Panel established pursuant to 5 U.S.C. 7702(d). Upon certification, the Board shall, within five days (excluding Saturdays, Sundays, and Federal holidays), transmit to the Chairman of the Special Panel and to the Chairman of the EEOC the administrative record in the proceeding including—

(a) The factual record compiled under this section, which shall include a transcript of any hearing(s);

(b) The decisions issued by the Board and the Commission under 5 U.S.C. 7702; and

(c) A transcript of oral arguments made, or legal brief(s) filed, before the Board and the Commission.

**§ 1614.307 Organization of special panel.**

(a) The Special Panel is composed of:

(1) A Chairman appointed by the President with the advice and consent of the Senate, and whose term is 6 years;

(2) One member of the MSPB designated by the Chairman of the Board each time a panel is convened;

(3) One member of the EEOC designated by the Chairman of the Commission each time a panel is convened.

(b) Designation of Special Panel member.

(1) Time of designation. Within five days of certification of the case to the Special Panel, the Chairman of the MSPB and the Chairman of the EEOC shall each designate one member from their respective agencies to serve on the Special Panel.

(2) Manner of designation. Letters of designation shall be served on the Chairman of the Special Panel and the parties to the appeal.

**§ 1614.308 Practices and procedures of the special panel.**

(a) *Scope.* The rules in this subpart apply to proceedings before the Special Panel.

(b) *Suspension of rules.* In the interest of expediting a decision, or for good cause shown, the Chairman of the Special Panel may, except where the rule is required by statute, suspend these rules on application of a party, or on his or her own motion, and may order proceedings in accordance with his or her direction.

(c) *Time limit for proceedings.* Pursuant to 5 U.S.C. 7702(d)(2)(A), the Special Panel shall issue a decision within 45 days after a matter has been certified to it.

(d) *Administrative assistance to Special Panel.*—(1) The MSPB and the EEOC shall provide the Panel with such reasonable and necessary administrative resources as determined by the Chairman of the Special Panel.

(2) Assistance shall include, but is not limited to, processing vouchers for pay and travel expenses.

(3) The Board and the EEOC shall be responsible for all administrative costs incurred by the Special Panel and, to the extent practicable, shall equally divide the costs of providing such administrative assistance. The Chairman of the Special Panel shall resolve the manner in which costs are divided in the event of a disagreement between the Board and the EEOC.

(e) *Maintenance of the official record.* The Board shall maintain the official record. The Board shall transmit two copies of each submission filed to each member of the Special Panel in an expeditious manner.

(f) *Filing and service of pleadings.*—(1) The parties shall file the original and six copies of all submissions with the

Clerk, Merit Systems Protection Board, 1120 Vermont Avenue, NW., Washington, DC 20419. One copy of each submission shall be served on the other parties.

(2) A certificate of service specifying how and when service was made must accompany all submissions of the parties.

(3) Service may be by mail or by personal delivery during normal business hours (8:30 a.m.–5:00 p.m.). Due to the short statutory time limit, parties are required to file their submissions by overnight Express Mail, provided by the U.S. Postal Service, should they file by mail.

(4) The date of filing shall be determined by the date of mailing as indicated by the order date for Express Mail. If the filing is by personal delivery, it shall be considered filed on that date it is received in the office of the Clerk, MSPB.

(g) *Briefs and responsive pleadings.* If the parties wish to submit written argument, briefs shall be filed with the Special Panel within 15 days from the date of the Board's certification order. Due to the short statutory time limit responsive pleadings will not ordinarily be permitted.

(h) *Oral argument.* The parties have the right to oral argument if desired. Parties wishing to exercise this right shall so indicate at the time of filing their brief, or if no brief is filed, within 15 days from the date of the Board's certification order. Upon receipt of a request for argument, the Chairman of the Special Panel shall determine the time and place for argument and the time to be allowed each side, and shall so notify the parties.

(i) *Post-argument submissions.* Due to the short statutory time limit, no post-argument submissions will be permitted except by order of the Chairman of the Special Panel.

(j) *Procedural matters.* Any procedural matters not addressed in these regulations shall be resolved by written order of the Chairman of the Special Panel.

**§ 1614.309 Enforcement of special panel decision.**

The Board shall, upon receipt of the decision of the Special Panel, order the agency concerned to take any action appropriate to carry out the decision of the Panel. The Board's regulations regarding enforcement of a final order of the Board shall apply. These regulations are set out at 5 CFR Part 1201, subpart E.

**§ 1614.310 Right to file a civil action.**

An individual who has a complaint processed pursuant to 5 CFR 1201.151 *et seq.* or 29 CFR 1614.302 *et seq.* is authorized by 5 U.S.C. 7702 to file a civil action in an appropriate United States District Court:

(a) Within 30 days of receipt of notice of final action issued by an agency on a complaint unless an appeal is filed with the MSPB; or

(b) Within 30 days of receipt of notice of the final decision or action taken by the MSPB if the individual does not file a petition for consideration with the EEOC; or

(c) Within 30 days of receipt of notice that the Commission has determined not to consider the decision of the MSPB; or

(d) Within 30 days of receipt of notice that the Commission concurs with the decision of the MSPB; or

(e) If the Commission issues a decision different from the decision of the MSPB, within 30 days of receipt of notice that the MSPB concurs in and adopts in whole the decision of the Commission; or

(f) If the MSPB does not concur with the decision of the Commission and reaffirms its initial decision or reaffirms its initial decision with a revision, within 30 days of the receipt of notice of the decision of the Special Panel; or

(g) After 120 days from the date of filing a formal complaint if there is no final action or appeal to the MSPB; or

(h) After 120 days from the date of filing an appeal with the MSPB if the MSPB has not yet made a decision; or

(i) After 180 days from the date of filing a petition for consideration with Commission if there is no decision by the Commission, reconsideration decision by the MSPB or decision by the Special Panel.

## Subpart D—Appeals and Civil Actions

**§ 1614.401 Appeals to the Commission.**

(a) A complainant may appeal an agency's notice of final action or an agency's failure to issue such a notice on an individual complaint.

(b) An agent may appeal a final agency decision on a class complaint, a class member may appeal a final agency decision on a claim for individual relief under a class complaint and both may appeal a final agency decision on a petition pursuant to § 1614.204(g)(4).

(c) A grievant may appeal issues of employment discrimination raised in a negotiated grievance procedure where the agency's negotiated labor-management agreement permits such issues to be raised and the individual elected under 5 U.S.C. 7121(d) to raise the matter in the negotiated grievance procedure. A grievant may appeal the final decision:

(1) Of the agency on the grievance;

(2) Of the arbitrator on the grievance; or

(3) Of the Federal Labor Relations Authority (FLRA) on exceptions to the arbitrator's award. A grievant may not appeal under this part, however, when the matter initially raised in the negotiated grievance procedure is still ongoing in that process, is in arbitration, is before the FLRA or is appealable to the MSPB. Any appeal prematurely filed in such circumstances shall be dismissed without prejudice. In addition, a grievant may not appeal under this subsection if 5 U.S.C. 7121(d) is inapplicable to the involved agency.

(d) A complainant, agent or individual class claimant may appeal to the Commission an agency's alleged noncompliance with a settlement agreement, notice of final action or final agency decision in accordance with § 1614.505.

**§ 1614.402 Time for appeals to the commission.**

Except for mixed case complaints and class complaints, any notice of final action may be appealed to the Commission within 30 days of the complainant's receipt of the notice. Except for complaints to which § 1614.301(c) applies, any complaint may be appealed after 180 days from the filing of the written complaint or, after 180 days plus any period of extension agreed to under § 1614.106(e), if the agency has not issued a notice of final action. Any complaint to which § 1614.301(c) applies may be appealed after 180 days after the grievance decision becomes final if the agency has not issued a notice of final action. Any grievance decision may be appealed within 30 days of receipt of a decision referred to in § 1614.401(c). In the case of class complaints, any final agency decision received by an agent, petitioner or an individual claimant may be appealed to the Commission within 30 days of its receipt.

**§ 1614.403 How to appeal.**

(a) The complainant must file his or her appeal and any supporting statement or brief with the Director, Office of Review and Appeals, Equal Employment Opportunity Commission, 1801 L Street, NW., Washington, DC 20507. The agency shall include this address in any notice of appeal rights which it is required to give the complainant under this part. The complainant should use EEOC Form 573, Notice of Appeal/Petition.

(b) The complainant shall furnish a copy of the appeal and any supporting statement or brief to the agency's EEO

Director (or whomever is designated by the agency in the notice of final action) at the same time that he or she files the appeal with the Commission. In or attached to the appeal, the complainant must certify that a copy of the appeal and any supporting statement or brief were furnished to the agency's EEO Director or other designated official and state the date and method by which it was furnished.

(c) If a complainant does not file an appeal within the time limits of this subpart, the appeal will be untimely and shall be rejected by the Commission.

(d) The Agency file and any agency statement or brief in opposition to the appeal must be submitted to the Commission within 30 days of the date on which the appeal was served on the agency. A copy of the agency's opposition and, if not already furnished, the agency file, must be served on the complainant at the same time.

**§ 1614.404 Appellate procedure.**

The EEOC Chairman or his or her designee shall review the record and shall determine if the record requires supplementation. If the record requires supplementation, EEOC may supplement the record by its own fact finding or may remand the complaint back to the agency for further investigation. Once EEOC determines the record is complete, it will notify the parties and the complainant may then request a hearing. After the hearing, or after the time to request a hearing expires, the Commission shall issue a written decision on the appeal setting forth the reasons for its decision.

**§ 1614.405 Supplementing the record on appeal.**

The EEOC Chairman or his or her designee may supplement the record by an exchange of letters or memoranda, investigation, fact finding conference, remand to the agency or other procedures.

(a) Where the EEOC Chairman or his or her designee determines that the agency record is inadequate (i.e., the agency, without a reasonable explanation, did not investigate an issue or matter raised by the complaint, the investigation of which is necessary for a proper determination or which could change the outcome of the case; material evidence is available but was not obtained, there is no adequate explanation as to why it was not obtained and such evidence is either necessary for a proper determination or could change the outcome of the case; new and material evidence has been discovered that could change the outcome of the case; or substantial allegations of impropriety in the conduct of the investigation have been made that could change the outcome of the case) he or she may send the appeal to one of the Commission's field offices with instructions on how to supplement the record, or may remand the complaint back to the agency to complete the investigation.

(b) An agency's failure to develop an adequate record may result in notice being sent to an appropriate agency official or Congressional committee, or other appropriate action.

(c) If the EEOC Chairman or his or her designee determines that the complaint requires further investigation by EEOC, the field office shall assigne an investigator to supplement the record. The Commission's investigator shall submit a report of the investigation to the Office of Review and Appeals.

(d) If the EEOC Chairman or his or her designee remands the complaint back to the agency to complete the investigation, he or she shall designate a period of time between 30 and 90 days within which the agency must complete the investigation and return the record to EEOC. If the agency fails to return the complete record to the EEOC within the designated time period without adequate explanation, such failure may, in appropriate circumstances, cause the EEOC:

(1) To draw an adverse inference that the completed record would have reflected unfavorably on the agency;

(2) To consider the matters to which the further investigation pertains to be established in favor of the complainant;

(3) To exclude other evidence offered by the agency;

(4) To take such other actions as deemed appropriate.

(e) When the Commission supplements the record by means of additional investigation, the agency shall reimburse the Commission in accordance with instructions contained in the Commission's Management Directives.

(f) The following procedures apply when the Commission supplements the record:

(1) The complainant, the agency, and any employee of a federal agency shall produce such documentary and testimonial evidence as the Commission deems necessary.

(2) Commission employees are authorized to administer oaths. Statements of witnesses shall be made under oath or affirmation or, alternatively, be made by written statement under penalty or perjury.

(3) When the complainant, or the agency against which a complaint is filed, or its employees in bad faith fail to respond fully and in timely fashion to requests for documents, records, comparative data, statistics, affidavits, or the attendance of witness(es), the Commission may, in appropriate circumstnaces:

(i) Draw an averse inference that the requested information would have reflected unfavorably on the party refusing to provide the requested information;

(ii) Consider the matters to which the requested information pertains to be established in favor of the opposing party;

(iii) Exclude other evidence offered by the party failing to produce the requested information;

(iv) Issue a decision in favor of the opposing party; or

(v) Take such other actions as it deems appropriate.

(g) Any supplementation of the record will be conducted by Commission employees with appropriate security clearances when necessary except where the Commission finds it appropriate to delegate this responsibility to an Administrative Judge, complaints examiner or investigator from another agency that is not a party to the complaint. When the Commission delegates such responsibilities, it will supply the agency with the name of an Administrative Judge, a complaints examiner or investigator from another agency with appropriate security clearance who has been certified by the Commission as qualified to exercise the delegated responsibility.

**§ 1614.406 Hearings.**

(a) When EEOC determines the investigation is complete, the Chairman or his or her designee shall notify the parties that the investigation is complete and where appropriate shall transmit copies of any supplemental record to the parties. At that time, the Chairman or his or her designee shall notify the complainant that he or she may request a hearing. The complainant must notify the EEOC in writing within 15 calendar days of the receipt of the notice that he or she desires a hearing.

(b) Conduct of hearing. Agencies shall provide for the attendance at a hearing of all employees approved as witnesses by a Commission Administrative Judge. Attendance at hearings will be limited to persons determined by the Administrative Judge to have a direct connection with the complaint. Hearings are part of the investigative process and are thus closed to the public. The Administrative Judge shall have the power to regulate the conduct of a

hearing, limit the number of witnesses whose testimony would be repetitious, and exclude any person from the hearing for contumacious conduct or misbehavior that obstructs the hearing. The Administrative Judge shall receive into evidence information or documents relevant to the complaint. Rules of evidence shall not be applied strictly, but the Administrative Judge shall exclude irrelevant or repetitious evidence. The Administrative Judge or the Commission may refer to the Disciplinary Committee of the appropriate Bar Association any attorney who refuses to follow the orders of an Administrative Judge, or who otherwise engages in improper conduct. The procedures contained in § 1614.405(f) shall apply to the conduct of hearings.

(c) *Recommended findings and conclusions without hearing.* (1) If a party believes that some or all material facts are not in genuine dispute and there is no genuine issue as to credibility, the party may file a statement with the Administrative Judge prior to the hearing setting forth the fact or facts and referring to the parts of the record relied on to support the statement. The statement must demonstrate that there is no genuine issue as to any material fact asserted not to be in dispute and cannot be based on informaiton not previously made available during the investigation unless the party demonstrates that the information was not available during the investigation. The statement must also demonstrate that there is no genuine issue as to credibility.

(2) A party opposing a request for recommended findings and conclusions without a hearing may refer to the record in the case to rebut the statement that a fact is not in dispute or may file an affidavit stating that the party cannot, for reasons stated, present facts to oppose the request. After considering the submissions, the Administrative Judge may refuse the request for recommended findings and conclusions without a hearing, order that discovery be permitted on the fact or facts involved, limit the hearing to the issues remaining in dispute, or make such other ruling as is appropriate.

(3) If the Administrative Judge determines that some or all facts are not in genuine dispute, based on a statement by a party or upon his or her own initiative, the Administrative Judge may, after giving notice to the parties and providing them an opportunity to respond in writing within 15 calendar days, issue recommended findings and conclusions without holding a hearing.

(d) *Recommended findings and conclusions.* Except as provided in § 1614.406(c), the Administrative Judge shall issue recommended findings and conclusions on the merits of the complaint, including recommended remedial action, where appropriate, with regard to the matter that gave rise to the complaint. The Administrative Judge shall send copies of the recommended findings and conclusions to the parties. The parties may, within 30 days of receipt of the recommended findings and conclusions, submit statements concerning the recommended findings and conclusions to the Office of Review and Appeals.

**§ 1614.407 Decisions on appeals.**

(a) Where the appeal has not been settled and after receipt of the statements of the parties regarding the recommended findings and conclusions or upon expiration of the period for submitting statements, or if a complainant fails to request a hearing within 15 days of receiving notice that the investigation is complete, the Office of Review and Appeals on behalf of the Commission shall issue a decision that specifically sets forth findings for each issue decided on the merits and reasons for each issue that is cancelled. The Commission shall cancel appeals or portions of appeals in accordance with § 1614.107 and shall remand matters to the agency when it reverses an agency's rejection or cancellation of a complaint. The decision shall be based on the preponderance of the evidence. If the decision contains a finding of discrimination or retaliation, appropriate remedy(ies) shall be included and, where appropriate, the entitlement to attorney's fees or costs shall be indicated. The decision shall reflect the date of its issuance, inform the complainant of his or her civil action rights, and be transmitted to the complainant and the agency by certified mail, return receipt requested. A copy of the appeal file will only be provided to the complainant and to the agency upon request.

(b) A decision issued under this section is final within the meaning of §§ 1614.408 and 1614.409 unless:

(1) Either party files a timely request to reopen pursuant to § 1614.407; or

(2) the Commission on its own motion reopens the case.

**§ 1614.408 Reopening and reconsideration.**

(a) Within a reasonable period of time, the Commission may, in its discretion, reopen and reconsider any decision of the Commission notwithstanding any other provisions of this part.

(b) A party may request reopening or reconsideration provided that such request is made within 30 days of receipt of a decision of the Commission or within 20 days of receipt of another party's timely request to reopen. Such request, along with any supporting statement or brief, shall be submitted to the Office of Review and Appeals and to all parties with proof of such submission. All other parties shall have 20 days from the date of service in which to submit to all other parties, with proof of submission, any statement or brief in opposition to the request.

(c) The request or the statement or brief in support of the request shall contain arguments or evidence which tend to establish that:

(1) New and material evidence is available that either was not readily available when the previous decision was issued or that explains evidence obtained by the Commission under § 1614.405; or

(2) The previous decision involved an erroneous interpretation of law, regulation or material fact, or misapplication of established policy; or

(3) The decision is of such exceptional nature as to have effects beyond the actual case at hand.

(d) A decision on a request to reopen by either party is final and there is no further right by either party to request reopening unless the decision remanded the complaint to the agency for further processing.

**§ 1614.409 Civil action: Title VII and Rehabilitation Act.**

A complainant who has filed an individual complaint, an agent who has filed a class complaint or a claimant who has filed a claim for individual relief is authorized under Title VII and the Rehabilitation Act to file a civil action in an appropriate United States District Court:

(a) Within 30 days of receipt of the agency's notice of final action on an individual complaint or final agency decision on a class complaint if no appeal has been filed;

(b) After 180 days from the date of filing a complaint if no appeal has been filed;

(c) Within 30 days after receipt of the Commission's final decision on an appeal; or

(d) After 180 days from the date of filing an appeal with the Commission if there has been no final decision by the Commission.

**§ 1614.410 Civil action: Age Discrimination in Employment Act.**

(a) A complainant who has filed an individual complaint, an agent who has filed a class complaint or claimant who has filed a claim for individual relief and who has exhausted administrative remedies may file a civil action in an appropriate United States District Court:

(1) Within 30 days of receipt of the agency's notice of final action on an individual complaint or final agency decision on a class complaint if no appeal has been filed;

(2) After 180 days from the date of filing a complaint if no appeal has been filed;

(3) Within 30 days after receipt of the Commission's final decision on an appeal; or

(4) After 180 days from the date of filing an appeal with the Commission if there has been no final decision by the Commission.

(b) When an individual has filed an administrative complaint alleging age discrimination, administrative remedies will be considered to be exhausted:

(1) 180 days after the filing of an individual complaint if the agency has not issued a notice of final action and the individual has not filed an appeal or 180 days after the filing of a class complaint if the agency has not issued a final agency decision;

(2) After the issuance of notice of final action on an individual complaint or final agency decision on a class complaint if the individual has not filed an appeal; or

(3) After the issuance of a final decision by the Commission on an appeal or 180 days after the filing of an appeal if the Commission has not issued a final decision.

(c) When a person has not filed an administrative complaint alleging age discrimination, the person may file a civil action not less than 30 days after giving the Commission notice of intent to file such action. Such notice shall be filed with EEOC, Federal Sector Programs, 1801 L Street NW., Washington, DC 20507, within 180 days after the alleged unlawful practice occurred. The civil action must be filed in an appropriate United States District Court within two years or, if willful, three years of the date of the alleged violation of the ADEA. Recovery of back wages in such a lawsuit is limited to two years prior to the date of filing suit, or to three years if the violation is deemed willful.

**§ 1614.411 Civil action: Equal Pay Act.**

A complainant is authorized under section 16(b) of the Fair Labor Standards Act to file a civil action in a court of competent jurisdiction within two years or, if the violation is willful, three years of the date of the alleged violation of the Equal Pay Act regardless of whether he or she pursued any administrative complaint processing. Recovery of back wages is limited to two years prior to the date of filing suit, or to three years if the violation is deemed willful; liquidated damages in an equal amount may also be awarded. The filing of a complaint or appeal under this part shall not toll the time for filing a civil action.

**§ 1614.412 Effect of filing civil action.**

Filing a civil action under § 1614.408 through § 1614.410 shall terminate Commission processing of the appeal. If private suit is filed subsequent to the Commission's initiation of an investigation, the parties are requested to notify the Commission in writing.

## Subpart E—Remedies and Corrective Action

**§ 1614.501 Remedial actions.**

(a) When an agency, or the Commission, in an individual case of discrimination, finds that an applicant or an employee has been discriminated against, the agency shall provide full relief, as explained in appendix A of this part, which shall include the following elements in appropriate circumstances:

(1) Notification to all employees of the agency in the affected facility of their rights to be free of unlawful discrimination and assurance that the particular types of discrimination found will not recur;

(2) Commitment that corrective, curative or preventive action will be taken, or measures adopted, to ensure that violations of the law similar to those found will not recur;

(3) An unconditional offer to each identified victim of discrimination of placement in the position the person would have occupied but for the discrimination suffered by that person, or a substantially equivalent position;

(4) Payment to each identified victim of discrimination on a make whole basis for any loss of earnings the person may have suffered as a result of the discrimination; and

(5) Commitment that the agency shall cease from engaging in the specific unlawful employment practice found in the case.

(b) Remedial action involving an applicant. (1) When an agency, or the Commission, finds that an applicant for employment has been discriminated against, the agency shall offer the applicant the position for which the applicant applied or, if justified by the circumstances, a substantially equivalent position unless clear and convincing evidence indicates that the applicant would not have been selected even absent the discrimination. The offer shall be made in writing. The individual shall have 15 days from receipt of the offer within which to accept or decline the offer. Failure to accept the offer within the 15-day period will be considered a declination of the offer, unless the individual can show that circumstances beyond his or her control prevented a response within the time limit. If the offer is accepted, appointment shall be retroactive to the date the applicant would have been hired. Back pay, computed in the manner prescribed by 5 CFR 550.805, shall be awarded from the date the individual would have entered on duty until the date the individual actually enters on duty unless clear and convincing evidence indicates that the applicant would not have been selected even absent discrimination. The back pay computation, however, shall not include any amount as interest on back pay. The individual shall be deemed to have performed service for the agency during this period for all purposes except for meeting service requirements for completion of a required probationary or trial period. If the offer of employment is declined, the agency shall award the individual a sum equal to the back pay he or she would have receive, computed in the manner prescribed by 5 CFR 550.805, from the date he or she would have been appointed until the date the offer was made, subject to the limitation of paragraph (b)(4) of this section. The back pay computation shall not include any amount as interest on back pay. The agency shall inform the applicant, in its offer of employment, of the right to this award in the event the offer is declined.

(2) When an agency, or the Commission, finds that discrimination existed at the time the applicant was considered for employment but also finds by clear and convincing evidence that the applicant would not have been hired even absent discrimination, the agency shall nevertheless take all steps necessary to eliminate the discriminatory practice and ensure it does not recur.

(3) This paragraph shall be cited as the authority under which the above-described appointments or awards of back pay shall be made.

(4) Back pay under this paragraph for complaints under Title VII or the Rehabilitation Act may not extend from a date earlier than two years prior to the date on which the complaint was initially filed by the applicant.

(c) Remedial action involving an employee. When an agency, or the Commission, finds that an employee of the agency was discriminated against, the agency shall take remedial actions which shall include one or more of the following, but need not be limited to these actions:

(1) Retroactive promotion, with back pay computed in the manner prescribed by 5 CFR 550.805, unless clear and convincing evidence contained in the record evidences that the employee would not have been promoted or employed at a higher grade, even absent discrimination. The back pay computation, however, shall not include any amount as interest on back pay. The back pay liability under Title VII or the Rehabilitation Act is limited to two years prior to the date the discrimination complaint was filed.

(2) If clear and convincing evidence indicates that, although discrimination existed at the time selection for promotion was made, the employee would not have been promoted even absent discrimination, the agency shall nevertheless eliminate any discriminatory practice and ensure it does not recur.

(3) Cancellation of an unwarranted personnel action and restoration of the employee.

(4) Expunction from the agency's records of any reference to or any record of an unwarranted disciplinary action that is not a personnel action.

(5) Full opportunity to participate in the employee benefit denied (e.g., training, preferential work assignments, overtime scheduling).

(d) The agency has the burden of proving by a preponderance of the evidence that the complainant has failed to mitigate his or her damages.

(e) *Attorney's fees or costs.* (1) *Awards of attorney's fees or costs.* The provisions of this paragraph relating to the award of attorney's fees or costs shall apply to allegations of discrimination or retaliation prohibited by Title VII and the Rehabilitation Act. In a notice of final action or a decision, the agency or Commission may award the applicant or employee reasonable attorney's fees or costs incurred in the processing of the complaint.

(i) A finding of discrimination raises a presumption of entitlement to an award of attorney's fees.

(ii) Any award of attorney's fees or costs shall be paid by the agency.

(iii) Attorney's fees are allowable only for the services of members of the Bar and law clerks, paralegals or law students under the supervision of members of the Bar, except that no award is allowable for the services of any employee of the Federal Government.

(iv) Attorney's fees shall be paid only for services performed after the filing of the complaint required in § 1614.104 and after the complainant has notified the agency that he or she is represented by an attorney, except that fees are allowable for a reasonable period of time prior to the notification of representation for any services performed in reaching a determination to represent the Complainant. Written submissions to the agency which are signed by the representative shall be deemed to constitute notice of representation.

(2) *Amount of awards.* When the agency or the Commission awards attorney's fees or costs, the complainant's attorney shall submit a verified statement of costs and attorney's fees, as appropriate, to the agency within 20 days of receipt of the decision. A statement of attorney's fees shall be accompanied by an affidavit executed by the attorney of record itemizing the attorney's charges for legal services and both the verified statement and the accompanying affidavit shall be made a part of the complaint file. The amount of attorney's fees or costs to be awarded the complainant shall be determined by agreement between the complainant, the complainant's representative and the agency. Such agreement shall immediately be reduced to writing. If the complainant, the representative and the agency cannot reach an agreement on the amount of attorney's fees or costs within 20 days of the agency's receipt of the verified statement and accompanying affidavit, the agency shall issue a decision determining the amount of attorney's fees or costs due within 30 days of receipt of the statement and affidavit. The decision shall include a notice of right to appeal to the EEOC along with EEOC Form 573, Notice Of Appeal/Petition and shall include the specific reasons for determining the amount of the award.

(i) The amount of attorney's fees shall be calculated in accordance with existing case law using the following standards:

(A) The starting point shall be the number of hours reasonably expended multiplied by a reasonable hourly rate.

(B) This amount may be reduced or increased in consideration of the following factors, although ordinarily many of these factors are subsumed within the calculation set forth above: the time and labor required, the novelty and difficulty of the questions, the skill requisite to perform the legal service properly, the attorney's preclusion from other employment due to acceptance of the case, the customary fee, whether the fee is fixed or contingent, time limitations imposed by the client or the circumstances, the amount involed and the results obtained, the experience, reputation, and ability of the attorney, the undesirability of the case, the nature and length of the professional relationship with the client, and the awards in similar cases. Only in cases of exceptional success should any of these factors be used to enhance an award computed by the formula set forth in paragraph (d)(2)(i)(A) of this section.

(ii) The costs that may be awarded are those authorized by 28 U.S.C. 1920 to include:

(A) Fees of the reporter for all or any of the stenographic transcript necessarily obtained for use in the case;

(B) Fees and disbursements for printing and witnesses; and

(C) Fees for exemplification and copies of papers necessarily obtained for use in the case.

Witness fees shall be awarded in accordance with the provisions of 28 U.S.C. 1821, except that no award shall be made for a federal employee who is in a duty status when made available as a witness.

**§ 1614.502 Corrective action.**

(a) Corrective action ordered by the Office of Review and Appeals or the Commission is mandatory and binding on the agency except as provided in § 1614.406(b). Failure to implement ordered relief shall be subject to judicial enforcement as specified in § 1614.504(c).

(b) When the agency requests reopening and when the case involves removal, separation, or suspension continuing beyond the date of the request to reopen, and when the decision recommends retroactive restoration, the agency shall comply with the decision only to the extent of the temporary or conditional restoration of the employee to duty status in the position recommended by the Commission, pending the outcome of the agency request for reopening.

(1) Service under the temporary or conditional restoration provisions of this paragraph shall be credited toward the completion of a probationary or trial period, eligibility for a within-grade increase, or the completion of the service requirement for career tenure, if the Commission upholds its decision after reopening the case or refuses to reopen.

(2) The agency shall notify the Commission and the employee in writing, at the same time it requests

reopening, that the remedial action it takes is temporary or conditional.

(c) When no request for reopening is filed within 30 days of receipt of the decision, or when a request to reopen is denied, the agency shall execute the action ordered and there is no further right to delay implementation of the ordered relief. The corrective action shall be completed not later than 60 days after the decision becomes final.

**§ 1614.503 Enforcement of final decisions.**

(a) *Petition for enforcement.* A complainant may petition the Commission for enforcement of a decision issued under the Commission's appellate jurisdiction. The petition shall be submitted to the Office of Review and Appeals. The petition shall specifically set forth the reasons that lead the complainant to believe that the agency is not complying with the decision.

(b) *Compliance.* On behalf of the Commission, the Office of Review and Appeals shall take all necessary action to ascertain whether the agency is implementing the decision of the Commission. If the agency is found not to be in compliance with the decision, efforts shall be undertaken to obtain compliance.

(c) *Clarification.* On behalf of the Commission, the Office of Review and Appeals may, on its own motion or in response to a petition for enforcement or in connection with a timely request to reopen, issue a clarification of a prior decision. A clarification cannot change the result of a prior decision or enlarge or diminish the relief ordered but may further explain the meaning or intent of the prior decision.

(d) *Referral to the Commission.* Where the Director, Office of Review and Appeals, is unable to obtain satisfactory compliance with the final decision, the Director shall submit appropriate findings and recommendations for enforcement to the Commission, or, as directed by the Commission, refer the matter to another appropriate agency.

**§ 1614.504 Enforcement action by the commission.**

(a) *Notice to show cause.* The Commission may issue a notice to the head of any Federal agency that has failed to comply with a decision to show cause why there is noncompliance. Such notice may request the head of the agency or a representative to appear before the Commission or to respond to the notice in writing with adequate evidence of compliance or with compelling reasons for non-compliance.

(b) *Certification to the Office of Special Counsel.* Where appropriate and pursuant to the terms of a memorandum of agreement, the Commission may refer the matter to the Office of Special Counsel for enforcement action.

(c) *Notification to complainant of completion of administrative efforts.* Where the Commission has determined that an agency is not complying with a prior decision, or where an agency has failed or refused to submit its report of corrective action, the Commission shall notify the complainant of the right to file a cival action for enforcement of the decision pursuant to Title VII, the ADEA, the Equal Pay Act or the Rehabilitation Act and to seek judicial review of the agency's refusal to implement corrective action pursuant to the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, and the mandamus statute, 28 U.S.C. 1361, or to commence *de novo* proceedings pursuant to the appropriate statutes.

**§ 1614.505 Compliance with settlement agreements and decisions.**

Any settlement agreement knowingly and voluntarily agreed to by the parties, reached at any stage of the complaint process, shall be binding on both parties. A notice of final action or final agency decision that has not been the subject of an appeal, request to reopen, or civil action shall be binding on the agency. If the complainant believes that the agency has failed to comply with the terms of a settlement agreement, notice of final action, or final agency decision, the complainant shall notifiy the EEO Director, in writing, of the alleged noncompliance within 30 days of when the complainant knew or should have known of the alleged noncompliance. The complainant may request that the terms of the settlement agreement be specifically implemented or, alternatively, that the complainant be reinstated for further processing from the point processing ceased. The agency shall resolve the matter and respond to the complainant, in writing. If the agency has not responded to the complainant, in writing, or if the complainant is not satisfied with the agency's attempt to resolve the matter, the complainant may appeal to the Commission for a determination as to whether the agency has complied with the terms of the settlement agreement, notice of final action or final agency decision. The complainant may file such an appeal 35 days after service of the allegations of noncompliance, but must file an appeal within 30 days of receipt of an agency's determination. Prior to rendering its determination, the Commission may request that the parties submit whatever additional information or documentation it deems necessary or may direct that an investigation or hearing on the matter be conducted. If the Commission determines that the agency is not in compliance and the noncompliance is not attributable to acts or conduct of the complainant, it may order such compliance or it may order that the complaint be reinstated for further processing from the point processing ceased. Allegations that subsequent acts of retaliation or discrimination violate a settlement agreement shall be processed as separate complaints under § 1614.106 or § 1614.204, as appropriate, rather than under this section.

## Subpart F—Matters of General Applicability

**§ 1614.601 EEO group statistics.**

(a) Each agency shall establish a system to collect and maintain accurate employment information on the race, national origin, sex and handicap(s) of its employees.

(b) Data on race, national origin and sex shall be collected by voluntary self-identification. If an employee does not voluntarily provide the requested information, the agency shall advise the employee of the importance of the data and of the agency's obligation to report it. If the employee still refuses to provide the information, the agency must make a visual identification and inform the employee of the data it will be reporting. If an agency believes that information provided by an employee is inaccurate, the agency shall counsel the employee about the solely statistical purpose for which the data is being collected, the need for accuracy, the agency's recognition of the sensitivity of the information and the existence of procedures to prevent its unauthorized disclosure. If, after counseling, the employee declines to change the apparently inaccurate self-identification, the agency must accept it.

(c) The information collected under paragraph (b) of this section shall be disclosed only in the form of gross statistics. An agency shall not collect or maintain any information on the race, national origin or sex of individual employees except when an automated data processing system is used in accordance with standards and requirements prescribed by the Commission to insure individual privacy and the separation of that information from personnel records.

(d) Each system is subject to the following controls:

(1) Only those categories of race and national origin prescribed by the Commission may be used;

(2) Only the specific procedures for the collection and maintenance of data that are prescribed or approved by the Commission may be used;

(3) The Commission shall review the operation of the agency system to insure adherence to Commission procedures and requirements. An agency may make an exception to the prescribed procedures and requirements only with the advance written approval of the Commission.

(e) The agency may use the data only in studies and analyses which contribute affirmatively to achieving the objectives of the equal employment opportunity program. An agency shall not establish a quota for the employment of persons on the basis of race, color, religion, sex, or national origin.

(f) Data on handicaps shall also be collected by voluntary self-identification. If an employee does not voluntarily provide the requested information, the agency shall advise the employee of the importance of the data and of the agency's obligation to report it. If an employee who has been appointed pursuant to special appointment authority for hiring individuals with handicaps still refuses to provide the requested information, the agency must identify the employee's handicap based upon the records supporting the appointment. If any other employee still refuses to provide the requested information or provides information which the agency believes to be inaccurate, the agency should report the employee's handicap status as unknown.

(g) An agency shall report to the Commission on employment by race, national origin, sex and handicap in the form and at such times as the Commission may require.

**§ 1614.602 Reports to the Commission.**

(a) Each agency shall report to the Commission information concerning precomplaint counseling and the status, processing and disposition of complaints under this part at such times and in such manner as the Commission prescribes.

(b) Each agency shall advise the Commission whenever it is served with a Federal court complaint based upon a complaint that has been appealed to the Commission.

(c) Each agency shall submit annually for the review and approval of the Commission written national and regional equal employment opportunity plans of action. Plans shall be submitted in a format prescribed by the Commission and shall include, but not be limited to:

(1) Provision for the establishment of training and education programs designed to provide maximum opportunity for employees to advance so as to perform at their highest potential;

(2) Description of the qualifications, in terms of training and experience relating to equal employment opportunity, of the principal and operating officials concerned with administration of the agency's equal employment opportunity program; and

(3) Description of the allocation of personnel and resources proposed by the agency to carry out its equal employment opportunity program.

**§ 1614.603 Voluntary settlement attempts.**

Each agency shall make reasonable efforts to voluntarily settle complaints of discrimination as early as possible in, and throughout, the administrative processing of complaints, including the precomplaint counseling stage. Any settlement reached shall be in writing and signed by both parties and shall identify the allegations resolved.

**§ 1614.604 Filing and computation of time.**

(a) All time periods in this part that are stated in terms of days are calendar days unless otherwise stated.

(b) A document shall be deemed timely if it is delivered in person or postmarked before the expiration of the applicable filing period, or, in the absence of a legible postmark, if it is received by mail within five days from the expiration of the applicable filing period.

(c) The agency or the Commission shall extend any time limits in this part when the individual shows that he or she was not notified of the time limits and was not otherwise aware of them, or that despite due diligence he or she was prevented by circumstances beyond his or her control from submitting the matter within the time limits, or for other reasons considered sufficient by the agency or the Commission.

(d) The first day counted shall be the day after the event from which the time period begins to run and the last day of the period shall be included, unless it falls on a Saturday, Sunday or Federal holiday, in which case the period shall be extended to include the next business day.

**§ 1614.605 Representation and official time.**

(a) At any stage in the processing of a complaint, including the counseling stage under § 1614.105, the complainant shall have the right to be accompanied, represented, and advised by a representative of complainant's choice.

(b) If the complainant is an employee of the agency, he or she shall have a reasonable amount of official time to prepare the complaint if otherwise on duty. If the complainant is an employee of the agency and he designates another employee of the agency as his or her representative, the representative shall have reasonable amount of official time, if otherwise on duty, to prepare the complaint. The agency is not obligated to change work schedules, incur overtime wages, or pay travel expenses to facilitate the choice of a specific representative or to allow the complainant and representative to confer. However, the complainant and representative, if employed by the agency and otherwise in a pay status, shall be on official time, regardless of their tour of duty, when their presence is authorized or required by the agency or the Commission during the investigation, informal adjustment, or hearing on the complaint.

(c) In cases where the representation of a complainant or agency would conflict with the official or collateral duties of the representative, the Commission or the agency may, after giving the representative an opportunity to respond, disqualify the representative.

(d) After the agency has received written notice of the designation of a representative, all official correspondence shall be with the representative with copies to the complainant, and time frames for receipt of materials by the complainant shall be computed from the time of receipt by the representative.

(e) The Complainant shall at all times be responsible for proceeding with the complaint whether or not he or she has designated a representative.

(f) Witnesses who are Federal employees, regardless of their tour of duty and regardless of whether they are employed by the respondent agency or some other Federal agency, shall be in a duty status when their presence is authorized or required by Commission or agency officials in connection with a complaint.

**§ 1614.606 Joint processing and consolidation of complaints.**

Complaints of discrimination filed by two or more complainants consisting of substantially similar allegations of discrimination or relating to the same matter, or two or more complaints of discrimination from the same complainant, may be consolidated by the agency or the Commission for joint

processing after appropriate notification to the parties.

**§ 1614.607 Severance of issues.**

An agency or the Commission may sever any issue(s) from a complaint at any time for separate processing or decision, or for consolidation with another complaint after appropriate notification to the complainant.

**§ 1614.608 Delegation of authority.**

An agency may delegate authority under this part to the agency's EEO Director, who must report directly to the agency head. The EEO Director may redelegate any of his or her authority to a designee reporting directly to the EEO Director.

[FR Doc. 89-25550 Filed 10-30-89; 8:45 am]
BILLING CODE 6750-06-M

## DEPARTMENT OF THE INTERIOR

### Office of Surface Mining Reclamation and Enforcement

### 30 CFR Part 917

### Kentucky Permanent Regulatory Program; Kentucky Bond Pool

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

**ACTION:** Proposed rule.

**SUMMARY:** OSM is announcing the receipt of a proposed program amendment to the Kentucky permanent regulatory program (hereinafter referred to as the Kentucky program) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). The amendment consists of proposed modifications to Kentucky Administrative Regulations (KAR) at 405 KAR 10:200, the regulations governing Kentucky's alternative bonding program known as the Kentucky Bond Pool. The proposed regulations implement Senate Bill 338 passed by the 1988 Kentucky General Assembly.

This notice sets forth the times and locations that the Kentucky program and the proposed amendment are available for public inspection, the comment period during which interested persons may submit written comments on the proposed amendment, and the procedures that will be followed regarding a public hearing, if one is requested.

**DATES:** Written comments must be received on or before 4:00 p.m. on November 30, 1989. If requested, a public hearing on the proposed amendment will be held at 10:00 a.m. on November 27, 1989. Requests to present oral testimony at the hearing must be received on or before 4:00 p.m. on November 15, 1989.

**ADDRESSES:** Written comments and requests for a hearing should be mailed or hand delivered to: Roger Calhoun, Acting Director, Lexington Field Office, Office of Surface Mining Reclamation and Enforcement, 340 Legion Drive, Suite 28, Lexington, Kentucky 40504. Copies of the Kentucky program, the proposed amendment, and all written comments received in response to this notice will be available for review at the addresses listed below, Monday through Friday, 9:00 a.m. to 4:00 p.m., excluding holidays. Each requestor may receive, free of charge, one copy of the proposed amendment by contacting OSM Lexington Field Office.

Office of Surface Mining Reclamation and Enforcement, Lexington Field Office, 340 Legion Drive, Suite 28, Lexington, Kentucky 40504, Telephone: (606) 233-7327

Office of Surface Mining Reclamation and Enforcement, 1100 "L" Street, NW., Room 5131, Washington, DC 20240. Telephone: (202) 343-5492

Office of Surface Mining Reclamation and Enforcement, Eastern Field Operations, Ten Parkway Center, Pittsburgh, Pennsylvania 15220, Telephone: (412) 937-2828

Department for Surface Mining Reclamation and Enforcement, No. 2 Hudson Hollow Complex, Frankfort, Kentucky 40601, Telephone: (502) 564-6940

If a public hearing is held, its location will be: The Harley Hotel, 2143 North Broadway, Lexington, Kentucky 40505.

**FOR FURTHER INFORMATION CONTACT:** Roger Calhoun, Acting Director, Lexington Field Office, Telephone (606) 233-7327.

**SUPPLEMENTARY INFORMATION:**

#### I. Background

On May 18, 1982, the Secretary of the Interior conditionally approved the Kentucky program. Information pertinent to the general background, revisions, modifications, and amendments to the proposed permanent program submission, as well as the Secretary's findings, the disposition of comments and a detailed explanation of the conditions of approval can be found in the May 18, 1982, **Federal Register** (47 FR 21404-21435). Subsequent actions concerning the conditions of approval and program amendments are identified at 30 CFR 917.11, 917.15, 917.16, and 917.17.

#### II. Discussion of Amendment

By letter dated September 18, 1989 (Administrative Record No. KY-916), Kentucky submitted proposed regulations to revise 405 KAR 10:200, the regulations governing the Kentucky Bond Pool. The proposed regulations implement Senate Bill 338 passed by the 1988 Kentucky General Assembly.

The proposed regulations delete from the definition of "member" the requirement that only permits held by bond pool members can be covered by the pool. Kentucky Revised Statutes (KRS) 350.720(14) authorizes pool coverage for nonmember permittees to participate in the abandoned mine land enhancement program.

The proposed regulations relax the criteria used to determine eligibility for membership into the Kentucky Bond Pool. The proposed regulations allow the Bond Pool Commission greater flexibility in applying compliance record criteria in determining eligibility. The Bond Pool Commission is authorized to defer action on an application for pool membership until violations and penalty assessments that could affect the applicant's eligibility or membership rating have been resolved. The proposed regulations also make several nonsubstantive changes for compliance with KRS Chapter 13A provisions.

#### III. Public Comment Procedures

In accordance with the provisions of 30 CFR 732.17(h), OSM is now seeking comment on whether the amendment proposed by Kentucky satisfies the applicable program approval criteria of 30 CFR 732.15. If the amendment is deemed adequate, it will become part of the Kentucky 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 Lexington Field Office will not necessarily be considered in the final rulemaking or included in the Administrative Record.

*Public Hearing*

Persons wishing to comment at the public hearing should contact the person listed under "**FOR FURTHER INFORMATION CONTACT**" by 4:00 p.m. on November 15, 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 OSM officials to prepare adequate responses and appropriate questions.

The public hearing will continue on the specified date until all persons scheduled to comment have been heard. Persons in the audience who have not been scheduled to comment, and who wish to do so, will be heard following those scheduled. The hearing will end after all persons scheduled to comment and persons present in the audience who wish to comment have been heard.

*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 OSM representatives to discuss the proposed amendments may request a meeting at the OSM, Lexington Field 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 in advance at the locations listed under "**ADDRESSES.**" A written summary of each meeting will be made a part of the Administrative Record.

**VI. Procedural Determinations**

*1. Compliance With the National Environmental Policy Act*

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

*2. Executive Order 12291 and the Regulatory Flexibility Act*

On July 12, 1984, the Office of Management and Budget (OMB) granted OSM an exemption from sections 3, 4, 7 and 8 of Executive Order 12291 for actions directly related to approval or conditional approval of State regulatory programs. Therefore, this action is exempt from preparation of a Regulatory Impact Analysis and regulatory review by OMB.

The Department of the Interior has determined that this rule will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). This rule will not impose any new requirements; rather, it will ensure that existing requirements established by SMCRA and the Federal rules will be met by the State.

*3. Paperwork Reduction Act*

This rule does not contain information collection requirements which require approval by the Office of Management and Budget under 44 U.S.C. 3507.

**List of Subjects in 30 CFR Part 917**

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

Dated: October 19, 1989.

**Carl C. Close,**

*Assistant Director, Eastern Field Operations.*

[FR Doc. 89-25560 Filed 10-30-89; 8:45am]

BILLING CODE 4310-05-M

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**30 CFR Part 935**

## Ohio Permanent Regulatory and Abandoned Mined Lands Programs; Revision of Ohio Revised Code

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

**ACTION:** Proposed rule.

**SUMMARY:** OSM is announcing the receipt of proposed Program Amendment Number 40 to the Ohio permanent regulatory and abandoned mined lands (AML) programs (hereinafter jointly referred to as the Ohio program) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). The amendments were initiated by Ohio and are intended to revise six sections of the Ohio Revised Code to be consistent with Amended Substitute House Bill 399 of the 118th Ohio General Assembly. The proposed amendments would revise Ohio's method of calculating average wage rates for contractors performing reclamation work for the State, would restore civil service status to Ohio's regulatory inspection officers, would allow use of forfeited bond and defaulted area funds to pay administrative and design costs, and would prohibit the delay of reclamation while the Ohio Attorney General takes action to recover the State's reclamation expenses.

This notice sets forth the times and locations that the Ohio program and proposed amendments to that program will be available for public inspection, the comment period during which interested 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 November 30, 1989. If requested, a public hearing on the proposed amendments will be held at 1:00 p.m. on November 27, 1989. Requests to present oral testimony at the hearing must be received on or before 4:00 p.m. on November 15, 1989.

**ADDRESSES:** Written comments and requests to testify at the hearing should be mailed or hand-delivered to Ms. Nina Rose Hatfield, Director, Columbus Field Office, at the address listed below. Copies of the Ohio program, 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 requester may receive, free of charge, one copy of the proposed amendments by contacting OSM's Columbus Field Office.

Office of Surface Mining Reclamation and Enforcement, Columbus Field Office, 2242 South Hamilton Road, Room 202, Columbus, Ohio 43232, Telephone: (614) 866-0578.

Ohio Department of Natural Resources, Division of Reclamation, Fountain Square, Building B-3, Columbus, Ohio 43224, Telephone: (614) 265-6675.

**FOR FURTHER INFORMATION CONTACT:** Ms. Nina Rose Hatfield, Director, Columbus Field Office, (614) 866-0578.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

On August 16, 1982, the Secretary of the Interior conditionally approved the Ohio program. Information on the general background of the Ohio program submission, including the Secretary's findings, the disposition of comments, and a detailed explanation of the conditions of approval of the Ohio program, can be found in the August 10, 1982 **Federal Register** (47 FR 34688). Subsequent actions concerning the conditions of approval and program amendments are identified at 30 CFR 935.11, 935.12, 935.15, and 935.16.

**II. Discussion of the Proposed Amendments**

By letter dated October 2, 1989 (Administrative Record No. OH-1218), Ohio submitted proposed Program Amendment No. 40. This proposed amendment was initiated by Ohio to revise six sections of the Ohio Revised Code to be consistent with Amended Substitute House Bill 399 of the 118th Ohio General Assembly. The proposed amendment would revise the Ohio program at Ohio Revised Code (ORC) sections 1513.02(J); 1513.08(A); 1513.18

(B), (C), (F), and (H); 1513.24; and 1513.37(J).

Nonsubstantive changes are proposed throughout these six sections of the ORC to correct paragraph letter notations and to improve the clarity of the statutes.

The substantive changes proposed in Program Amendment No. 40 are discussed briefly below:

*(1) Average Wage Rates for Reclamation Contractors*

ORC section 1513.02 paragraph (J): This new paragraph is being added to specify that the Chief of the Ohio Department of Natural Resources, Division of Reclamation (the Chief), shall triennially determine the average wage rates paid by companies performing reclamation for Ohio. The initial determination of the average wage rate will be based on the wages paid by companies performing work for Ohio during the last ten years. Subsequent determinations will be based on wages paid by companies during the preceding three years.

ORC section 1513.18 paragraph (H): This paragraph is being rewritten to specify that the average wage rate required by the Chief of every contractor performing reclamation work under ORC section 1513.18 shall be as determined by the Chief under ORC section 1513.02.

ORC section 1513.24: A new paragraph is being added to provide that the Chief shall require every contractor performing reclamation work under ORC section 1513.24 to pay workers at the greater of their rate of pay or the average wage rate for the same or similar work as determined by the Chief under ORC section 1513.02.

ORC section 1513.37 paragraph (J): The last sentence in this paragraph is being rewritten to specify that the average wage rate required by the Chief of every contractor performing reclamation work under ORC section 1513.37 shall be as determined by the Chief under ORC section 1513.02.

*(2) Civil Service Status for Regulatory Inspectors*

ORC 1513.03: This section is being rewritten to delete the statement that Ohio regulatory inspection officers shall serve at the pleasure of the Chief. A new paragraph is also being added to provide that, to be eligible for appointment as inspection officers, appointees shall first pass an examination prepared and administered by the Ohio Department of Administrative Services and that new inspectors shall serve in a provisional status for one year to the satisfaction of the Chief. These provisions shall not apply to persons who were inspection officers on or before April 10, 1972 if the person is a certified employee in the classified service of the State.

*(3) Administrative and Design Costs for Reclamation of Forfeited and Defaulted Areas*

ORC section 1513.08 paragraph (A): This paragraph is being rewritten to provide that the Chief may expend money from the reclamation supplemental forfeiture account to pay necesary administrative, engineering, and design costs incurred by Ohio in reclaiming forfeited areas. Administrative exenditures need not be made under contract.

ORC section 1513.18 paragraphs (B) and (C): These paragraphs are being rewritten to provide that the Chief may expend money from the defaulted areas fund to pay necessary administrative, engineering, and design costs incurred by Ohio in reclaiming defaulted areas. Administrative expenditures need not be made under contract.

*(4) Prohibition Against Delaying Reclamation*

ORC section 1513.18 paragraph (F): The last sentence in this paragraph is being rewritten to provide that the Chief shall not postpone the reclamation of forfeited or defaulted areas because of any actions being brought by the Ohio Attorney General under this paragraph to recover the State's reclamation expenses. Prior to completing reclamation, the Chief may collect through the Attorney General any additional amount in excess of the forfeited bond that the Chief believes will be necessary for reclamation of the land that the operator should have, but failed to, reclaim.

**III. Public Comment Procedures**

In accordance with the provisions of 30 CFR 732.17(h), OSM is now seeking comment on whether the amendments proposed by Ohio satisfy the applicable program approval criteria of 30 CFR 732.15. If the amendments are deemed adequate, they will become part of the Ohio program.

Written Comments

Written comments should be specific, pertain only to the issues proposed in this rulemaking, and include explanations in support of the commenters recommendations. Comments received after the time indicated under **"DATES"** or at locations other than the Columbus Field Office will not necessarily be considered in the final rulemaking or included in the Administrative Record.

Public Hearing

Persons wishing to comment at the public hearing should contact the person listed under **"FOR MORE INFORMATION CONTACT"** by 4:00 p.m. on November 15, 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 OSM officials to prepare adequate responses and appropriate questions.

The public hearing will continue on the specified date until all persons scheduled to comment have been heard. Persons in the audience who have not been scheduled to comment and who wish to do so will be heard following those scheduled. The hearing will end after all persons scheduled to comment and persons present in the audience who wish to comment have been heard.

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 OSM representatives to discuss the proposed amendments may request a meeting at the Columbus Field Office by contacting the person listed under **"FOR MORE INFORMATION CONTACT."** All such meetings shall be open to the public and, if possible, notices of the meetings will be posted at the locations listed under **"ADDRESSES."** A written summary of each public meeting will be made a part of the Administrative Record.

**List of Subjects in 30 CFR Part 935**

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

Dated: October 19, 1989.

**Carl C. Close,**

*Assistant Director, Eastern Field Operations.*

[FR Doc. 89-25512 Filed 10-31-89; 8:45 am]

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## DEPARTMENT OF THE TREASURY

## 31 CFR Part 103

## Bank Secrecy Act Regulatory Applictions to the Problem of Money Laundering Through International Payments

**AGENCY:** Departmental Offices, Treasury.

**ACTION:** Advance notice of proposed rulemaking.

**SUMMARY:** Treasury expects to issue a Notice of Proposed Rulemaking under the Bank Secretary Act to address the problem of money laundering through international payments, especially wire transfers of funds. This Advance Notice of Proposed Rulemaking requests comments on a number of regulatory options.

**DATES:** Comments must be received no later than January 2, 1990.

**ADDRESS:** Comments should be sent to: Amy G. Rudnick, Director, Office of Financial Enforcement, Department of the Treasury, Room 4320, 1500 Pennsylvania Avenue NW., Washington, DC 20220.

**FOR FURTHER INFORMATION CONTACT:** Linda Noonan, Senior Counsel for Financial Enforcement. Office of the Assistant General Counsel (Enforcement), (202) 566–2941.

**SUPPLEMENTARY INFORMATION:** The Bank Secretary Act, Public Law 91–508, (codified at 12 U.S.C. 1829b, 12 U.S.C. 1951, *et seq.*, and 31 U.S.C. 5311–5326), authorizes the Secretary of the Treasury to require financial institutions to keep records and file reports that the Secretary determines have a high degree or usefulness in criminal, tax, and regulatory matters. The primary purpose of the Act is to identify the sources, volumes and movements of monies moving into and out of the country and through domestic financial institutions. *See* H.R. Rep. No. 975, 91st Cong., 2d Sess. 11–13 (1970). In exercising this far reaching authority, Treasurey has been mindful of issues concerning undue interference with foreign laws and has been careful not to create obstacles to the free flow of legitimate international trade and commerce. H.R. Rep. No. 975 at 13.

Under 31 U.S.C. 5314, the Secretary may require reports or records relating to transactions between persons subject to the jurisdiction of the United States and "foreign financial agencies", *e.g.*, financial institutions located abroad. In addition, pursuant to 31 U.S.C. 5318(a)(2), the Secretary may require that domestic financial institutions "maintain appropriate procedures" to ensure compliance with any regulation prescribed under section 5314 or any other provision in 31 U.S.C. 5311–5326. Treasury will be exercising its authority unde these provisions to address the problem of "laundering" drug and other illegal proceeds through the international payments system, particularly through international wire transfers of funds. International wire transfers of funds include transactions where either (1) a foreign office of a financial institution instructs a U.S. office of a financial institution to effect a payment in the U.S., directly or indirectly, or (2) where a U.S. office of a financial institution instructs a foreign office of a financial institution to effect a payment abroad, directly or indirectly. (The term does not include check or ACH payments.)

World-wide gross drug revenues are estimated to be $300 billion. Illegal drug revenues in the United States are estimated to total $110 billion. Estimates are that only 20% of the money generated from narcotics trafficking goes to the cost of goods sold, with 80% available for profits. These profits are used to finance other narcotics and criminal activities, purchase luxury items, make investmens in real estate and acquire legitimate businesses.

Money laundering is a vital component of drug trafficking and other criminal activity throughout the world. Criminals must "wash" their "dirty" money to make it appear "clean." As President Bush recently stated,

> Drug money undermines honest businesses, corrupts political institutions, and even threatens the security of nations. To conceal their obscene profits, drug barons must wash their money by cycling it through financial institutions and illegitimate shell corporations.

Currently, illegal funds are being transferred from or to the United States and "cycled" through intricate money laundering schemes involving international payments, particularly wire transfers. Several recent money laundering operations, which have been discovered by Treasury and other federal law enforcement agencies, such as Operations C-Chase and Polar Cap, are testaments to this phenomenon. In an April 28, 1989, submission to the Director, Office of National Drug Control Policy, reprinted in the Congressional Record of May 18, 1989, the American Bankers Association stated that, "Wire transfers, which are essentially unregulated, have emerged as the primary method by which high volume launderers ply their trade." 135 Cong. Rec. S5555 (May 18, 1989).

To date Treasury has used its Bank Secrecy Act authority to require financial institutions to keep records of all requests, advices and instructions relating to international transfers of more than $10,000 to or from any person or account outside the United States. 31 CFR 103.33(b). Under this provision, a financial institution must keep a record of each international transaction over $10,000, including all international wire transfers of funds and book transfers of credit. Currently, Treasury does not specify what type of information must be contained in the record. Thus, financial institutions are not required to obtain or record information from or about the identity of an originator or beneficiary of a payment, about the parties on whose behalf the originator or beneficiary may be acting, or other information beyond what is in their records or necessary to make the transfer.

In addition to the current recordkeeping requirements for wire transfers, Treasury is authorized to require financial institutions to report transactions, including international wire transfers of funds, with foreign financial institutions in a designated location for a limited period of time pursuant to 31 CFR 103.25. This authority is limited by the fact that financial institutions involved in international wire transfers of funds frequently do not have complete information about the originator or beneficiary of payments.

Treasury is reviewing a number of regulatory options under the authority of 31 U.S.C. 5314 and 5318 to deal with these deficiencies and the severe money laundering problem. In our regulatory review, we will give careful consideration to the question of reaching an appropriate balance between law enforcement needs, the importance of free capital flow in global commerce and an efficient international financial network, and the potential burden on financial institutions. This is difficult given the severity of the money laundering problem and the enormous daily volume of international payments, the overwhelming majority of which represent normal commercial transactions. Therefore, Treasury is soliciting views of financial institutions, law enforcement officials, regulatory agencies, and other interested parties on these or other regulatory options. After Treasury analyzes the comments received in response to the Advance Notice, it expects to issue a Notice of Proposed Rulemaking with specific regulatory proposals for comment.

The following list illustrates some of the regulatory options under consideration. Treasury seeks views on each of these proposals. However, these proposals are not meant to be considered as mutually exclusive alternatives; they may be later proposed in combination with one another. With respect to any possible reporting requirement, Treasury would propose that reporting could be made by electronic data transmission.

1. Require a record or report by the financial institution originating or receiving an international wire transfer of funds for a customer which includes identifying and account information about the originator, beneficiary and the person on whose behalf the payment is being made or received and whether the sender or receiver is aware of any separate payment instructions regarding the payment unknown to the financial institution. This requirement might be coupled with some type of an exemption system designed to cover the majority of normal business transactions.

2. Require that all international wire transfer messages contain all known third party identifying information, *e.g.*, account numbers, addresses, and names of the originator and beneficiary of the payment.

3. Require that, prior to originating international payments on a customer's behalf, either through book entry transfers of credit or through international wire transfers of funds, financial institutions apply model "know your customer" procedures to verify the legitimate nature of the customer's business and that the transfers are commensurate with legitimate business activities.

4. Require special identification procedures and recordkeeping or reporting of international payments sent or received by persons without established account relationships at financial institutions.

5. Require that financial institutions develop a suspicious international wire transfer profile and report suspicious payments to Treasury. The profile might include certain criteria suggested by Treasury, for example, the presence of large currency deposits prior to an outgoing transfer or the existence of an incoming transfer followed by issuance of a cashier's check.

6. Require that (A) when an institution, typically a bank, receives a targeting order under 31 CFR 103.25 relating to international wire transfers of funds, it must obtain, to the extent possible, information from other domestic banks involved in the transfer regarding the identity of the originator or beneficiary of the transfer, and (B) that those other domestic banks cooperate in providing this information on a timely basis to the targeted institution.

7. Provide that an additional category of information may be requested through a regulation issued under 31 CFR 103.25, relating to international book transfers of credit not involving wire transfers, *e.g.*, transfers of credit between U.S. and foreign offices of a financial institution.

This list is not meant to be exhaustive of the ways in which Treasury's regulatory authority might be used to address the problem. Treasury is open to other suggestions from financial institutions or other interested parties regarding additional or alternative regulatory measures or voluntary programs.

Treasury requests that financial institutions that have dealt with the issue of money laundering through international payments share their experiences with Treasury, for instance, on efforts to isolate suspicious wire transfers or to impose "know your customer" procedures. We would like financial institutions to advise of their policies and procedures for "pay on proper ID" payments or other arrangements whereby noncustomers can receive (or send) international payments. Treasury also is interested in comments on any practical problems presented by these options and on the estimated costs of compliance. We welcome recommendations on how best to fashion an appropriate exemption system if routine recordkeeping or reporting requirements are adopted. Finally, we welcome comments relating to specific problems which might arise with foreign jurisdictions, such as foreign constraints on U.S. jurisdiction and enforcement abilities.

Treasury is committed to the effective and judicious use of its Bank Secrecy Act authority and wishes to work with the affected financial institutions and law enforcement community to fashion a responsible regulatory solution to the problem at hand. We look forward to the full cooperation and participation of financial institutions on this regulatory project.

Dated: October 25, 1989.

**Salvatore R. Martoche,**

*Assistant Secretary (Enforcement).*

[FR Doc. 89-25521 Filed 10-30-89; 8:45 am]

BILLING CODE 4810-25-M

## DEPARTMENT OF DEFENSE

### Office of the Secretary

### 32 CFR Part 169a

[DOD Instruction 4100.33]

RIN 0790-AA48

### Commercial Activities Program Procedures

**AGENCY:** DOD, WHS.

**ACTION:** Proposed rule; correction.

**SUMMARY:** This document makes corrections to paragraph 169a.2(k) which was published in the **Federal Register** on October 18, 1989 (54 FR 42807), "Commercial Activities Program Procedures," 32 CFR part 169a. This correction is made to enable readers to better understand paragraph 169a.2(k)'s original meaning.

**FOR FURTHER INFORMATION CONTACT:** Mr. Dom Miglionico, Office of the Assistant Secretary of Defense (Production and Logistics)Installations Support Division, Pentagon, Washington, DC 20301-8000.

**SUPPLEMENTARY INFORMATION:**

**List of Subjects in 32 CFR Part 169a**

Armed forces; Government procurement.

Accordingly, 32 CFR Part 169a is amended as follows:

**PART 169a—[AMENDED]**

1. The authority citation for part 169a continues to read as follows:

Authority: 5 U.S.C. 301; E.O. 12615; Pub. L. 93-400.

2. Section 169a.2(k) is corrected to read as follows:

**§ 169a.2 Applicability and scope.**

* * * * *

(k) Establishes and shall not be construed to create any substantive or procedural basis for anyone to challenge any DoD action or inaction on the basis that such action or inaction was not in accordance with this part, except as specifically set forth in paragraph 169a.6(c)(7).

October 24, 1989.

**L.M. Bynum,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

[FR Doc. 89-25585 Filed 10-30-89; 8:45am]

BILLING CODE 3810-01-M

## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 73

[MM Docket No. 89-462, RM-6852]

### Television Broadcasting Services; Colorado Springs, CO

**AGENCY:** Federal Communications Commission.

**ACTION:** Proposed rule.

**SUMMARY:** This document requests comments on a petition filed on behalf of the University of Southern Colorado, seeking the allotment of UHF Channel *66 to Colorado Springs, Colorado, as that community's first local

noncommercial television service. Coordinates for the proposal are 38–48–26 and 104–48–51.

Although this proposal falls within the parameters of the Denver, Colorado, market, which is one of the metropolitan areas for which the Commission has imposed a "freeze" on TV allotments, or applications therefor, a waiver is appropriate in this instance since the proposed allotment of Channel *66 at Colorado Springs is for noncommercial educational use.

**DATES:** Comments must be filed on or before December 12, 1989, and reply comments on or before December 22, 1989.

**ADDRESSES:** Federal Communications Commission, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner's counsel, as follows: Wayne Coy, Jr., Esq., Cohn & Marks, 1333 New Hampshire Ave., NW., Suite 600, Wash., DC 20036.

**FOR FURTHER INFORMATION CONTACT:** Nancy Joyner, Mass Media Bureau (202) 634–6530.

**SUPPLEMENTARY INFORMATION:** This is a synopsis of the Commission's Notice of Proposed Rule Making, MM Docket No.89–462, adopted September 26,1989, and released October 16, 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.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contact.

For information regarding proper filing procedures for comments, See 47 CFR 1.415 and 1.420.

**List of Subjects in 47 CFR part 73**

Television broadcasting.

Federal Communications Commission.

**Karl A. Kensinger,**

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

[FR Doc. 89–25576 Filed 10–30–89; 8:45 am]

BILLING CODE 6712–01–M

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**47 CFR Part 73**

**[MM Docket No. 89–461, RM–6881]**

## Radio Broadcasting Services; Lafayette, FL

**AGENCY:** Federal Communications Commission.

**ACTION:** Proposed rule.

**SUMMARY:** This document requests comments on a petition by Brian Mitchell Rowland requesting the substitution of Channel 260C2 for Channel 260A at Lafayette, Florida, and modification of the construction permit (BPH–870729MJ) for Station WKXJ(FM) to special operation on the higher powered channel. Channel 260C2 can be allotted to Lafayette in compliance with the Commission's minimum distance separation requirements with a site restriction of 20.8 kilometers (12.9 miles) southeast. The coordinates for the allotment are North Latitude 30–18–21 and West Longitude 84–03–09. In accordance with § 1.420(g) of the Commission's Rules, competing expressions of interest in use of Channel 260C2 at Lafayette will not be considered and petitioner will not be required to demonstrate the availability of an additional equivalent channel for use by such interested parties.

**DATES:** Comments must be filed on or before December 7, 1989, and reply comments on or before December 22, 1989.

**ADDRESS:** Federal Communications Commission, Washington, DC 20554 In addition to filing comments with the FCC, interested parties should serve the petitioners, or their counsel or consultant, as follows: Peter Gutmann, Neal J. Friedman, Pepper & Corazzini, 200 Montgomery Building, 1776 K Street, NW., Washington, DC 20006, (Attorneys for petitioner)

**FOR FURTHER INFORMATION CONTACT:** Nancy J. Walls, Mass Media Bureau (202) 634–6530.

**SUPPLEMENTARY INFORMATION:** This is a synopsis of the Commission's Notice of Proposed Rule Making, MM Docket No.89–461, adopted October 2, 1989, and released October 16, 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.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, as *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contact.

For information regarding proper filing procedures for comments, See 47 CFR 1.415 and 1.420.

**List of Subjects in 47 CFR Part 73**

Radio broadcasting.

Federal Communications Commission.

**Karl A. Kensinger,**

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

[FR Doc. 89–25577 Filed 10–30–89; 8:45 am]

BILLING CODE 6712–01–M

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**47 CFR Part 73**

**[MM Docket No.89–463, RM–6896]**

## Radio Broadcasting Services; Boyce, LA

**AGENCY:** Federal Communications Commission.

**ACTION:** Proposed rule.

**SUMMARY:** This document requests comments on a petition by Trinity Broadcasting Corporation, licensee of Station KBCE(FM), Boyce, Louisiana, proposing the substitution of Channel 272C3 for Channel 272A at Boyce, and the modification of the station's license to special operation on the higher powered channel. A site restriction of 5.7 kilometers (3.5 miles) east of the community has been requested. The coordinates are 31–22–21 and 92–36–41. The community could receive its first wide coverage area FM service.

**DATES:** Comments must be filed on or before December 7, 1989, and reply comments on or before December 22, 1989.

**ADDRESSES:** Federal Communications Commission, Washington, DC 20554 In addition to filing comments with the FCC, interested parties should serve the petitioners, or their counsel or

consultant, as follows: Robert G. Allen, Esquire, Denise B. Moline, Broadcast Media Legal Services, P.O. Box 1667, Manassas Park, VA 22111 (Counsel for petitioner).

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

**SUPPLEMENTARY INFORMATION:** This is a synopsis of the Commission's Notice of Proposed Rule Making, MM Docket No. 89–463, adopted September 26, 1989, and released October 16, 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.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contact.

For information regarding proper filing procedures for comments, See 47 CFR 1.415 and 1.420.

**List of Subjects in 47 CFR Part 73**

Radio Broadcasting.

Federal Communications Commission.

**Karl A. Kensinger,**

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

[FR Doc. 89–25579 Filed 10–30–89; 8:45 am]

BILLING CODE 6712-01-M

## 47 CFR Part 73

**[MM Docket No. 89–459, RM–7009]**

## Radio Broadcasting Services; Giddings, Cameron, Centerville, Edna and Hearne, TX

**AGENCY:** Federal Communications Commission.

**ACTION:** Proposed rule.

**SUMMARY:** This document requests comments on a petition by Radio Lee County, the licensee of Station KGID(FM), Channel 268C2 at Giddings, Texas, proposing the substitution of Channel 268C1 for Channel 268C2 at Giddings and the modification of its license to specify the higher class station. In order to accomplish the substitution at Giddings, channel substitutions must also be made at four other Texas communities: (1) Cameron, Texas, Channel 232A for Channel 267A, Station KJKS(FM); (2) Centerville, Texas, Channel 290A for vacant Channel 276A; (3) Edna, Texas, Channel 285A for vacant but applied for Channel 269A; and (4) Hearne, Texas, Channel 276A for Channel 232A, Station KHRN(FM).

**DATES:** Comments must be filed on or before December 8, 1989, and reply comments on or before December 26, 1989.

**ADDRESSES:** Federal Communications Commission, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioners, or their counsel or consultant, as follows: Don Werlinger, Broadcast Development Group, 7819 Manassas Drive, Austin, Texas 78745 (Consultant to petitioner).

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

**SUPPLEMENTARY INFORMATION:** This is a synopsis of the Commission's Notice of Proposed Rule Making, MM Docket No.89–459, adopted October 2, 1989, and released October 17, 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.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, as *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contact.

For information regarding proper filing procedures for comments, See 47 CFR 1.415 and 1.420.

**List of Subjects in 47 CFR Part 73**

Radio broadcasting.

The proposed allotment of Channel 268C1 at Giddings requires the station to relocate its transmitter site at least 21.6 kilometers south of the community. The coordinates specified by the petitioner are 29–55–00 and 97–20–00, which is located 48.2 kilometers (30.0 miles) southwest of the city. The suggested channel changes at Cameron, Centerville, Edna and Hearne can be accomplished at the existing stations's sites. The coordinates for Channel 232A at Cameron are 30–57–00 and 96–54–07. The coordinates for Channel 290A at Centerville are 31–15–36 and 95–58–42. The coordinates for Channel 285A at Edna are 28–57–32 and 96 37–30. The coordinates for Channel 276A at Hearne are 30–51–07 and 96–34–04.

Federal Communications Commission.

**Karl A. Kensinger,**

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

[FR Doc. 89–25578 Filed 10–30–89; 8:45am]

BILLING CODE 6712-01-M

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

### 50 CFR Part 17

**RIN 1018–AB35**

## Endangered and Threatened Wildlife and Plants; Desert Tortoise

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Proposed rule; correction.

**SUMMARY:** The U.S. Fish and Wildlife Service (Service) is correcting an error in the SUMMARY of the proposed rule to list the Mojave population of the desert tortoise, which appeared in the **Federal Register** on October 13, 1989 (54 FR 42270).

**FOR FURTHER INFORMATION CONTACT:** Dr. James Tate, Jr. at (703) 358–2171.

**SUPPLEMENTARY INFORMATION:** The Service published an emergency rule to list the Mojave population of the desert tortoise as endangered on August 4, 1989 (54 FR 55654). The emergency rule will cease to have force and effect after 240 days unless the procedures leading to a final rule, or to a withdrawal of the emergency rule, have been complied with during that period. Thus, the emergency rule to list the desert tortoise would expire on Sunday, April 1, 1990 (actually on the next working day, Monday, April 2, 1990). A proposed rule to list the Mojave population of the desert tortoise appeared in the **Federal Register** on October 13, 1989 (54 FR 42270).

The correct statement that the "* * * emergency rule provides protection

under the [Endangered Species] Act for the Mojave population of tortoises for 240 days (until April 2, 1990)" appears on page 42271. An incorrect date of August 2, 1990 appears in the SUMMARY of the same publication. This error is corrected below.

* * * * *

Dated: October 25, 1989.

**John F. Turner,**

*Director, Fish and Wildlife Service.*

The following correction is made in RIN 1018–AB35, the proposed rule to list the Mojave population of the desert tortoise, which appeared in the **Federal Register** on October 13, 1989 (54 FR 42270).

On page 42270, first column, line 33, change "August 2, 1990" to "April 2, 1990".

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[FR Doc. 89–25628 Filed 10–30–89; 8:45 am]

BILLING CODE 4310–55–M

# Notices

Federal Register
Vol. 54, No. 209
Tuesday, October 31, 1989

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

## DEPARTMENT OF AGRICULTURE

### Forest Service

### Seismic Exploration Permit Fees

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice of interim policy.

**SUMMARY:** The Forest Service gives notice that it is establishing a standard land use rental fee applicable nationwide to seismic exploration permits issued by the Forest Service. The revised fee policy is set forth in Interim Directive No. 69 to the Forest Service Manual Chapter 2720—Special Uses Administration. The intended effect is to bring consistency to fee determinations on seismic exploration permits and to increase efficiency in processing permits.

**EFFECTIVE DATE:** The interim directive is effective November 15, 1989.

**FOR FURTHER INFORMATION CONTACT:** Persons interested in this rental fee policy should direct inquiries and comments to Ruben M. Williams, Lands Staff, Forest Service, USDA, P.O. Box 96090, Washington, DC 20090–6090 (703) 235–8212.

**SUPPLEMENTARY INFORMATION:** National Forest System lands are open to seismic exploration activities. Seismic exploration commonly involves the use of explosives or machinery to generate energy shock waves through the earth's surface to detect the presence of oil and gas deposits or conditions likely to be favorable to location of such deposits. When an operator wishes to explore for oil and gas in an area of the National Forest system that is not covered by a Federal lease, the operator must obtain a permit for the exploration and pay a land use rental fee (36 CFR 251.57).

Forest Service policy has allowed Regional Foresters to establish fees for seismic exploration permits by one of two methods. The first method bases the fee on a survey of rental payments paid to private land owners within a market area for seismic exploration surveys. The second method, which was developed by the Regional Forester for the Rocky Mountain Region in consultation with seismic exploration contractors, was based upon average rental values of Federal oil and gas leases within that Region and adjacent areas. This fee method, notice of which was published February 12, 1987, in the **Federal Register** [52 FR 4514] resulted in a fee of $200 per mile, or fraction of a mile. In contrast, surveys of the private rental market have resulted occasionally in fees that were higher than the fees determined by the Rocky Mountain Region, particularly when the National Forest lands were located in areas with good potential for oil and gas development, such as the Gulf Coast States.

The agency has reviewed the current fee determination procedure and concluded that a uniform fee would not only eliminate inconsistent fee charges but would also increase agency efficiency of processing seismic permits by reducing the time and cost associated with the current fee determination methods. The agency is, therefore, adopting a standard, nationwide fee for seismic exploration permits of $200 per mile, or fraction of a mile, and $50 per shot hole. This fee rate is currently charged on several National Forests for seismic permits.

These fee rates will be imposed on all types of seismic exploration in which temporary disturbance and occupancy of the land is authorized by a Forest Service permit. They do not apply to exploration by a holder of a valid Federal lease within a leasehold on National Forest System lands. Also, the seismic permit fee does not include any costs of reclamation, restoration, or compliance with applicable laws, such as indentification and protection of cultural resources for which the holder may be responsible as a condition of the permit.

This fee policy is being issued as interim direction to allow the agency to evaluate the effects of a standard fee and the fee amount over the next 12 months and to determine if any changes are needed before isuing permanent direction. Any member of the public, including seismic exploration contractors, may submit comments for the agency's consideration during the evaluation period. Notice of adoption of a final fee policy for seismic exploration will be given in the **Federal Register.**

Dated: October 10, 1989.

**George M. Leonard,**

*Associate Chief.*

[FR Doc. 89–25568 Filed 10–30–89; 8:45 am]

BILLING CODE 3410–11–M

### Draft Supplement to a Final Environmental Impact Statement for the Grouse Creek Gold Mine Project (Formally the Sunbeam Mine Project) on the Yankee Fork Ranger District of the Challis National Forest, Custer County, ID

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice of intent to prepare a supplement to an environmental impact statement.

**SUMMARY:** The Department of Agriculture, Forest Service will prepare a Draft and Final Supplement (DSEIS and SEIS respectively) to the Environmental Impact Statement (EIS) previously prepared for the Sunbeam Mining Project (September 1984). The supplement is for an expanded Plan of Operation proposed by Grouse Creek Mining, Inc., for an open-pit gold mine located 19 miles northeast of Stanley, Idaho and 30 miles southwest of Challis, Idaho, on the Yankee Fork District of the Challis National Forest in Custer County, Idaho.

The supplement will focus on proposed modifications to the original Sunbeam Mining Project, including: (1) Expanded operation into the Grouse Creek drainage resulting in an additional pit and potential waste dump, (2) change in milling process from vat leaching to conventional counter-current decant process, (3) construction of tailing impoundment and embankments, and (4) improvement of Forest Route 40172. The modified proposal will be called Grouse Creek Project.

The agency will accept written comments and suggestions on the scope of the analysis. However, because the Forest has been communicating with interested persons concerning the scope of the proposed action through prior negotiations and meetings, the agency urges that any comments on the proposal be concise. Comments directed to the substance, as opposed to the scope, of the proposal are more

appropriately submitted during the comment period following release of the DSEIS.

In addition, the agency gives notice of the full environmental analysis and decision-making process will occur on the proposal so that interested persons are aware of how they may participate and contribute to the final decision.

**DATE:** Comments concerning the scope of the analysis must be received by December 1, 1989 to ensure timely consideration.

**ADDRESS:** Submit written comments and suggestions related to the scope of the analysis to Forest Supervisor, Challis National Forest, P.O. Box 404, Challis, Idaho 83226.

**FOR FURTHER INFORMATION:** Direct questions about the proposed action and DSEIS to Ruth Monahan, Project Coordinator, Challis Supervisor's Office, P.O. Box 404, Challis, Idaho, telephone 208–879–2285.

**SUPPLEMENTARY INFORMATION:** The Final Environmental Impact Statement for the Sunbeam Mining Project was approved by Forest Supervisor Jack C. Griswold on September 28, 1984. Full development and construction of the Sunbeam Project has been delayed due to litigation concerning Clean Water Act section 402/404 permitting authority between the U.S. Army Corps of Engineers and the U.S. Environmental Protection Agency, relating to the discharge of spent ore tailings to the Pinyon Basin wetland. As a result of Sunbeam Mining Corporation's recent merger with CoCa Mines, Inc., the original Sunbeam Mine Project is now being developed by Grouse Creek Mining, Inc. a subsidiary of CoCa Mines, Inc.

The Forest Service received a Conceptual Plan of Operation from Grouse Creek Mining, Inc. in August of 1989. Re-evaluation of the original Sunbeam Mine Project caused Grouse Creek Mining, Inc. to modify components of the original project. Grouse Creek Mining proposes to construct an open pit mine, waste dumps, haul road, processing facilities, mine tailing embankments and impoundments, and widening of USFS Forest Road #40172 along Jordan Creek. The 1984 EIS Project Area has also been expanded under the modified proposed project to include the Grouse Creek drainage basin. The supplemental EIS will evaluate the new or changed aspects of the Project.

A range of alternatives will be considered, including the no-action alternative. Other alternatives will be developed to address significant issues and to mitigate impacts.

Scoping of this project was initiated on August 24, 1989 through an informational meeting held in Stanley, Idaho by Grouse Creek Mining, Inc. Numerous Federal, State, and local agencies and other individuals and organizations were represented at the August 24 meeting. All interested and affected publics are invited to participate in the scoping process. This process will include:

1. Identification of new or additional issues.
2. Identification of issues to be analyzed in depth.
3. Elimination of insignificant issues or those sufficiently covered in the original Sunbeam EIS.
4. Exploring additional alternatives.
5. Identifying potential environmental effects of the proposed action and alternatives (i.e., direct, indirect, and cumulative effects and connected actions).

Additional public meetings are tentatively scheduled for November 1989 and will be held in Stanley and Challis, Idaho. Actual dates, times and locations for these meetings will be announced through the news media, by letter or personal contact.

The Fish and Wildlife Service of the Department of the Interior, Army Corps of Engineers of the Department of Army, and the U.S. Environmental Protection Agency (EPA) have been invited to participate as cooperating agencies. The U.S. Fish and Wildlife Service will evaluate potential impacts on threatened and endangered species habitat if any are found to exist in and adjacent to proposed project area.

The Army Corps of Engineers is responsible for issuance of the Clean Water Act section 404 permit, regulating the discharge of dredged or fill materials into navigable waters. The EPA is responsible for the issuance of the National Pollution Discharge Elimination System (NPDES) permit, regulating any discharges to surface water. The SEIS will provide the National Environmental Policy Act documentation requirements necessary for the issuance of the section 404 and the NPDES permits. Numerous other State and local permits and licenses will be required to implement the proposed action.

Jack C. Griswold, Forest Supervisor of the Challis National Forest, Challis, Idaho, is the responsible official for this action. The Forest Service is the lead agency.

The DSEIS is expected to be filed with the Environmental Protection Agency and be available for public review in April of 1990. At that time, the Environmental Protection Agency will publish a notice of availability of the draft supplement in the **Federal Register**.

The comment period on the DSEIS will be 45 days from the date the Environmental Protection Agency's notice of availability appears in the **Federal Register**. It is very important that those interested in this proposed action participate at that time. To be most useful, comments on the DSEIS should be as specific as possible and may address the adequacy of the statement or the merits of the alternatives discussed (See The Council on Environmental Quality Regulations for implementing the procedural provisions of the National Environmental Policy Act at 40 CFR 1503.3).

In addition, Federal court decisions have established that reviewers of DSEIS's must structure their participation in the environmental review of the proposal so that it is meaningful and alerts an agency to the reviewers' position and contentions. *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 553 (1978). Environmental objections that could have been raised at the draft stage may be waived if not raised until after completion of the SEIS. *City of Angoon* v. *Hodel*, (9th Circuit, 1986) and *Wisconsin Heritages, Inc.* v. *Harris*, 490 F. Supp. 1334, 1338 (E.D. Wis. 1980). The reason for this is to ensure that substantive comments and objections are made available to the Forest Service at a time when it can meaningfully consider them and respond to them in the final.

The SEIS is scheduled to be completed and available to the public by August 1990. The responsible official will document the decision and the reasons supporting it in a Record of Decision. That decision will be subject to appeal pursuant to 36 CFR 217.

Dated: October 23, 1989.

**Ronald L. Johnson,**

*Acting Forest Supervisor.*

[FR Doc. 89–2551 Filed 10–30–89; 8:45 am]

BILLING CODE 3410–11–M

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### Marine Mammals; National Zoological Park, Smithsonian Institution

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

**ACTION:** Application for Permit; National Zoological Park—Smithsonian Institution (P6L).

**SUMMARY:** Notice is hereby given that an Applicant has applied in due form for a Scientific Research Permit to import marine mammal samples as authorized by the Marine Mammal Protection Act of 1972 (16 U.S.C. 1361–1407), and the Regulations Governing the Taking and Importing of Marine Mammals (50 CFR part 216).

1. Applicant: National Zoological Park, Smithsonian Institution, Washington, DC 20008.

2. Type of Permit: Scientific Research.

3. Name and Number of Marine Mammals: Harbor seals (*Phoca vitulina*), up to 80; Gray seal (*Halichoerus grypus*), up to 160.

4. The Applicant requests permission to import samples of milk (including gastric milk contents), blood and tissues (organs and blubber) from harbor seals and gray seals, collected from animals under a research permit issued by the Director General of Fisheries and Oceans, Government of Canada. Tissues were previously obtained by the Canadian Government from animals sacrificed according to Canadian Sealing Regulations.

5. Location and Duration of Activity: Samples will be obtained from seals on Sable Island, Nova Scotia, Canada. The requested duration for import of samples is three years.

Concurrent with the publication of this notice in the **Federal Register**, the Secretary of Commerce is forwarding copies of this application to the Marine Mammal Commission and the Committee of Scientific Advisors.

Written data or views, or requests for a public hearing on this application should be submitted to the Assistant Administrator for Fisheries, National Marine Fisheries Service, U.S. Department of Commerce, 1335 East West Highway, Silver Spring, Maryland 20910, within 30 days of the publication of this notice. Those individuals requesting a hearing should set forth the specific reasons why a hearing on this particular application would be appropriate. The holding of such hearing is at the discretion of the Assistant Administrator for Fisheries. All statements and opinions contained in this application are summaries of those of the Applicant and do not necessarily reflect the views of the National Marine Fisheries Service.

Documents submitted in connection with the above application are available for review by interested persons in the following offices:

Office of Protected Resources and Habitat Programs, National Marine Fisheries Service, 1335 East West Highway, Room 7330, Silver Spring, Maryland 20910;

Director, Northeast Region, National Marine Fisheries Service, NOAA, One Blackburn Drive, Gloucester, Massachusetts 01930; and

Director, National Marine Mammal Laboratory, National Marine Fisheries Service, NOAA, 7600 Sand Point Way, NE BIN C15700, Seattle, Washington 98115.

Dated: October 19, 1989.

**Nancy Foster,**

*Director, Office of Protected Resources and Habitat Programs.*

[FR Doc. 89–25537 Filed 10–31–89; 8:45 am]

BILLING CODE 3510–22–M

## COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

### Rescission of a Limit on Luggage of Silk Blend and Other Vegetable Fiber Produced or Manufactured in the People's Republic of China

October 24, 1989.

**AGENCY:** Committee for the Implementation of Textile Agreements (CITA).

**ACTION:** Issuing a directive to the Commissioner of Customs cancelling a limit.

**EFFECTIVE DATE:** October 31, 1989.

**FOR FURTHER INFORMATION CONTACT:** Jerome Turtola, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 377–4212.

**SUPPLEMENTARY INFORMATION:**

**Authority:** Executive Order 11651 of March 3, 1972, as amended; section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854).

Pursuant to consultations held with the Government of the People's Republic of China, the United States Government has decided to cancel the current restraint limit on luggage of silk blend and other vegetable fiber in Category 870.

A description of the textile and apparel categories in terms of HTS numbers is available in the CORRELATION: Textile and Apparel Categories with the Harmonized Tariff Schedule of the United States (see **Federal Register** notice 53 FR 44937, published on November 7, 1988). Also see 53 FR 50276, published on December 14, 1988.

**Auggie D. Tantillo,**

*Chairman, Committee for the Implementation of Textile Agreements.*

**Committee for the Implementation of Textile Agreements**

October 24, 1989.

Commissioner of Customs,
*Department of the Treasury,*
*Washington, DC 20229.*

Dear Mr. Commissioner: Effective on October 31, 1989, this directive cancels only that portion of the directive of December 6, 1988 issued to you by the Chairman, Committee for the Implementation of Textile Agreements, which establishes a restraint limit for silk blend and other vegetable fiber textile products in Category 870, produced or manufactured in China and exported during the twelve-month period which began on January 1, 1989 and extends through December 31, 1989.

The Committee for the Implementation of Textile Agreements has determined that this action falls within the foreign affairs exception to the rulemaking provisions 5 U.S.C. 553(a)(1).

Sincerely,

Auggie D. Tantillo,

*Chairman, Committee for the Implementation of Textile Agreements.*

[FR Doc. 89–25420 Filed 10–27–89; 8:45 am]

BILLING CODE 3510–DR–M

### Adjustment of Import Limits for Certain Cotton, Wool, Man-Made Fiber, Silk Blend and Other Vegetable Fiber Textiles and Textile Products Produced or Manufactured in the Republic of Korea

October 25, 1989.

**AGENCY:** Committee for the Implementation of Textile Agreements (CITA).

**ACTION:** Issuing a directive to the Commissioner of Customs adjusting limits.

**EFFECTIVE DATE:** November 1, 1989.

**FOR FURTHER INFORMATION CONTACT:** Kimbang Pham, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 377–4212. For information on the quota status of these limits, refer to the Quota Status Reports posted on the bulletin boards of each Customs port or call (202) 566–8041. For information on embargoes and quota re-openings, call (202) 377–3715.

**SUPPLEMENTARY INFORMATION:**

**Authority:** Executive Order 11651 of March 3, 1972, as amended; Sec. 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854).

The current limits for Groups I, II, and III, and certain sublevels within the groups, are being adjusted, variously, for swing, carryover and shift.

A description of the textile and apparel categories in terms of HTS numbers is available in the CORRELATION: Textile and Apparel Categories with the Harmonized Tariff Schedule of the United States (see **Federal Register** notice 53 FR 44937, published on November 7, 1988). Also see 53 FR 50988, published on December 19, 1988.

The letter to the Commissioner of Customs and the actions taken pursuant to it are not designed to implement all of the provisions of the bilateral agreement, but are designed to assist only in the implementation of certain of its provisions.

**Auggie D. Tantillo,**

*Chairman, Committee for the Implementation of Textile Agreements.*

**Committee for the Implementation of Textile Agreements**

October 25, 1989.

Commissioner of Customs,
*Department of the Treasury,*
*Washington, DC 20229.*

Dear Mr. Commissioner: This directive amends, but does not cancel, the directive of December 13, 1988 issued to you by the Chairman, Committee for the Implementation of Textile Agreements. That directive concerns imports into the United States of certain cotton, wool, man-made fiber, silk blend and other vegetable fiber textiles and textile products, produced or manufactured in the Republic of Korea and exported during the twelve-month period which began on January 1, 1989 and extends through December 31, 1989.

Effective on November 1, 1989, the directive of December 13, 1988 is amended further to adjust the limits for the following categories, as provided under the terms of the current bilateral textile agreement between the Governments of the United States and the Republic of Korea:

| Category | Adjusted 12-month limit [1] |
|---|---|
| Group I | |
| 200, 201, 218–220, 222–229, 300–326, 360–363, 369–0[2], 400, 410, 414, 464–469, 600–607, 611–622, 624–629, 665–669 and 670–0[3], as a group. | 387,587,856 square meters equivalent. |
| Sublevels in Group I | |
| 200 | 375,199 kilograms. |
| 300/301 | 2,689,281 kilograms. |
| 317/326 | 16,054,242 square meters. |
| 604 | 295,819 kilograms. |
| 611 | 2,230,203 square meters. |
| 625/626/627/628/629. | 11,749,337 square meters. |
| 669–T [4] | 3,924,236 kilograms. |
| Group II | |
| 237, 239, 330–354, 359, 431–448, 459, 630–654 and 659, as a group. | 583,581,095 square meters equivalent. |
| Sublevels in Group II | |
| 333/334 | 106,000 dozen. |
| 335 | 111,229 dozen. |
| 336 | 49,635 dozen. |
| 338/339 | 851,843 dozen. |
| 340 | 471,144 dozen of which not more than 155,980 dozen shall be in Category 340–Y.[5] |
| 341 | 201,608 dozen. |
| 342 | 75,429 dozen. |
| 347/348 | 377,339 dozen. |
| 351 | 126,819 dozen. |
| 352 | 149,282 dozen. |
| 353/354/653/654 | 249,281 dozen. |
| 359–H [6] | 2,126,281 kilograms. |
| 433/434 | 18,063 dozen of which not more than 13,627 dozen shall be in Category 433 and not more than 6,802 dozen shall be in Category 434. |
| 435 | 34,151 dozen. |
| 436 | 13,655 dozen. |
| 442 | 46,526 dozen. |
| 443 | 338,158 numbers. |
| 444 | 52,737 numbers. |
| 447 | 85,504 dozen. |
| 448 | 34,691 dozen. |
| 459–W [7] | 92,974 kilograms. |
| 631 | 260,499 dozen pairs. |
| 632 | 1,996,798 dozen pairs. |
| 633/634/635 | 1,340,662 dozen of which not more than 150,000 dozen shall be in Category 633, not more than 803,000 dozen shall be in Category 634, and not more than 559,000 dozen shall be in Category 635. |
| 638/639 | 5,756,299 dozen. |
| 640–D [8] | 3,477,935 dozen of which not more than 1,325,538 dozen shall be in Category 640–DY.[9] |
| 640–0 [10] | 2,548,567 dozen of which not more than 2,192,235 dozen shall be in Category 640–OY.[11] |
| 641 | 1,042,542 dozen of which not more than 37,730 dozen shall be in Category 641–Y.[12] |
| 642 | 98,672 dozen. |
| 643 | 778,560 numbers. |
| 647/648 | 1,273,262 dozen. |
| 650 | 21,113 dozen. |
| 659–H [13] | 1,211,917 kilograms. |
| 659–S [14] | 156,811 kilograms. |
| Group III | |
| 831–844 and 847–859, as a group. | 12,507,858 square meters equivalent. |
| Sublevels in Group III | |
| 835 | 29,595 dozen. |
| 836 | 76,315 dozen. |

[1] The limits have not been adjusted to account for any imports exported after December 31, 1988.

[2] In Category 369–0, all HTS numbers except 4202.12.4000, 4202.12.8020, 4202.12.8060, 4202.92.1500, 4202.92.3015 and 4202.92.6000 in Category 369–L.

[3] In Category 670–0, all HTS numbers except 4202.12.8030, 4202.12.8070, 4202.92.3020, 4202.92.3030 and 4202.92.9020 in Category 670–L.

[4] In Category 669–T, only HTS numbers 6306.12.0000, 6306.19.0010 and 6306.22.9000.

[5] In Category 340–Y, only HTS numbers 6205.20.2015, 6205.20.2020, 6205.20.2046, 6205.20.2050 and 6205.20.2060.

[6] In Category 359–H, only HTS numbers 6505.90.1530 and 6505.90.2060.

[7] In Category 459–W, only HTS number 6505.90.4060.

[8] In Category 640–D, only HTS numbers 6205–30.2010, 6205.30.2020, 6205.30.2030, 6205.90.2040, 6205.90.2030 and 6205.90.4030.

[9] In Category 640–DY, only HTS numbers 6205.30.2010 and 6205.30.2020.

[10] In Category 640–0, only HTS numbers 6203.23.0080, 6203.29.2050, 6205.30.1000, 6205.30.2050, 6205.30.2060, 6205.30.2070, 6205.30.2080 and 6211.33.0040.

[11] In Category 640–OY, only HTS numbers 6205.30.2050 and 6205.30.2060.

[12] In Category 641–Y, only HTS numbers 6204.23.0050, 6204.29.2030, 6206.40.3010 and 6206.40.3025.

[13] In Category 659–H, only HTS numbers 6502–00.9030, 6504.00.9015, 6504.00.9060, 6505.90.5060, 6505.90.6060, 6505.90.7060 and 6505.90.8060.

[14] In Category 659–S, only HTS numbers 6112.31.0010, 6112.31.0020, 6112.41.0010, 6112.41.0020, 6112.41.0030, 6112.41.0040, 6211.11.1010, 6211.11.1020, 6211.12.1010 and 6211.12.1020.

The Committee for the Implementation of Textile Agreements has determined that these actions fall within the foreign affairs exception to the rulemaking provisions of 5 U.S.C. 553(a)(1).

Sincerely,

Auggie D. Tantillo,

*Chairman, Committee for the Implementation of Textile Agreements.*

[FR Doc. 89–25557 Filed 10–30–89; 8:45 am]

BILLING CODE 3510–DR–M

## DEPARTMENT OF DEFENSE

### Public Information Collection Requirement Submitted to OMB for Review

**ACTION:** Notice.

The Department of Defense has submitted to OMB for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Title, Applicable Form, and Applicable OMB Control Number: Civilian Validation of ASVAB–14; Supplemental Information form, Behaviorally-Anchored Rating Scales (BARS), Importance of Occupational Dimensions; 0704–0292.

*Type of Request:* Extension.

*Average Burden Hours/Minutes per Response:* 15 minutes

*Frequency of Resonse:* One

*Number of Respondents:* 7,736

*Annual Burden Hours:* 1,934

*Annual Responses:* 7,736

*Needs and Uses:* Three types of instruments will be used to determine the valdity of ASVAB 14 for predicting

performance in 12 civilian occupations. The Supplemental Information form will ask employees who take the ASVAB certain background information about themselves. The Behaviorally-anchored Rating Scales will ask supervisors their employees' performance; and the third instrument, Importance of Occupational Dimensions, will ask supervisors to indicate importance of the occupational dimensions covered in the scales.

*Affected Public:* Individuals or households, State or local governments, businesses or other for-profit, Federal agencies or employees, non-profit institutions.

*Frequency:* One-time only.

*Respondent's Obligation:* Voluntary.

*OMB Desk Officer:* Dr. Timothy Sprehe

Written comments and recommendations on the proposed information collection should be sent to Dr. Timothy Sprehe at Office of Management of Budget, Desk Officer, Room 3235, New Executive Office Building, Washington, DC 20503.

*DoD Clearance Officer:* Ms. Pearl Rascoe-Harrison.

Written request for copies of the information collection proposal should be sent to Ms. Rasco-Harrison, WHS/DIOR, 1215 Jefferson Davis Highway, Suite 1204, Arlington, Virginia 22202-4302.

Dated: October 25, 1989.

**L. M. Bynum,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

[FR Doc. 89-25587 Filed 10-30-89; 8:45 am]

BILLING CODE 3810-01-M

## Armed Forces Institute of Pathology, Scientific Advisory Board; Meeting

In order to comply with Section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463), notice is hereby given of a meeting of the Armed Forces Institute of Pathology's Scientific Advisory Board, November 8 and November 9, 1989, at 0830 hours in the Director's Conference Room, Armed Forces Institute of Pathology, Washington, DC 20306-6000. This meeting will be open to the public.

The proposed agenda include professional discussion of the mission of the Armed Forces Institute of Pathology relating to consultation, education and research. The Executive Secretary from whom substantive program information may be obtained is Colonel Lloyd A. Schlaeppi, Executive Officer, Armed Forces Institute of Pathology, Washington, DC 20306-6000, telephone (202) 576-2900.

**Kenneth L. Denton,**

*Department of the Army, Alternate Liaison Officer with the Federal Register.*

[FR Doc. 89-25515 Filed 10-30-89; 8:45 am]

BILLLING CODE 3710-08-M

## Department of the Army

## Privacy Act of 1974, Amended System of Records Notice

**AGENCY:** Department of the Army, DOD.

**ACTION:** Amendment of one system of records notice for public comment.

**SUMMARY:** The Department of the Army proposes to amend one system of records to its inventory of systems of records subject to the Privacy Act of 1974, as amended, (5 U.S.C. 552a). The system notice for the amended system is set forth below.

**DATES:** This amendment will be effective November 30, 1989, unless comments are received which would result in a contrary determination.

**ADDRESS:** Send comments to Mr. Robert Priest, Chief, Systems Management Branch, HQ, Army Information Systems Command (AS-OPS-MR), Ft. Huachuca, AZ 85613-5000.

**SUPPLEMENTARY INFORMATION:** The Department of the Army systems of records notices subject to the Privacy Act of 1974, as amended, (5 U.S.C. 552a), have been published in the **Federal Register** as follows:

50 FR 22090, May 29, 1985 (Compilation, changes follow)
51 FR 23576, Jun 30, 1986
51 FR 30900, Aug 29, 1986
51 FR 40479, Nov 7, 1986
51 FR 44361, Dec 9, 1986
52 FR 11847, Apr 13, 1987
52 FR 18798, May 19, 1987
52 FR 25905, Jul 9, 1987
52 FR 32329, Aug 27, 1987
52 FR 43932, Nov 17, 1987
53 FR 12971, Apr 20, 1988
53 FR 16575, May 10, 1988
53 FR 21509, Jun 8, 1988
53 FR 28247, Jul 27, 1988
53 FR 28249, Jul 27, 1988
53 FR 28430, Jul 28, 1988
53 FR 34576, Sep 7, 1988
53 FR 49586, Dec 8, 1988
53 FR 51580, Dec 22, 1988
54 FR 10034, Mar 9, 1989
54 FR 11790, Mar 22, 1989
54 FR 14835, Apr 13, 1989

The record system was previously published in the **Federal Register** at 54 FR 14835 on April 13, 1989. The system is being amended to separate the "Disclosure to consumer reporting agencies" from the "Routine uses" element and adding the Federal Claims Collection Act of 1966 and the Debt Collection Act of 1982 to the "Authority" element. The specific changes to the record system being amended is set forth below, followed by the system notice, as amended, published in its entirety. The amended notice is not within the purview of subsection (r) of the Privacy Act, 5 U.S.C. 552a, which requires the submission of an altered system report.

**L.M. Bynum,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

October 24, 1989.

**AAFES0702.34**

*System name:*

Individual Accounts Receivable Files (54 FR 14835, Apr 13, 1989).

*Changes:*

* * * * *

*Authority for maintenance of the system:*

Delete entire entry and substitute with "10 U.S.C. 3012 and 8012; Federal Claims Collection Act of 1966, 31 U.S.C. § 3711; Debt Collection Act of 1982 (Pub. L. 97-365); 31 U.S.C. 5512 through 5514; and E.O. 9397."

* * * * *

*Routine uses of records maintained in the system, including categories of users and the purpose of such uses:*

Delete paragraph d. in its entirety. Change paragraph e. to d. Add the following element after paragraph d.:

*"Disclosure to consumer reporting agencies:*

Disclosure pursuant to 5 U.S.C. 552a(b)(12) may be made from this system to consumer reporting agencies as defined in the Fair Credit Reporting Act (15 U.S.C. 1681a(f) or the Federal Claims Collection Act of 1966 (31 U.S.C. 3701(a)(3)) to collect dishonored check indebtedness."

* * * * *

**AAFES0702.34**

**SYSTEM NAME:**

Individual Accounts Receivable Files.

**SYSTEM LOCATION:**

Headquarters, Army and Air Force Exchange Service (AAFES), Dallas, TX 75222; Headquarters, AAFES Europe; and Headquarters, AAFES, Pacific. Official mailing addresses are published as an appendix to the Army's compilation of systems notices.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

AAFES customers (military, retirees, civilian, and civilian dependents).

**CATEGORIES OF RECORDS IN THE SYSTEM:**

Case files relating to debts owed by individuals, including dishonored checks, deferred payment plans, home layaways, salary/travel advances, pecuniary liability claims and credit cards. These files include all correspondence to the debtor/his or her commander, notices from banks concerning indebtedness, originals or copies of returned checks, envelopes showing attempts to contact the debtor, payment documentation, pay adjustment authorizations, deferred payment plan applications, charges and statements or accounts, and home layaway cards.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

10 U.S.C. 3012 and 8012; Federal Claims Collection Act of 1966, 31 U.S.C. 3711; Debt Collection Act of 1982 (Pub. L. 97–365); 31 U.S.C. 5512 through 5514; and E.O. 9397.

**PURPOSE(S):**

To process, monitor, and post audit accounts receivable, to administer the Federal Claims Collection Act, and to answer inquiries pertaining thereto. To collect dishonored check indebtedness.

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSE OF SUCH USES:**

To the U.S. Department of Justice/U.S. Attorneys for legal action and/or final disposition of the debt claim.

To the Internal Revenue Service to obtain locator status for delinquent accounts receivables (controls exist to preclude redisclosure of solicited IRS address data; and/or to report write-off amounts as taxable income as pertains to amounts compromised and accounts barred from litigation due to age.

To private collection agencies for collection action when the Army has exhausted its internal collection efforts.

To civil or criminal law enforcement agencies for law enforcement purposes.

The "Blanket Routine Uses" that appear at the beginning of the Department of the Army's compilation of systems of records also apply to this system.

**DISCLOSURE TO CONSUMER REPORTING AGENCIES:**

Disclosure pursuant to 5 U.S.C. 552a(b)(12) may be made from this system to consumer reporting agencies as defined in the Fair Credit Reporting Act (15 U.S.C. 1681a(f) or the Federal Claims Collection Act of 1966 (31 U.S.C. 3701(a)(3)) to collect dishonored check indebtedness.

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING AND DISPOSING OF RECORDS IN THE SYSTEM:**

**STORAGE:**

Paper records in individual file folders.

**RETRIEVABILITY:**

Retrieved by customer's surname or Social Security Number.

**SAFEGUARDS:**

Records are maintained in areas accessible only by authorized personnel within AAFES/CM–G.

**RETENTION AND DISPOSAL:**

Records are retained in current files until close of fiscal year in which the receivable is cleared, or if office space doesn't permit, at the end of the fiscal quarter in which receivable is cleared. At year end, files are stored for 10 years and subsequently forwarded to the Federal Records Center, Fort Worth, Texas for destruction.

**SYSTEM MANAGER(S) AND ADDRESS:**

Commander, Army and Air Force Exchange Service, Dallas, TX 75222.

**NOTIFICATION PROCEDURE:**

Individuals seeking to determine whether this system of records contains information about themselves should address written inquiries to the Commander, Army and Air Force Exchange Service, ATTN: Chief, General Accounting Branch, Comptroller Division, Dallas, TX 75222 or telephone (214) 330–2631.

Individuals should provide full name, Social Security Number, or other acceptable identifying information that will facilitate locating the records.

**RECORD ACCESS PROCEDURE:**

Individuals seeking access to information about themselves contained in this system of records should address written inquiries to the Commander, Army and Air Force Exchange Service, ATTN: Chief, General Accounting Branch, Comptroller Division, Dallas, TX 75222 or telephone (214) 330–2631.

Individuals should provide full name, Social Security Number, or other acceptable identifying information that will facilitate locating the records.

**CONTESTING RECORD PROCEDURE:**

The Department of the Army rules for accessing records and for contesting contents and appealing initial agency determinations are published in Department of the Army Regulation 430–21–8; 32 CFR Part 505; or may be obtained from the system manager.

**RECORD SOURCE CATEGORIES:**

From the customer and from correspondence between AAFES and Vendors.

**EXEMPTIONS CLAIMED FOR THE SYSTEM:**

None.

[FR Doc. 89–25588 Filed 10–30–89; 8:45 am]
BILLING CODE 3810–01–M

## Corps of Engineers, Department of the Army

### Intent To Prepare a Draft Environmental Impact Statement (DEIS) for a Clean Water Act Section 404 Permit for Construction of Hunter Lake Reservoir near Springfield, IL

**AGENCY:** U.S. Army Corps of Engineers, DoD.

**ACTION:** Notice of intent.

**SUMMARY:** On July 26, 1989, an application for a permit under Section 404 of the Clean Water Act (33 CFR part 325) was submitted to the U.S. Army Corps of Engineers, Rock Island District (Corps) for construction of the Hunter Lake Reservoir near Springfield, Illinois. A DEIS will be prepared to address the effects of construction and operation of the project.

**FOR FURTHER INFORMATION CONTACT:** Questions about the proposed action and DEIS can be answered by: Charlene Carmack; 309/788–6361, Ext. 570. Written comments may be addressed to: District Engineer, U.S. Army Engineer District, Rock Island, ATTN: Planning Division, Clock Tower Building—P.O. Box 2004, Rock Island, Illinois 61204–2004.

**SUPPLEMENTARY INFORMATION:**

1. The proposed reservoir, presently known as Hunter Lake, would be constructed by building an earthfill dam across Horse Creek, approximately one mile downstream of the confluence of Horse and Brush Creeks. The lake would have a projected storage volume of 17.4 billion gallons with a surface area at normal lake elevation of 3,250 acres. Proposed development will include approximately 82 miles of shoreline and 4,450 acres of marginal property surrounding the area of inundation.

2. Alternatives, in addition to the No Action alternative, to be considered for meeting water supply needs include temporary or permanent diversions of water from the Sangamon River to supplement the City's present supply.

3. This notice solicits input and assistance from the interested public and invites participation by affected Federal and State agencies having special jurisdiction and/or expertise.

—Impacts to natural, social, economic, and cultural resources resulting from construction and operation of the project will be addressed and considered in determining whether it is in the public interest to grant or to deny the permit.

4. A scoping meeting is expected to be scheduled within the last quarter of calendar year 1989 to facilitate early input to the NEPA process and identify significant issues to be analyzed in depth in the EIS. The date, time and location of this meeting is yet to be determined.

5. It is anticipated that the DEIS will be made available to the public in the second quarter of calendar year 1991.

Dated: October 13, 1989.

**John R. Brown,**

*Colonel, EN, Commanding.*

[FR Doc. 89-25514 Filed 10-30-89; 8:45 am]

BILLING CODE 3710-HV-M

## Department of the Navy

## Privacy Act of 1974; Amended Record Systems

**AGENCY:** Department of the Navy, DOD.

**ACTION:** Notice of amended systems of records subject to the Privacy Act.

**SUMMARY:** The Department of the Navy proposes to amend eight systems of records in its inventory of record systems subject to the Privacy Act of 1974, as amended (5 U.S.C. 552a).

**DATES:** This proposed action will be effective without further notice November 30, 1989, unless comments are received which would result in a contrary determination.

**ADDRESS:** Send any comments to Mrs. Gwen Aitken, Head, PA/FOIA Branch, Office of the Chief of Naval Operations (OP-09B30), Room 5E521, Department of the Navy, The Pentagon, Washington, DC 20350-2000. Telephone (202) 697-1459, Autovon: 227-1459.

**SUPPLEMENTARY INFORMATION:** The Department of the Navy systems of records notices inventory subject to the Privacy Act of 1974 have been published in the **Federal Register** as follows:

51 FR 12908 Apr 16, 1986
51 FR 18086 May 16, 1986 (Compilation, changes follow)
51 FR 19884 Jun 3, 1986
51 FR 30377 Aug 26, 1986
51 FR 30393 Aug 26, 1986
51 FR 45931 Dec 23, 1986
52 FR 2147 Jan 20, 1987
52 FR 2149 Jan 20, 1987
52 FR 8500 Mar 18, 1987
52 FR 15530 Apr 29, 1987
52 FR 22671 Jun 15, 1987
52 FR 45846 Dec 2, 1987
53 FR 17240 May 16, 1988
53 FR 21512 Jun 8, 1988
53 FR 22028 Jun 13, 1988
53 FR 25363 Jul 6, 1988
53 FR 39499 Oct 7, 1988
53 FR 41224 Oct 20, 1988
54 FR 8322 Feb 28, 1989
54 FR 14377 Apr 11, 1989
54 FR 32682 Aug 9, 1989
54 FR 40160 Sep 29, 1989
54 FR 41495 Oct 10, 1989

The specific changes to the record systems being amended are set forth below, followed by the system notices, as amended, published in their entirety. These notices are not within the purview of subsection (r) of the Privacy Act, 5 U.S.C. 552a, which requires the submission of altered systems reports.

October 24, 1989.

**L.M. Bynum,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

**N10140-1**

*System name:*

Ration Card, Luxury Permit Record Cards (51 FR 18207, May 16, 1986).

*Changes:*

*System name:*

Delete entire entry and substitute with "Ration Card Records".

*System location:*

Delete entire entry and substitute with "U.S. Navy Personnel Support Activity Detachments London, Holy Loch, Brawdy, Edzell and Thurso, United Kingdom."

* * * * *

*Categories of records in the system:*

In line one, delete the words "/Luxury Permits." In line five, delete the words "/Luxury Permit." In line seven, delete the words "Card/Luxury Permit" and replace with "Cards".

* * * * *

*Purpose(s):*

In line nine, delete the words "Card and Luxury Permits program" and replace with "Cards".

* * * * *

*Policies and practices for storing, retrieving, accessing, retaining and disposing of records in the system:*

*Storage:*

In line one, delete the words "Card/Luxury Permit" and replace with "Cards".

* * * * *

*Retention and disposal:*

Delete the entry in its entirety and substitute with "All records maintained for duration of tour of personnel concerned and then destroyed."

* * * * *

**N10140-1**

**SYSTEM NAME:**

Ration Card Records.

**SYSTEM LOCATION:**

U.S. Navy Personnel Support Activity Detachments London, Holy Loch, Brawdy, Edzell, and Thurso, United Kingdom.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

Officers, enlisted, and civilian component personnel.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

Ration Card holders are entered on 5" x 8" color coded cards, which are contained in boxes and maintained alphabetically. Ration Cards are registered in log, showing name of individual and number of Ration Cards issued.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

5 U.S.C. 301, Departmental Regulations.

**PURPOSE(S):**

To establish strict control over persons entitled to acquire tax-free ration items; to ensure entitled personnel do not obtain more than one ration card, and for inspection by officers of Her Majesty's Commissioners of Customs and Excise, United Kingdom, with whom the Ration Card program was originally negotiated by the U.S. military authorities. Accredited members of the Naval Investigative Service Office may have access, upon request.

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSE OF SUCH USES:**

The "Blanket Routine Uses" that appear at the beginning of the Department of the Navy's compilation of systems of records apply to this system.

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING AND DISPOSING OF RECORDS IN THE SYSTEM:**

**STORAGE:**

All Ration Cards are maintained on 5" x 8" cards filed and listed in numerical order in logs.

**RETRIEVABILITY:**

Retrieved by name.

**SAFEGUARDS:**

Records held in file cabinets in space maintained by Enlisted Personnel Office during working hours and locked after working hours.

**RETENTION AND DISPOSAL:**

All records maintained for duration of tour of personnel concerned and then destroyed.

**SYSTEM MANAGER(S) AND ADDRESS:**

Commander, U.S. Naval Activities, United Kingdom, Box 60, FPO New York 09510–5000.

**NOTIFICATION PROCEDURE:**

Individuals seeking to determine whether this system of records contains information about themselves should visit the U.S. Navy Personnel Support Activity Detachment where attached. Official addresses are published as an appendix to the Department of the Navy's compilation of systems of records.

Personnel should be prepared to present a valid military identification card or Department of Defense identification card to view records pertaining to themselves.

**RECORD ACCESS PROCEDURE:**

Individuals seeking access to records about themselves contained in this system of records should visit the U.S. Navy Personnel Support Activity where attached. Official addresses are published as an appendix to the Department of the Navy's compilation of systems of records.

**CONTESTING RECORD PROCEDURE:**

The Department of the Navy rules for accessing records and contesting contents and appealing initial determinations by the individual concerned are published in Secretary of the Navy Instruction 5211.5, 32 CFR Part 701, or may be obtained from the system manager.

**RECORD SOURCE CATEGORIES:**

Not applicable.

**EXEMPTIONS CLAIMED FOR THE SYSTEM:**

None.

N10140–4

*System name:*

USAREUR/USAFE Ration Card (51 FR 18208, May 16, 1986).

*Changes:*

* * * * *

*System location:*

Delete entire entry and substitute with "U.S. Navy Personnel Support Activity Detachment, Thurso UK, FPO New York 09516–1100."

*Categories of individuals covered by the system:*

In lines three and four, delete the words "U.S. Radio Station, FPO New York 09516" and substitute with "U.S. Naval Communication Station, FPO New York 09516–3000."

*Categories of records in the system:*

In line two, delete the word "* * * and * * *" and the period and replace the period with a comma. Delete line three in its entirety and substitute with "* * * and marital status."

* * * * *

*Safeguards:*

Delete the entire entry and substitute with "Locked safe in PSD with a 24 hour security alarm."

* * * * *

*System manager(s) and address:*

Delete the entire entry and substitute with "Commanding Officer, U.S. Navy Personnel Support Activity, UK/NOREUR FPO New York 09553–2900 is the overall policy official with the Officer in Charge, U.S. Navy Personnel Support Activity Detachment, Thurso UK, FPO New York 09516–1100 as the subordinate holder."

* * * * *

N10140–4

**SYSTEM NAME:**

USAREUR/USAFE Ration Card.

**SYSTEM LOCATION:**

U.S. Navy Personnel Support Activity Detachment, Thurso, United Kingdom, FPO New York 09516–1100.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

USN personnel and their dependent wives and children over 18 years of age who are stationed at U.S. Naval Communication Station, FPO New York 09516–3000.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

File sheet with member's name, rate, Social Security Number, organization assigned, and marital status.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

5 U.S.C. 301, Departmental Regulations.

**PURPOSE(S):**

To record the individuals holding a ration card.

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSE OF SUCH USES:**

The "Blanket Routine Uses" that appear at the beginning of the Department of the Navy's compilation of systems of records apply to this system.

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING AND DISPOSING OF RECORDS IN THE SYSTEM:**

**STORAGE:**

File folders.

**RETRIEVABILITY:**

Retrieved by name.

**SAFEGUARDS:**

Locked safe in PSD with a 24 hour security alarm.

**RETENTION AND DISPOSAL:**

Records are maintained as long as member retains ration card. After transfer, records are burned.

**SYSTEM MANAGER(S) AND ADDRESS:**

Commanding Officer, U.S. Navy Personnel Support Activity, UK/NOREUR FPO New York 09553–2900 is the overall policy official with the Officer in Charge, U.S. Navy Personnel Activity Detachment, Thurso United Kingdom, FPO New York 09516–1100 as the subordinate holder.

**NOTIFICATION PROCEDURE:**

Individuals seeking to determine whether this system of records contains information about themselves should address written inquiries to the Officer in Charge, U.S. Navy Personnel Support Activity Detachment, Thurso, United Kingdom, FPO New York 09516–2200. The request should include full name, address, and Social Security Number of the individual concerned and should be signed. Personal visitors must have valid military I.D. or, if no longer in the military, have other valid identification such as a driver's license.

**RECORD ACCESS PROCEDURE:**

Individuals seeking access to records about themselves contained in this system of records should address

written inquiries to the Officer in Charge, U.S. Navy Personnel Support Activity Detachment, Thurso, United Kingdom, FPO New York 09516–1100.

**CONTESTING RECORD PROCEDURE:**

The Department of the Navy rules for accessing records and contesting contents and appealing initial determinations by the individual concerned are published in Secretary of the Navy Instruction 5211.5, 32 CFR Part 701, or may be obtained from the system manager.

**RECORD SOURCE CATEGORIES:**

Applicable U.S. Servicemen.

**EXEMPTIONS CLAIMED FOR THE SYSTEM:**

None.

**N10140–6**

*System name:*

Gasoline Ration System (51 FR 18209, May 16, 1986).

*Changes:*

* * * * *

*Purpose(s):*

In lines one and two, delete the words "Transportation Officer" and replace with "custodian(s)".

* * * * *

*Storage:*

Delete entire entry and replace with "Index cards in a safe."

* * * * *

*Safeguards:*

In line three, delete the words "Transportation Officer" and replace with "custodian(s)".

*Retention and disposal:*

In line two, delete the words "or burning approximately * * *" In line three, place a "." after "transfer" and delete the words "of individual" and replace with "sale, death, or other changes in status."

* * * * *

**N10140–6**

**SYSTEM NAME:**

Gasoline Ration System.

**SYSTEM LOCATION:**

Officer in Charge, U.S. Naval Weapons Facility Detachment, FPO New York 09515–0052.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

All personnel stationed aboard Naval Weapons Facility Detachment Machrihanish who own private vehicles and wish to purchase Navy Exchange Gasoline.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

Record on each individual contains information on vehicle description; dates of vehicle insurance, inspection and tax; United Kingdom address of individual and amount of gasoline allowed.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

5 U.S.C. 301, Departmental Regulations.

**PURPOSE(S):**

Information is used by custodian(s) to allocate ration coupons to authorized personnel.

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSE OF SUCH USES:**

The "Blanket Routine Uses" that appear at the beginning of the Department of the Navy's compilation of systems of records apply to this system.

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING AND DISPOSING OF RECORDS IN THE SYSTEM:**

**STORAGE:**

Index cards in a safe.

**RETRIEVABILITY:**

Name.

**SAFEGUARDS:**

Locked in combination safe in an office which is locked when unmanned. Only custodian(s) know(s) combination to safe.

**RETENTION AND DISPOSAL:**

Records are destroyed by shredding one year after transfer, sale, death, or other changes in status.

**SYSTEM MANAGER(S) AND ADDRESS:**

Officer in Charge, U.S. Naval Weapons Facility, Detachment, FPO New York 09515–0052.

**NOTIFICATION PROCEDURE:**

Individuals seeking to determine whether this system of records contains information about themselves should address written inquiries to the Officer in Charge, U.S. Naval Weapons Facility, Detachment, FPO New York 09515–0052. The request should contain full name and address of the individual concerned and should be signed.

**RECORD ACCESS PROCEDURE:**

Individuals seeking access to records about themselves contained in this system of records should address written inquiries to the Officer in Charge, U.S. Naval Weapons Facility, Detachment, FPO New York 09515–0052.

**CONTESTING RECORD PROCEDURE:**

The Department of the Navy rules for accessing records and contesting contents and appealing initial determinations by the individual concerned are published in Secretary of the Navy Instruction 5211.5, 32 CFR Part 701, or may be obtained from the system manager.

**RECORD SOURCE CATEGORIES:**

Information concerning vehicles, insurance, inspection and tax is copied from the appropriate document as provided by the individual. Other information is received from the individual directly.

**EXEMPTIONS CLAIMED FOR THE SYSTEM:**

None.

**N12711–1**

*System name:*

Labor Management Relations Records (51 FR 18216, May 16, 1986)

*Changes:*

* * * * *

*System location:*

Delete lines one through four and substitute with "Office of Civilian Personnel Management (OCPM) (Code 31), Department of the Navy and Designated Contractors; OCPM Regional Offices; * * *"

*Categories of individuals covered by the system:*

In line five, beginning with "; Navy" delete the entry in its entirety and substitute with "or who are involved in the filing of an Unfair Labor practice complaint which has been referred to the Federal Labor Relations Authority (FLRA) for resolution, or who are involved in a labor negotiations impasse which has been referred to the Federal Service Impasses Panel or an interest arbitrator for resolution, or who are involved in a negotiability dispute which has been referred to the FLRA for resolution; union officials and representatives (both Navy employees and non-employees) involved in the aforementioned processes and in national consultation; independent arbitrators involved in grievance and interest arbitrations concerning Navy activities."

*Categories of records in the system:*

In line six, beginning with the word "arbitration" delete entry in its entirety and substitute with "case. Field

activities maintain manual rosters of local union officials and representatives. OCPM Headquarters maintains manual roster of addresses and files concerning national consultation with national/international unions regarding changes in Departmental-level civilian personnel policies. (2) ADP system maintains records by type of case and case number (not individual). Centrally maintained data base (access restricted to authorized users) contains all information pertaining to a specific case. Bargaining unit files contain information about each bargaining unit, including contact information on union local presidents."

* * * * *

*Purpose(s):*

In line four, beginning with the word "interpretation" delete entry in its entirety and substitute with "processing of unfair labor practice charges; adjudication of negotiability disputes, resolution of negotiations impasses; interpretation of 5 U.S.C. 7101–7135 through 3rd party case decisions; national consultation and other dealings with recognized unions."

*Routine uses of records maintained in the system, including categories of users and the purpose of such uses:*

In paragraph three, delete lines two through four in their entirety and substitute with "* * * Administrative Law Judge, arbitrator, or other proper 3rd party for the purpose of conducting a hearing or inquiry in connection with an employee's grievance, unfair labor practice charge, impasse, negotiability appeal, or other labor relations dispute." Delete paragraph four in its entirety.

*Policies and practices for storing, retrieving, accessing, retaining and disposing of records in the system:*

*Storage:*

At end of entry, add "ADP records are stored in a central, contractor maintained data base."

*Retrievability:*

At end of entry, add "ADP records are retrieved by case subject, activity, bargaining unit, servicing personnel office, command, or 3rd party docket number."

*Safeguards:*

In line one, delete the word "* * * manual * * *" and at the end of the entry add "Access to the ADP system is controlled through the use of multiple security passwords."

*System manager(s) and address:*

Delete the entire entry and substitute with "Office of Civilian Personnel Management (Code 31), 800 North Quincy Street, Arlington, VA 22203–1998."

* * * * *

**N12711-1**

**SYSTEM NAME:**

Labor Management Relations Records System.

**SYSTEM LOCATION:**

Office of Civilian Personnel Management (OCPM) (Code 31), Department of the Navy and Designated Contractors; OCPM Regional Offices; and Navy staff headquarters and field activities employing civilians. Official mailing addresses are published as an appendix to the Department of the Navy's compilation of systems of records.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

Navy civilian employees paid from appropriated and non-appropriated funds, who are involved in a grievance which has been referred to an arbitrator for resolution, or who are involved in the filing of an Unfair Labor practice complaint which has been referred to the Federal Labor Relations Authority (FLRA) for resolution, or who are involved in a labor negotiations impasse which has been referred to the Federal Service Impasses Panel or an interest arbitrator for resolution, or who are involved in a negotiability dispute which has been referred to the FLRA for resolution; union officials and representatives (both Navy employees and non-employees) involved in the aforementioned processes and in national consultation; independent arbitrators involved in grievance and interest arbitrations concerning Navy activities.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

Records are comprised of (1) Manual files maintained in paper folders, manually filed by type of case and case number (not individual). Folder contains all information pertaining to a specific case. Field activities maintain manual rosters of local union officials and representatives. OCPM Headquarters maintains manual roster of addresses and files concerning national consultation with national/international unions regarding changes in Departmental level civilian personnel policies. (2) ADP system maintains records by type of case and case number (not individual). Centrally maintained data base (access restricted to authorized users) contains all information pertaining to a specific case. Bargaining unit files contain information about each bargaining unit, including contact information on union local presidents.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

5 U.S.C. 7101–7135.

**PURPOSE(S):**

To manage the Labor-Management Relations Program, e.g., administration/implementation of arbitration awards; processing of unfair labor practice charges; adjudication of negotiability disputes, resolution of negotiations impasses; interpretation of 5 U.S.C. 7101–7135 through 3rd party case decisions; national consultation and other dealings with recognized unions.

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSE OF SUCH USES:**

To representatives of the Office of Personnel Management on matters relating to the inspection, survey, audit, or evaluation of Navy Civilian Personnel Management Programs.

To the Comptroller General or any of his authorized representatives, in the course of the performance of duties of the General Accounting Office relating to the Navy's Labor Management Relations Program. To a duly appointed hearing examiner, Administrative Law Judge, arbitrator, or other proper 3rd party for the purpose of conducting a hearing or inquiry in connection with an employee's grievance, unfair labor practice charge, impasse, negotiability appeal, or other labor relations dispute.

The "Blanket Routine Uses" that appear at the beginning of the Department of the Navy's compilation of systems of records also apply to this system.

**POLICIES AND PRACTIOES FOR STORING, RETRIEVING, ACCESSING, RETAINING AND DISPOSING OF RECORDS IN THE SYSTEM:**

**STORAGE:**

Manual records are stored in paper folders. ADP records are stored in a central, contractor maintained data base.

**RETRIEVABILITY:**

Manual records are retrieved by case subject, case number, and/or individual employee names. ADP records are retrieved by case subject, activity, bargaining unit, servicing personnel office, command, or 3rd party docket number.

**SAFEGUARDS:**

All files are accessible only to authorized personnel having a need to know. Access to the ADP system is controlled through the use of multiple security passwords.

**RETENTION AND DISPOSAL:**

Case files are permanently maintained. Union official rosters are normally destroyed after a new roster has been established.

**SYSTEM MANAGER(S) AND ADDRESS:**

Office of Civilian Personnel Management (Code 31), 800 North Quincy Street, Arlington, VA 22203–1998.

**NOTIFICATION PROCEDURE:**

Individuals seeking to determine whether this system of records contains information about themselves should address written inquiries to the Office of Civilian Personnel Management (Code 31), 800 North Quincy Street, Arlington, VA 22203–1998, their servicing personnel office, arbitrator's office, or Federal unions or local unions.

**RECORD ACCESS PROCEDURE:**

Individuals seeking access to records about themselves contained in this system of records should address written inquiries to the Office of Civilian Personnel Management (Code 31), 800 North Quincy Street, Arlington, VA 22203–1998, their servicing personnel office, arbitrator's office, or Federal unions or local unions.

**CONTESTING RECORD PROCEDURE:**

The Department of the Navy rules for accessing records and contesting contents and appealing initial determinations by the individual concerned are published in Secretary of the Navy Instruction 5211.5, 32 CFR Part 701, or may be obtained from the system manager.

**RECORD SOURCE CATEGORIES:**

Navy civilian personnel offices; arbitrator's offices; Federal unions and union locals.

**EXEMPTIONS CLAIMED FOR THE SYSTEM:**

None.

N12930–2

*System name:*

Area Coordinator Information and Operation Files (51 FR 18219, May 16, 1986).

*Changes:*

* * * * *

*System location:*

Delete lines one through four, and substitute with "Office of Civilian Personnel Management (OCPM) and OCPM field offices,".

* * * * *

*System manager(s) and address:*

Delete line one and substitute with "Director, Office of Civilian Personnel Management, 800 North Quincy Street, Arlington, VA 22203–1998 * * * ".

* * * * *

N12930–2

**SYSTEM NAME:**

Area Coordinator Information and Operation Files.

**SYSTEM LOCATION:**

Office of Civilian Personnel Management (OCPM) and OCPM field offices, designated contractors, and Navy staff, headquarters, and field activities employing civilians. Official mailing addresses are published as an appendix to the Department of the Navy's compilation of systems of records.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

Civilian employees, paid from appropriated and non-appropriated funds, military personnel or private citizens affected by or involved in action of area coordination significance, and speakers, specialists and other interested participants.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

System is composed of, but not limited to, records compiled in accordance with regulations, correspondence regarding status of EEO investigations, index file of program administration and interested participants including ad hocs, summaries compiled for budget administration, biographies of speakers or of key officials obtained from individual.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

5 U.S.C. 301, Departmental Regulations.

**PURPOSE(S):**

To manage civilian personnel and special projects related to civilian employees.

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSE OF SUCH USES:**

To representatives of the Office of Personnel Management on matters relating to the inspection, survey, audit or evaluation of Navy civilian personnel management programs or personnel actions, or such other matters under the jurisdiction of the Office of Personnel Management.

To a duly appointed Hearing Examiner or Arbitrator (an employee of another Federal agency) for the purpose of conducting a hearing in connection with an employee's grievance.

To an arbitrator who is given a contract pursuant to a negotiated labor agreement to hear an employee's grievance.

The "Blanket Routine Uses" that appear at the beginning of the Department of the Navy's compilation of systems of records also apply to this system.

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING AND DISPOSING OF RECORDS IN THE SYSTEM:**

**STORAGE:**

Records are stored in paper file folders, list finders, index cards, or logs or other indexing systems.

**RETRIEVABILITY:**

Records are retrieved by subject matter or by name.

**SAFEGUARDS:**

Records are available only to authorized personnel having a need to know.

**RETENTION AND DISPOSAL:**

Records are retained for varying lengths of time as required by local regulations; some records may be maintained indefinitely.

**SYSTEM MANAGER(S) AND ADDRESS:**

Director, Office of Civilian Personnel Management, 800 North Quincy Street, Arlington, VA 22203–1998 and the heads of Navy Staff, Headquarters, and field activities employing civilians. Official mailing addresses are published as an appendix to the Department of the Navy's compilation of systems of records.

**NOTIFICATION PROCEDURE:**

Individuals seeking to determine whether this system of records contains information about themselves should address written inquiries to the servicing civilian personnel office where assigned or to the Director, Office of Civilian Personnel Management, 800 North Quincy Street, Arlington, VA 22203–1998. The request should contain full name, Social Security Number, and address. For personal visits, proof of identification will consist of a Department of Defense or Navy building pass or identification badge or driver's license or other types of identification

bearing his/her signature or picture or by providing information which may be verified against the record.

**RECORD ACCESS PROCEDURE:**

Individuals seeking access to records about themselves contained in this system of records should address written inquiries to the servicing civilian personnel office or to the Director, Office of Civilian Personnel Management, 800 North Quincy Street, Arlington, VA 22203–1998.

**CONTESTING RECORD PROCEDURE:**

The Department of the Navy rules for accessing records and contesting contents and appealing initial determinations by the individual concerned are published in Secretary of the Navy Instruction 5211.5; 32 CFR Part 701; or may be obtained from the system manager.

**RECORD SOURCE CATEGORIES:**

Navy Civilian Personnel Offices and their representatives.

**EXEMPTIONS CLAIMED FOR THE SYSTEM:**

None.

**N12950–3**

*System name:*

Payroll and Employee Benefits Records (51 FR 18221, May 16, 1986).

*Changes:*

* * * * *

*System location:*

In lines two and three, delete the words "Fort Wadsworth" and substitute with "Naval Station New York Staten Island".

* * * * *

*Authority for maintenance of the system:*

Delete the words "and 10 U.S.C. 5031" and substitute with ", Departmental Regulations". At the end of the entry, add "and E.O. 9397."

* * * * *

*System manager(s) and address:*

In paragraph one, lines two and three, delete the words "Fort Wadsworth" and substitute with "Naval Station New York Staten Island". Delete paragraph two and substitute with "Record Holder-Manager, Risk Management and Workers Compensation Branch (TD2), Manager, Labor/Employee Relations and Employee Benefits Branch (IRD1), Comptroller Non-Appropriated Fund Division (CNAFD), Navy Resale and Services Support Office, Naval Station New York Staten Island, Staten Island, New York 10305–5097."

* * * * *

**N12950–3**

**SYSTEM NAME:**

Payroll and Employee Benefits Records.

**SYSTEM LOCATION:**

Commander, Navy Resale and Services Support Office, Naval Station New York Staten Island, Staten Island, New York 10305–5097.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

Civilian employees and former civilian employees with the Navy Resale and Services Support Office and Navy Exchanges located world-wide. (Payroll and benefits information) Civilian employees and former civilian employees of Coast Guard exchanges, clubs and messes and US Navy civilian employees.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

Distribution reports; tax reports; leave accrual reports; earnings records cards, payroll registers; insurance records and reports regarding property damage, personal injury or death, group life, disability, medical and retirement plan; payroll savings authorization; record of payroll savings; overtime authorization; Treasury Department tax withholding exemption certificate.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

5 U.S.C. 301, Departmental Regulations and E.O. 9397.

**PURPOSE(S):**

To calculate pay; prepare checks for distribution; prepare education registers; leave records; to submit federal and state tax reports; to record contributions to benefit plans; to process all insurance claims; to calculate retirement benefits upon request of employees.

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSE OF SUCH USES:**

To the insurance carriers and the U.S. Department of Labor, Bureau of Employees Compensation.

The "Blanket Routine Uses" that appear at the beginning of the Department of the Navy's compilation of systems of records also apply to this system.

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING AND DISPOSING OF RECORDS IN THE SYSTEM:**

**STORAGE:**

The media in which these records are maintained vary, but include Magnetic tape files; card files; file folders; ledgers; and printed reports.

**RETRIEVABILITY:**

Name and/or Social Security Number; employee job number; employee payroll number.

**SAFEGUARDS:**

Locked file cabinets; safes; locked offices which are supervised by appropriate personnel, when open; security guards; supervised computer tape library which is accessible only through the computer center (entry to computer center is controlled by a combination lock known by authorized personnel only).

**RETENTION AND DISPOSAL:**

Permanent records—maintained for five years and then retired to the Director, National Personnel Records Center, Civilian Personnel Records, 111 Winnebago Street, St. Louis, MO 63118.

**SYSTEM MANAGER(S) AND ADDRESS:**

Policy Official: Commander, Navy Resale and Services Support Office, Naval Station New York Staten Island, Staten Island, NY 10305–5097.

Record Holder Manager, Risk Management and Workers Compensation Branch (TD2), Manager, Labor/Employee Relations and Employee Benefits Branch (IRD1), Comptroller Non-appropriated Fund Division (CNAFD), Navy Resale and Services Support Office, Naval Station New York Staten Island, Staten Island, NY 10305–5097.

Individual record holders within the central system may be contacted through the central system record holder.

**NOTIFICATION PROCEDURE:**

Individuals seeking to determine whether this system of records contains information about themselves should address written inquiries to the Commander, Navy Resale and Services Support Office, Naval Station New York Staten Island, Staten Island, NY 10305–5097.

In the initial inquiry the requester must provide full name, Social Security Number, activity where last employed. A list of other offices the requester may visit will be provided after initial contact is made at the office listed above. At the time of a personal visit,

requesters must provide proof of identity containing the requester's signature.

**RECORD ACCESS PROCEDURE:**

Individuals seeking access to records about themselves contained in this system of records should address written inquiries to the Commander, Navy Resale and Services Support Office, Naval Station New York Staten Island, Staten Island, NY 10305–5097.

**CONTESTING RECORD PROCEDURE:**

The Department of the Navy rules for accessing records and contesting contents and appealing initial determinations by the individual concerned are published in Secretary of the Navy Instruction 5211.5C, 32 CFR part 701, or may be obtained from the system manager.

**RECORD SOURCE CATEGORIES:**

The employee or former employee; payroll department; the employee's supervisor and the employee's physician or insurance carrier's physician.

**EXEMPTIONS CLAIMED FOR THE SYSTEM:**

None.

**N12950–5**

*System name:*

Navy Civilian Personnel Data System (NCPDS) (51 FR 18222, May 16, 1986).

*Changes:*

* * * * *

*System location:*

Delete lines one through six beginning with "Chief" and ending with "Divisions" and substitute with "Office of Civilian Personnel Management (OCPM) and its field offices".

* * * * *

*Categories of records in the system:*

In lines 33 and 34, delete the phrase "OP–14/NCPC" and substitute with "Office of Civilian Personnel Management (OCPM)".

* * * * *

*Routine uses of records maintained in the system, including categories of users and the purpose of such uses:*

In paragraph eight, line one, delete the words "complaints examiner" and substitute with "Administrative Judge".

* * * * *

*System manager(s) and address:*

Delete the entry in its entirety and substitute with "Director, Office of Civilian Personnel Management, 800 North Quincy Street, Arlington, VA 22203–1998 and the commanding officers of the employee's activity."

* * * * *

*Record source categories:*

In line four, delete the word "NCPC" and substitute with "OCPM".

* * * * *

**N12950–5**

**SYSTEM NAME:**

Navy Civilian Personnel Data System (NCPDS).

**SYSTEM LOCATION:**

Office of Civilian Personnel Management (OCPM) and its field offices; operating civilian personnel offices and Navy commands and management offices; and the Navy Regional Data Automation Center (NARDAC) and its designated contractors. Official mailing addresses are published as an appendix to the Department of the Navy's compilation of systems of records. Included in this notice are those records duplicated for retrievability at a site closer to where the employee works (e.g., in an administrative office or a supervisor's work area).

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

Department of the Navy civilian employees paid from appropriated and non-appropriated funds and foreign national direct and indirect hire employees.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

The system is comprised of automated and non-automated records describing and identifying the employee (e.g., name, Social Security Account Number, sex, birth date, minority designator, citizenship, physical handicap code); the position occupied and the employee's qualifications; salary and salary basis or other compensation and allowances; employee's status in relation to the position occupied and the organization to which assigned; tickler dates for impending changes in status; education and training records; previous military status; functional code; previous employment record; performance appraisal and other data needed for screening and selection of an employee; referral records; professional licenses and publications; and reason for position change or other action affecting the employee and case files pertaining to EEO, MSPB, labor and employee relations, and incentive awards. The records are those found in the NCPDS subsystems: the Navy Automated Civilian Manpower Information System (NACMIS), the Training Information Management System (TIMS), the Personnel Automated Data System (PADS), the Computerized Employee Management Program Administration and Research (CEMPAR), Office of Civilian Personnel Management Customer Support Centers, the Executive Personnel Management Information System (EPMIS) and the NCPDS base level and Headquarters systems.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

5 U.S.C. 301; 5 U.S.C. 4118; E.O. 9397; 5 U.S.C. 2951; E.O. 10450; 42 U.S.C. 2000e, 5 U.S.C. 3135, 5 U.S.C. 4301, et seq., 5 U.S.C. 4501 et seq., 5 U.S.C. 4705 and subparts D, E, F, and G of title 5 U.S.C. and 29 CFR part 1613 et seq.

**PURPOSE(S):**

To manage and administer the Department's civilian personnel and civilian manpower planning programs and in the design, development, maintenance and operation of the automated system of records. Designated contractors of the Department of the Navy and Defense in the performance of their duties with respect to equipment and system design, development test, operation and maintenance.

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSE OF SUCH USES:**

To the Comptroller General or any of his authorized representatives, in the course of the performance of duties of the General Accounting Office.

To the Attorney General of the United States or his authorized representatives in connection with litigation, law enforcement, or other matters under the direct jurisdiction of the Department of Justice or carried out as the legal representative of Executive Branch agencies.

To officials and employees of other departments and agencies of the Executive Branch of government upon request in the performance of their official duties related to the screening and selection of candidates for vacant positions.

To representatives of the United States Department of Labor on matters relating to the inspection, survey, audit or evaluation of the Navy's apprentice training programs or on other such matters under the jurisdiction of the Labor Department.

To representatives of the Veterans Administration on matters relating to the inspection, survey, audit or evaluation of the Navy's apprentice and on-the-job training program.

To contractors or their employees for the purpose of automated processing of data from employee personnel actions and training documents, or data collection forms and other documents.

To a duly appointed hearing examiner or arbitrator in connection with an employee's grievance.

To an appointed Administrative Judge for the purpose of conducting a hearing in connection with an employee's formal Equal Employment Opportunity (EEO) complaint.

To officials and employees of schools and other institutions engaged to provide training.

To labor organizations recognized under 5 U.S.C. Chapter 71 when relevant and necessary to their duties of exclusive representation concerning personnel policies, practices, and matters affecting working conditions.

To representatives of the Federal Labor Relations Authority.

To representatives of the Merit Systems Protection Board.

The "Blanket Routine Uses" that appear at the beginning of the Department of the Navy's compilation of systems of records also apply to this system.

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING AND DISPOSING OF RECORDS IN THE SYSTEM:**

**STORAGE:**

Automated records are stored on magnetic tape, disc, drum and punched cards and computer printouts. Manual records are stored in paper file folders.

**RETRIEVABILITY:**

Information is retrieved by Social Security Number or other similar substitute if there is no Social Security Number, position number, name, or by specific employee characteristics such as date of birth, grade, occupation, employing organization, tickler dates, academic specialty level.

**SAFEGUARDS:**

The computer facility and terminal are accessible only to authorized persons that have been properly screened, cleared and trained. Manual and automated records and computer printouts are available only to authorized personnel having a need-to-know.

**RETENTION AND DISPOSAL:**

Input documents are destroyed after data are converted to magnetic medium. Information is stored in magnetic medium within the ADP system. Information recorded via magnetic medium will be retained permanently. For TIMS and the apprentice programs the computer magnetic tapes are permanent. Manual records are maintained on a fiscal year basis and are retained for varying periods from one to five years.

**SYSTEM MANAGER(S) AND ADDRESS:**

Director, Office of Civilian Personnel Management, 800 North Quincy Street, Arlington, VA 22203–1998 and the commanding officers of the employee's activity.

**NOTIFICATION PROCEDURE:**

Individuals seeking to determine whether this system of records contains information about themselves should address written inquiries to the Director, Office of Civilian Personnel Management, 800 North Quincy Street, Arlington, VA 22203–1998 or to the civilian personnel officer under his/her cognizance. The request should contain the individual's full name, Social Security Number and name of employing activity. Requesters may visit the civilian personnel office of the naval activity covered by the system to obtain information. In such case, proof of identity will consist of full name, Social Security Number and a third positive identification such as driver's license, Navy building pass or identification badge, birth certificate, Medicare-card, etc. Official mailing addresses are published as an appendix to the Department of the Navy's compilation of systems of records.

**RECORD ACCESS PROCEDURE:**

Individuals seeking access to records about themselves contained in this system of records should address written inquiries to the Director, Office of Civilian Personnel Management, 800 North Quincy Street, Arlington, VA 22203–1998 or to the civilian personnel officer under his/her cognizance. The request should contain the individual's full name, Social Security Number and name of employing activity. Requesters may visit the civilian personnel office of the naval activity covered by the system to obtain information. In such case, proof of identity will consist of full name, Social Security Number and a third positive identification such as driver's license, Navy building pass or identification badge, birth certificate, Medicare card, etc. Official mailing addresses are published as an appendix to the Department of the Navy's compilation of systems of records.

**CONTESTING RECORD PROCEDURE:**

The Department of the Navy rules for accessing records and contesting contents and appealing initial determinations by the individual concerned are published in Secretary of the Navy Instruction 5211.5, 32 CFR part 701, or may be obtained from the system manager.

**RECORD SOURCE CATEGORIES:**

Categories of sources of records in the system are: the civilian personnel office of the employing activity; the payroll office; OCPM headquarters; the security office of the employing activity; line managers, other designated officials and supervisors; the employee and persons named by the employee as references.

**EXEMPTIONS CLAIMED FOR THE SYSTEM:**

None.

**N12950–6**

*System Name:*

Computer Assisted Manpower Analyses System (CAMAS) (51 FR 18223, May 16, 1986)

*Changes:*

* * * * *

*System location:*

In line one, delete the words "Chief of Naval Operations (OP–14)," and substitute with "Office of Civilian Personnel Management,".

* * * * * *

*Authority for maintenance of the system:*

In line one, delete the word "Title". At the end of the entry, add "and E.O. 9397."

* * * * *

*System manager(s) and address:*

Delete the entire entry and substitute with "Director, Office of Civilian Personnel Management, 800 N. Quincy St., Arlington, VA 22203–1998".

* * * * *

**N12950–6**

**SYSTEM NAME:**

Computer Assisted Manpower Analyses System (CAMAS).

**SYSTEM LOCATION:**

Office of Civilian Personnel Management, and Navy Department Staff, headquarters, and field activities employing civilians. Official mailing addresses are published as an appendix to the Department of the Navy's compilation of systems of records.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

Navy civilian employees paid from appropriated funds.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

Files contain records from the Personnel Automated Data System (PADS) which contain job related data including individual identification, location information, and salary.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

5 U.S.C. 301, Departmental Regulations and E.O. 9397.

**PURPOSE(S):**

To aggregate manpower planning, including calculating transition rates, forecasting number of retirements, and running models to determine the extent to which projected manpower requirements can be met.

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSE OF SUCH USES:**

The "Blanket Routine Uses" that appear at the beginning of the Department of the Navy's compilation of systems of records apply to this system.

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING AND DISPOSING OF RECORDS IN THE SYSTEM:**

**STORAGE:**

Computer magnetic tape and disc.

**RETRIEVABILITY:**

Retrieved by Social Security Number.

**SAFEGUARDS:**

Records are maintained in areas accessible only to authorized personnel.

**RETENTION AND DISPOSAL:**

Records are permanent.

**SYSTEM MANAGER(S) AND ADDRESS:**

Office of Civilian Personnel Management, Department of the Navy, 800 North Quincy Street, Arlington, VA 22203–1998.

**NOTIFICATION PROCEDURE:**

Individuals seeking to determine whether this system of records contains information about themselves should address written inquiries to the Director, Office of Civilian Personnel Management, 800 North Quincy Street, Arlington, VA 22203–1998. The request for information must contain full name of the individual, current address and telephone number, and birth date and Social Security Number.

**RECORD ACCESS PROCEDURE:**

Individuals seeking access to records about themselves contained in this system of records should address written inquiries to the Director, Office of Civilian Personnel Management, 800 North Quincy Street, Arlington, VA 22203–1998.

**CONTESTING RECORD PROCEDURE:**

The Department of the Navy rules for accessing records and contesting contents and appealing initial determinations by the individual concerned are published in Secretary of the Navy Instruction 5211.5, 32 CFR part 701, or may be obtained from the system manager.

**RECORD SOURCE CATEGORIES:**

Personnel Automated Data System (PADS).

**EXEMPTIONS CLAIMED FOR THE SYSTEM:**

None.

[FR Doc. 89–25589 Filed 10–30–89; 8:45 am]

BILLING CODE 3810–01

## DEPARTMENT OF DEFENSE

## GENERAL SERVICES ADMINISTRATION

## NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

### Federal Acquisition Regulation (FAR); Information Collection Under OMB Review

**AGENCIES:** Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

**ACTION:** Notice.

**SUMMARY:** Under the provisions of the Paperwork Reduction Act of 1980 (44 U.S.C. chapter 35), the Federal Acquisition Regulation (FAR) Secretariat has submitted to the Office of Management and Budget (OMB) a request to review and approve an extension of a currently approved information collection, Customs and Duties.

**ADDRESS:** Send comments to Ms. Eyvette Flynn, FAR Desk Officer, OMB, Room 3235, NEOB, Washington, DC 20503.

**FOR FURTHER INFORMATION CONTACT:** Ms. Jeritta Parnell, Office of Federal Acquisition Policy, GSA (202) 523–6982.

**SUPPLEMENTARY INFORMATION:**

**a. Purpose**

United States laws impose duties on foreign supplies imported into the customs territory of the United States. Certain exemptions from these duties are available to Government agencies. These exemptions are used whenever the anticipated savings outweigh the administrative costs associated with processing required documentation. When a Government contractor purchases foreign supplies it must notify the contracting officer to determine whether the supplies should be duty-free. In addition, all shipping documents and containers must specify certain information to assure the duty-free entry of the supplies.

The contracting officer analyzes the information submitted by the contractor to determine whether or not supplies should enter the country duty-free. The information, the contracting officer's determination, and the U.S. Customs forms are placed in the contract file.

**b. Annual Reporting Burden**

This is estimated as follows: Respondents, 10; total annual responses, 13,300; hours per response, .5; responses, total burden hours, 6,650.

*Obtaining Copies of Proposals:* Requester may obtain copies from the FAR Secretariat (VRS), Room 4041, GSA Building Washington, DC 20405, telephone (202) 523–4755. Please cite OMB Control No. 9000–0022, Customs and Duties.

Dated: October 23, 1989.

Margaret A. Willis,

*FAR Secretariat.*

[FR Doc. 89–25517 Filed 10–30–89; 8:45 am]

BILLING CODE 6820–JC–M

### Federal Acquisition Regulation (FAR); Information Collection Under OMB Review

**AGENCIES:** Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

**ACTION:** Notice.

**SUMMARY:** Under the provisions of the Paperwork Reduction Act of 1980 (44 U.S.C. chapter 35), the Federal Acquisition Regulation (FAR) Secretariat has submitted to the Office of Management and Budget (OMB) a request to review and approve an extension of a currently approved information collection, Customs and Duties.

**ADDRESS:** Send comments to Ms. Eyvette Flynn, FAR Desk Officer, OMB, Room 3235, NEOB, Washington, DC 20503.

**FOR FURTHER INFORMATION CONTACT:** Ms. Jeritta Parnell, Office of Federal Acquisition Policy, GSA, (202) 523–6982.

**SUPPLEMENTARY INFORMATION:**

a. Purpose

Under the Trade Agreements Act of 1979, unless specifically exempted by statute or regulation, agencies are required to evaluate offers over a certain dollar limitation not supply an eligible product without regard to the restrictions of the Buy American Act or the Balance of Payments program. Offerors identify excluded end products on this certificate.

The contracting officer uses the information to identify the offered items which are domestic end products. Items having components of unknown origin are considered to have been mined, produced, or manufactured outside the United States or a designated country of the Act.

b. Annual Reporting Burden

This is estimated as follows: Respondents, 10; total annual responses, 11,400; hours per response, .167; responses, total burden hours, 1,904.

*Obtaining Copies of Proposals:* Requester may obtain copies from the FAR Secretariat (VRS), Room 4041, GSA Building, Washington, DC 20405, telephone (202) 523–4755. Please cite OMB Control No. 9000–0025, the Buy American Act-Trade Agreements Act-Balance of Payments Program Certificate.

Dated: October 23, 1989.

Margaret A. Willis,

*FAR Secretariat.*

[FR Doc. 89–25518 Filed 10–30–89; 8:45 am]

BILLING CODE 6820–JC–M

## DEPARTMENT OF EDUCATION

**[CFDA 84.026]**

### Educational Media Research, Production, Distribution, and Training Program; Correction

**AGENCY:** Department of Education.

**ACTION:** Final priority; correction.

**SUMMARY:** On September 14, 1989, final funding priorities for certain new Direct Grant awards for FY 1990 were published at 54 FR 38160. The notice contained a final priority for Closed-Captioned Children's Program under the Educational Media Research, Production, Distribution, and Training Program, at 54 FR 38164.

The priority is corrected as follows:

On page 38164, in the second column, the fifth line is corrected to read "closed-captioned network, syndicated and public".

**FOR FURTHER INFORMATION CONTACT:** Joseph Clair, Office of Special Education and Rehabilitative Services, Division of Educational Services, 400 Maryland Avenue, SW., Room 4622, Switzer Building, Washington, DC 20202 Telephone: (202) 732–4503.

Authority: 20 U.S.C. 1451, 1452.

Dated: October 25, 1989.

**Robert Davila,**

*Assistant Secretary, Office of Special Education and Rehabilitative Services.*

[FR Doc. 89–25539 Filed 10–31–89; 8:45 am]

BILLING CODE 4000–01–M

## DEPARTMENT OF ENERGY

### Solicitation for Grant Application

**AGENCY:** U.S. Department of Energy.

**ACTION:** Solicitation for grant application.

**SUMMARY:** The U.S. Department of Energy (DOE), pursuant to the DOE Financial Assistance Rule, 10 CFR 600.9, announces the availability of a solicitation for grant application No. DE–90CH15997 under the States' Initiative Subprogram of the Energy-Related Invention Program (ERIP).

**FOR FURTHER INFORMATION CONTACT:** Ms. Mary Lou Zambrano, U.S. Department of Energy, Chicago Operations Office, 9800 South Cass Avenue, Argonne, IL 60439, (312) 972–2077.

**SUPPLEMENTARY INFORMATION:** The objective of this solicitation is to identify and provide support for up to ten innovative projects to be conducted by nonfederal entities in the field of providing support to independent inventors.

ERIP was established in 1974 under the authority of the Federal Non-Nuclear Energy Research and Development Act of 1974 to assist independent and small company inventors. The principal means through which the program has worked with inventors is a program offering technical evaluation of inventions by the National Institute of Standards and Technology (NIST), formerly the National Bureau of Standards (NBS), and the prospect of financial support (grants) form DOE for those inventions identified by NIST as "promising" in terms of technical feasibility, commercial viability and energy impact potential.

Establishement of the States' Initiatives Program in 1986 was prompted by the recognition that the needs of independent and small company inventors were being addressed by numerous programs at the non-federal level. The proliferation of programs during the middle of the decade indicated widespread interest at the state and local level in helping inventors and technology based small businesses succeed. Since that time, program staff have been involved in identifying and characterizing various assistance programs that can be useful to inventors.

This solicitation represents a new effort of the States' Initiatives Program to provide assistance to groups (inventor support groups) which work with independent and small company inventors in the area of invention development and commercialization assistance or otherwise promote the interests of inventors. This solicitation invites proposals for grants to support new initiatives by inventor support groups; it is not intended to offset the cost of established day-to-day operations of existing programs. The grants will be awarded to inventor support groups proposing new, innovative projects aimed at improving assistance to inventors. The grants will be for projects of up to one year in length. Examples of such projects would include experimental inventor-resource matching systems, development of educational materials pertaining to the invention commercialization process or projects which will enhance the standing of inventors as a group.

Project applications must identify a complete project and the availability of resources required to complete it in order to receive consideration. Funding will not be awarded to start a project that will rely upon as yet unidentified resources for completion. Special consideration will be given for projects that are transferable to other inventor support groups for their educational benefit or duplication by them. A final report on the results of each project will be required. Project results will be published in the Inventor Assistance Newsletter published by Argone National Laboratory.

Total funding for this solicitation is $200,000.00 to fund up to ten grants. No grant under this solicitation will exceed $20,000.00. The solicitation is expected to be issued on or about November 6, 1989 with applications due on or about December 8, 1989. If you are interested in receiving the solicitation, send your written request to Mary Lou Zambrano, Team Secretary at the above address.

All responsible sources may submit an application, which will be considered.

**Timothy S. Crawford,**

*Assistant Manager for Administration.*

[FR Doc. 89-25618 Filed 10-30-89; 8:45 am]

BILLING CODE 6450-01-M

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## Advisory Committee on Nuclear Facility Safety; Open and Closed Meetings

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 & Time:*

Monday, November 13, 1989, 8:00 a.m. to 10:00 p.m.

Tuesday, November 14, 1989, 1:00 p.m. to 5:00 p.m.

*Place:* Harvey Hotel, 3100 I-40 West, Amarillo, Texas 79102.

*Contact:* Wallace R. Kornack, Executive Director, ACNFS, S-2, 1000 Independence Avenue SW., Washington, DC 20585, Telephone: 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**

*November 13, 1989*

8:00 a.m. Chairman John F. Ahearne Opens Meeting, Waste Isolation Pilot Plant Report, Committee Business, Review of Issues at Pantex.

Noon. Lunch.

1:00 p.m. Review of Issues at Pantex, Subcommittee Reports, Committee Business.

5:00 p.m. Meeting Adjourned until 8:00 p.m.

8:00 p.m. to 10:00 p.m. Public Comment Session.

*November 14, 1989*

1:00 p.m. to 5:00 p.m. Closed Meeting.

*Public Participation:* The meeting on November 13 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 at the public comment session on November 13 should contact Wallace R. 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.

*Closed Meeting:* Pursuant to section 10(d) of the Federal Advisory Committee Act, Public Law 92-463, as amended (U.S.C. App. II (1982)), part of these advisory committee meetings concerns matters listed in 5 U.S.C. 552b(c)(l). Accordingly on November 14, 1989, from approximately 1:00 p.m. until 5:00 p.m., the meeting will be closed to the public.

*Transcripts:* The transcript of the open meeting will be available for public review and copying at the Freedom of Information Public Reading Room, IE-190, Forrestal Building, 1000 Independence Ave., SW., Washington, DC, between 9:00 a.m. and 4:00 p.m., Monday through Friday, except Federal holidays.

Issued at Washington, DC on October 25, 1989.

**J. Robert Franklin,**

*Deputy Advisory Committee Management Officer.*

[FR Doc. 89-25619 Filed 10-30-89; 8:45 am]

BILLING CODE 6450-01-M

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## Federal Energy Regulatory Commission

**[Docket No. RP90-15-000]**

## Equitrans, Inc. v. Texas Eastern Transmission Corp.; Complaint and Request for Stay

October 24, 1989.

Take notice that on October 20, 1989, pursuant to Section 5 of the Natural Gas Act, 15 USCA § 717d, Section 10(d) of the Administrative Procedure Act, 5 USCA § 705, and Rules 206 and 212 of the Commission's Rules of Practice and Procedure, 18 CFR 385.206 and 385.212, Equitrans, Inc. (Equitrans) filed an emergency complaint against Texas Eastern Transmission Corporation (Texas Eastern) and requests an immediate stay of the Commission's authorization for Texas Eastern to implement a Gas Supply Inventory Reservation Charge (GIC) pending action on the complaint.

Equitrans alleges it has been unable to secure, to the extent requested, the FT-1 firm receipt and delivery points upon which to secure transportation of third party supplies. As a result, Equitrans alleges it is unable to convert the full portion of sales entitlements to transportation entitlements it requested in order to avoid the GIC payments to Texas Eastern.

Equitrans contends that in order to obtain priority to firm receipt and delivery points for FT-1 service, Texas Eastern's sales customers were required to submit nominations for those points by October 1, 1989. Equitrans contends that it fully complied with Texas Eastern's tariff requirements by requesting firm FT-1 conversions of 60,000 dekatherms (dth) per day by letter dated September 25, 1989 and amended on September 29, 1989. However, even though the conversion option was intended to permit up to 100 percent abandonment of the sales service at the sole discretion of the sales customer, Equitrans alleges that it was denied its request for even the 60,000 dth conversion it requested. Equitrans asserts that Texas Eastern informed Equitrans by letter on October 9, 1989, that it would permit only 20,000 dth of firm transportation and that if it still desired FT-1 conversion of the remaining 40,000 dth, it must request alternative firm receipt and delivery points by noon on October 11, 1989, less than 48 hours after the letter was received. Equitrans contends this was insufficient time to arrange for new gas purchase agreements with third parties. In addition, according to Equitrans, it and the other customers were required to execute new ten-year service agreements which provide for, *inter alia*, full or partial conversions from firm sales to firm transportation, by October 16, 1989. Equitrans asserts that it had no meaningful choice but to execute a service agreement providing for only 20,000 dth of firm transportation under Rate Schedule FT-1, and make no change with respect to its remaining sales entitlements.

Equitrans requests that the Commission:

(1) Investigate the policy of Texas Eastern with respect to handling requests for firm transportation receipt and delivery points for FT-1 and standby service customers;

(2) Assure that Texas Eastern give a higher priority to requests for firm receipt and delivery points by customers opting for FT-1 conversions than for standby service;

(3) Direct Texas Eastern to incorporate its policy on allocating FT-1 capacity in its FERC Gas Tariff;

(4) Provide for an iterative process to take place under which a series of requests for firm receipt and delivery points would be made by customers

converting to firm transportation from firm sales service in whole or in part until such time as all requests for firm points have been satisfied at mutually agreeable points;

(5) Nullify new ten-year service agreements between Texas Eastern and its customers executed on or about October 16, 1989, and permit new agreements to be executed after the new rounds of requests for firm receipt and delivery points have been concluded;

(6) Determine whether denials of requests for firm receipt and delivery points that were made by Texas Eastern in order to reserve the locations where the lowest cost supplies are available for Texas Eastern's system supply; and

(7) Stay the authorization for Texas Eastern to commence billing its sales customers a GIC for purchase deficiencies until after the firm transportation conversions and new service agreements requested above have been completed and executed, respectively.

Any person desiring to be heard or to protest said complaint should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rules 214 and 211 of the Commission's Rules of Practice and Procedure [18 CFR 385.214, 385.211 (1988)]. All such motions or protests should be filed on or before November 7, 1989. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection. Answers to this complaint shall be due on or before November 7, 1989.

**Lois D. Cashell,**

*Secretary.*

[FR Doc. 89-25524 Filed 10-30-89; 8:45 am]

BILLING CODE 6717-01-M

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**[Docket No. QF88-72-003]**

## Gulf Coast Engineering Management, Inc., and Boyce Machinery Corp. (Walker-Roemer Facility; Application for Commission Certification of Qualifying Status of a Cogeneration Facility

October 24, 1989.

On October 17, 1989, Gulf Coast Engineering Management, Inc., 6 Richmond Place, New Orleans, Louisiana 70115 and Boyce Machinery Corporation, c/o Jones, Walker, Waechter, Poitevent, Carrere & Denegre, Suite 1700, One American Plaza, Baton Rouge, Louisiana 70825 on behalf of Walker Resources, Inc. (Applicant) submitted for filing an application for certification of a facility as a qualifying cogeneration facility pursuant to § 292.207 of the Commission's regulations. No determination has been made that the submittal constitutes a complete filing.

The proposed topping-cycle cogeneration facility will be located at 2800 Richland Street, Metairie, Louisiana. The facility will consist of an internal combustion engine-generator and a heat recovery boiler. The thermal energy recovered from the facility will be used in pasteurizing and processing milk and milk products, and for space heating and cooling. The net electric power production capacity will be 481 kW. Primary source of energy will be natural gas.

Any person desiring to be heard or objecting to the granting of qualifying status should file a petition to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426, in accordance with rules 211 and 214 of the Commission's Rules of Practice and Procedure. All such petitions or protests must be filed within 30 days after the date of publication of this notice and must be served on the applicant. Protests will be considered by the Commission in determining the appropriate action to be taken but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a petition to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

**Lois D. Cashell,**

*Secretary.*

[FR Doc. 89-25523 Filed 10-30-89; 8:45 am]

BILLING CODE 6717-01-M

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**[Docket No. CI89-348-001]**

## Natgas U.S. Inc.; Application To Amend a Blanket Certificate With Pregranted Abandonment

October 24, 1989.

Take notice that on October 23, 1989, Natgas U.S. INC. (Natgas) of 500, 707 Eighth Avenue, SW., Calgary, Alberta, Canada, T2P 3V3, filed an application pursuant to sections 4 and 7 of the Natural Gas Act and the Federal Energy Regulatory Commission's (Commission) regulations thereunder and Section 9 of the Alaska Natural Gas Transportation Act of 1976 to amend its blanket certificate with pregranted abandonment previously issued by the Commission in Docket No. CI89-348-000 to the extent necessary to authorize the sale for resale of gas purchased by Natgas from Northwest Alaskan Pipeline Company (Northwest Alaskan) as part of the Alaska Natural Gas Transportation System (ANGTS) prebuild project. Natgas also request that the Commission amend the blanket certificates of marketers which purchase gas from Natgas to provide such marketers with blanket authorization to sell such gas for resale. In addition, Natgas requests that it be authorized to resell prebuild gas which it purchases from Northwest Alaskan at the contract rates which it negotiates at arm's length with its customers and that similar authority be granted to certificated marketers who purchase such gas from Natgas for resale. Finally, Natgas requests that the Commission find that Commission actions granting the approvals requested are "necessary or related to the construction and initial operation of the * * * [ANGTS]" and grant any waivers or relief as may be necessary to implement the proposal set forth herein. The application is on file with the Commission and open for public inspection.

According to Natgas, the authorization requested is an integral part of a comprehensive settlement agreed to by Pan-Alberta Gas Ltd. and United Gas Pipe Line Company (United) on June 5, 1989, in order to resolve all ongoing disputes pertaining to United's obligation to the ANGTS prebuild project and to release United permanently from all such obligations.

It appears reasonable and consistent with the public interest in this case to prescribe a period of 10 days for the filing of protests and petitions to intervene. Therefore, any person desiring to be heard or to make any protest with reference to said application should on or before November 3, 1989, file with the Federal Energy Regulatory Commission, Washington, DC 20426, a petition to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party in any proceeding herein most file a petition to intervene in accordance with the Commission's rules.

Under the procedure herein provided for, unless otherwise advised, it will be

unnecessary for Natgas to appear or to be represented at the hearing.

**Lois D. Cashell,**

*Secretary.*

[FR Doc. 89-25525 Filed 10-30-89; 8:45 am]

BILLING CODE 6717-01-M

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**[Docket No. CP90-93-000]**

## Natgas U.S. Inc.; Application

October 24, 1989.

Take notice that on October 23, 1989, Natgas U.S. Inc. (Natgas), 500, 707 Eighth Avenue, SW., Calgary, Alberta, Canada, T2P 3V3, filed an abbreviated application pursuant to Section 7(c) of the Natural Gas Act, section 9 of the Alaska Natural Gas Transportation Act (ANGTA) and part 157 of the Commission's Regulations for the expedited issuance of a certificate of public convenience and necessity.

By such application, Natgas seeks:

(1) Authorization to sell up to 100,000 Mcf of natural gas per day to Northern Natural Gas Company for resale in interstate commerce;

(2) A finding that such an authorization is necessary or related to the construction and initial operation of the Alaskan Natural Gas Transportation System (ANGTS);

(3) Confirmation that the sale by Natgas to Northern is exempt from Order No. 380 concerning minimum bills, as codified in Section 154.111 of the Commission's Regulations;

(4) Confirmation that Northern may flow through, on an "as-billed" basis, all demand charges paid to Natgas, as an exception to policy established in Opinion No. 256; and,

(5) Waiver of certain tariff and rate regulations so that Natgas' tariff may be in the form of its agreement with Northern and that such tariff may become effective on a specifically defined date in the *pro forma* tariff.

Natgas' proposals are more fully set forth in the application which is on file with the Commission and open to public inspection.

Natgas states that it is a wholly-owned subsidiary of Pan-Alberta Resources, Inc., an affiliate of Pan-Alberta Gas, Ltd. (Pan-Alberta). All of these companies are engaged in various phases of natural gas marketing in both Canada and the United States.

Natgas states that this application is one of several being filed as the result of complex, interrelated agreements reached between the parties with respect to the purchase, sale and transportation of Canadian gas on the pre-build Eastern Leg of the ANGTS. This group of applications includes:

Northwest Alaskan Pipeline Co., Docket No. CP78-123-028

Northwest Alaskan Pipeline Co., Docket No. RP90-16-000

Northern Border Pipeline Co., Docket No. CP78-124-013

Natgas (U.S.) Inc., Docket No. CI89-348-001

United Gas Pipe Line Co., Docket No. CP79-400-004

Northern Natural Gas Co., Natgas (U.S.) Inc., Docket No. CP79-396-007

Natgas states that Pan-Alberta is the export/supplier of 800,000 Mcf per day of natural gas to Northwest Alaskan Pipeline Company (Northwest Alaskan), which sells the gas for resale in interstate commerce to three interstate pipelines. The gas is transported by Northern Border Pipeline Company as part of the pre-build project of the Eastern Leg of the ANGTS. Natgas further states that one on those interstate pipeline repurchasers, United Gas Pipe Line Company, (United) is assigning its rights and obligation to purchase and ship up to 450,000 Mcf per day to Natgas. Natgas states that it will seek to market these supplies of natural gas, which it will now purchase from its affiliate, Pan-Alberta.

Natgas states that this application requests certification of a specific long-term sale for resale in interstae commerce of up to 100,000 Mcf per day of those supplies to Northern pursuant to a Gas Purchase Agreement dated October 16, 1989, between Natgas and Northern. Natgas states that under the Agreement, Northern will have the obligation to purchase a minimum of 20% of the contract quantity on a daily basis and a minimum of 60% of the contract quantity on an annual average basis. The term of the Agreement is through October 31, 2001.

Natgas states that the price of the gas will be based on a multi-part rate which includes a demand charge, Tier I, Tier II and best-efforts commodity charges. The demand charges is equal to 50% of the current demand charge, Northern currently pays to Northwest Alaskan, plus 100/450 th's of Natgas' share of Northern Border's demand charges. The demand charge is limited by a cap through October 31, 1991. The Tier I commodity charge is equal to Northern's then effective weighted average cost of domestic gas and the Tier II and best-efforts commodity charges will be determined on the basis of market factors.

Any person desiring to be heard or to make any protest with reference to said application should on or before November 3, 1989, file with the Federal Energy Regulatory Commission, Washington, DC 20426, a motion to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the Natural Gas Act (18 CFR 157.10). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken, but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party to a proceeding or to participate as a party in any hearing therein must file a motion to intervene in accordance with the Commission's Rules.

Take further notice that, pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by sections 7 and 15 of the Natural Gas Act and the Commission's Rules of Practice and Procedure, a hearing will be held without further notice before the Commission or its designee on this application if no motion to intervene is filed within the time required herein, if the Commission or its designee on this application if no motion to intervene is filed within the time required herein, if the Commission on its own review of the matter finds that a grant of the certificate is required by the public convenience and necessity. If a motion for leave to intervene is timely filed, or if the Commission on its own motion believes that a formal hearing is required, further notice of such hearing will be duly given.

Under the procedure herein provided for, unless otherwise advised, it will be unnecessary for Natgas to appear or be represented at the hearing.

**Lois D.Cashell,**

*Secretary.*

[FR Doc. 89-25526 Filed 10-30-89; 8:45 am]

BILLING CODE 6717-01-M

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**[Docket No. EL89-55-000]**

## New England Power Co.; Filing

October 24, 1989.

Take notice that on September 28, 1989, New England Power Company (NEP) filed a Petition for Waiver of Fuel Clause Regulations. NEP requests waiver of the Commission's fuel clause regulations in order to allow flow-through to customers of certain contract termination costs related to uranium supply and enrichment services billed to NEP pursuant to its power contracts with Yankee Atomic Electric Company, Maine Yankee Nuclear Corporation, and Vermont Yankee Nuclear Power Corporation. According to the Company, the benefits of these transactions have

already been passed on to customers as lower fuel expense.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). All such motions or protests should be filed on or before November 7, 1989. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

**Lois D. Cashell,**

*Secretary.*

[FR Doc. 89-25527 Filed 10-30-89; 8:45 am]

BILLING CODE 6717-01-M

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**[Docket No. CP78-124-013]**

## Northern Border Pipeline Co.; Petition To Amend

October 24, 1989.

Take notice that on October 23, 1989, Northern Border Pipeline Company (Northern Border), 2223 Dodge Street, Omaha, Nebraska 68102, filed in Docket No. CP78-124-013, an application pursuant to Sections 7 (b) and (c) of the Natural Gas Act and Section 9 of the Alaska Natural Gas Transportation Act (ANGTA) for amendment of its certificate authorization.

By such application Northern Border seeks: (1) Approval to abandon the transportation of natural gas for United Gas Pipe Company (United); (2) A certificate of public convenience and necessity authorizing the firm transportation of natural gas for Natgas U.S. Inc. (Natgas) through October 31, 2001; and, (3) Pre-granted approval to abandon service to Natgas under certain conditions.

Northern Border's proposals are fully set forth in the application which is on file with the Commission and open to public inspection.

Northern Border indicates that the application is one of several being filed as the result of complex, interrelated agreements reached between the parties with respect to the purchase, sale and transportation of Canadian gas on the pre-built Eastern Leg of the ANGTS. This group of applications includes:

Northwest Alaskan Pipeline Co., Docket No. CP78-123-028;
Northwest Alaskan Pipeline Co., Docket No. RP90-16-000;
Natgas (U.S.) Inc, Docket No. CP90-93-000;
Natgas (U.S. Inc., Docket No. CI89-348-001;
United Gas Pipe Line Co., Docket No. CP79-400-004;
Northern Natural Gas Co., Natgas (U.S.) Inc., Docket No. CP79-396-007.

By this application Northern Border proposes to abandon the firm transportation of 450,000 Mcf per day of natural gas for United. Northern Border receives the natural gas volumes for United's account at a point of interconnection between the facilities of Foothills Pipe lines (Sask.) Ltd. and Northern Border on the international boundary near Port of Morgan, Montana, (Monchy, Saskatchewan). Northern Border transports and redelivers such volumes at existing points of interconnection between the facilities of Northern Natural Gas Company, (Northern) and Northern Border near Aberdeen, South Dakota, Welcome, Minnesota and Ventura, Iowa.

Northern Border states that United purchases the natural gas volumes transported by Northern Border from Northwest Alaskan Pipeline Company (Northwest Alaskan) which in turn purchases them from Pan-Alberta Gas Ltd. (Pan-Alberta).

Northern Border further states that United and Pan-Alberta have entered into a Memorandum of Understanding, dated June 5, 1989 which provides that Pan-Alberta's designee, Natgas U.S. Inc., (Natgas), will assume United's natural gas purchase rights and obligations with Northwest Alaskan and United's natural gas transportation rights and obligations with Northern Border.

Thus, Northern Border now proposes to transport on a firm basis up to 450,000 Mcf per day of natural gas for Natgas from Monchy to Aberdeen, Welcome and Ventura. Northern Border states that Natgas is a natural gas marketer in the United States and is an affiliate of Pan-Alberta. Northern Border states that Natgas and Northern Border have entered into a "U.S. Shippers Service Agreement", dated October 6, 1989, which makes special provision for an alternative credit support arrangement between Natgas and Northern Border.

Northern Border also seeks pre-granted approval for abandonment of the transportation service for Natgas in the event of nonpayment by Natgas. Northern Border states that it will terminate service to Natgas if Natgas fails to make timely payment to Northern Border, fails to maintain a letter of credit or fails to adhere to the specific provision of the alternative credit support arrangement. Northern Border states that its application is being filed under the ANGTA and that ANGTA furnishes an independent and unique basis for approval of the pre-granted abandonment.

Any person desiring to be heard or to make any protest with reference to said petition to amend should on or before November 3, 1989, file with the Federal Energy Regulatory Commission, Washington, DC 20426, a motion to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 384.214 or 385.211) and the Regulations under the Natural Gas Act (18 CFR 157.10). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party to a proceeding or to participate as a party in any hearing therein must file a motion to intervene in accordance with the Commission's Rules.

**Lois D. Cashell,**

*Secretary.*

[FR Doc. 89-25528 Filed 10-30-89; 8:45 am]

BILLING CODE 6717-01-M

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**[Docket No. RP90-16-000]**

## Northern Alaskan Pipeline Co.; Tariff Changes

October 24, 1989.

Take notice that on October 23, 1989, Northwest Alaskan Pipeline Company ("Northwest Alaskan") tendered for filing in Docket No. RP90-16-000 the following revisions to its FERC Gas Tariff, Original Volume No. 2.

**Rate Schedule and Tariff Sheet Number**

X-1

Fourth Revised Sheet No. 100;
Fourth Revised Sheet No. 101;
Second Revised Sheet No. 106;
Third Revised Sheet No. 109;
Fourth Revised Sheet No. 123;
Fifth Revised Sheet No. 150;
Second Revised Sheet No. 157;
Second Revised Sheet No. 157A;
Third Revised Sheet No. 158;
Fourth Revised Sheet No. 186A;

X-3

Third Revised Sheet No. 300;
Third Revised Sheet No. 301;
Original Sheet Nos. 321A-321I;
Third Revised Sheet No. 322;
Second Revised Sheet No. 350;
Second Revised Sheet No. 386A;

Original Sheet Nos. 386B–386G.

Northwest Alaskan states that the proposed tariff revisions implement, in part, a transaction contemplated in principle by the Memorandum of Understanding between Northwest Alaskan's supplier, Pan-Alberta Gas, Ltd. ("Pan-Alberta") and its purchaser, United Gas Pipe Line Company ("United"). The proposed tariff revisions provide, in summary, for an assignment at Pan-Alberta's request of the Gas Purchase Agreement between Northwest Alaskan and United (the "United Agreement") from United to Natgas U.S. Inc. ("Natgas"), a redetermination of the price to be paid by Natgas under the United Agreement, an increase of the minimum daily volume of gas to be purchased by Northern National Gas Company, Division of Enron Corp. ("Northern"), from Northwest Alaskan, and the elimination of Northern's option to increase its average daily volume of gas purchased from Northwest Alaskan.

These tariff revisions would not become effective unless a notice is filed with the commission by Northwest Alaskan within thirty days of filing the Petition and would not become effective until the time specified in that notice.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 or 385.214). All such motions or protests should be filed on or before November 3, 1989. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

**Lois D. Cashell,**

*Secretary.*

[FR Doc. 89–25529 Filed 10–30–89; 8:45 am]

BILLING CODE 6717–01–M

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**[Docket No. CP78–123–028]**

## Northwest Alaskan Pipeline Co.; Petition To Amend

October 24, 1989.

Take notice that on October 23, 1989, Northwest Alaskan Pipeline Company (Northwest Alaskan), 295 Chipeta Way, Salt Lake City, Utah 84158–0900, filed in Docket No. CP78–123–028, an application pursuant to Section 7 of the Natural Gas Act and Section 9 of the Alaskan Natural Gas Transporation Act (ANGTA). Northwest Alaskan states that its application is necessary or related to the construction and initial operation of the Alaskan Natural Gas Transportation System (ANGTS).

By such application Northwest Alaskan seeks to: (1) Abandon its sale to United Gas Pipe Line Company (United) of an average daily volume of 450,000 Mcf of Canadian natural gas transported through the Eastern Leg of the ANGTS; (2) Amend its current certificate of public convenience and necessity to authorize the sale for resale of an annual average daily volume of 450,000 Mcf to Natgas U.S. Inc. (Natgas), as a replacement for United; and (3) Amend its current certificate of public convenience and necessity to extend the authorization for sale for resale through October 31, 2001 of a maximum daily volume of up to 880,000 Mcf per day, plus two percent tolerance, not to exceed on an annual basis, a daily average of 800,000 Mcf.

Northwest Alaskan's proposals are more fully set forth in the application which is on file with the Commission and open to public inspection.

Northwest Alaskan indicates that the application is one of several being filed as the result of complex, interrelated agreements reached between the parties with respect to the purchase, sale and transportation of Canadian gas on the pre-build Eastern Leg of the ANGTS. This group of applications includes:

Northwest Alaskan Pipeline Co., Docket No. RP90–16–000;

Northern Border Pipeline Co., Docket No. CP78–124–013;

Natgas (U.S.) Inc., Docket No. CP90–93–000;

Natgas (U.S.) Inc., Docket No. CI89–348–001;

United Gas Pipe Line Co., Docket No. CP79–400–004;

Northern Natural Gas Co., Natgas (U.S.) Inc., Docket No. CP79–396–007.

Northwest Alaskan states that the overall transaction proposed by this group of applications is subject to a final Closing Agreement which will have terms addressing and resolving all issues relating to the potential bankruptcy of a party and any potential losses or liabilities that result. Northwest Alaskan further states that if it has not filed a notice with the Commission within thirty days of this application, the application will be deemed automatically withdrawn.

Northwest Alaskan states that upon the recommendation of the United States Government it initiated the pre-build projects of the Eastern and Western Legs of the ANGTS. With respect to the Eastern Leg, Northwest Alaskan states that it entered into a contract, dated March 9, 1978, with Pan-Alberta Gas, Ltd. for the purchase of 800,000 Mcf per day of natural gas which was to be imported by Northwest Alaskan and resold to three interstate natural gas pipelines. Of that volume, United was to have purchased 450,000 Mcf per day, Northern Natural Gas Company (Northern)—200,000 Mcf per day, and Panhandle Eastern Pipe Line Company (Panhandle)—150,000 per day.

Northwest Alaskan states that the sale to United has been amended several times, most recently by the Commission in Docket No. RP87–34–000 and 001 on June 16, 1987. This amendment approved a two-year settlement of take-or-pay and *force majeure*, disputes between United and Northwest Alaskan. The settlement was later extended through October 31, 1989. Northwest Alaskan states that upon further negotiations, United has agreed to assign its Northwest Alaskan natural gas purchase rights and obligations to Pan-Alberta's designee, now Natgas. Northwest Alaskan states that Natgas is a natural gas marketer in the United States and is an affiliate of Pan-Alberta.

Thus, by this application, Northwest Alaskan seeks approval of the abandonment the sale to United of 450,000 Mcf per day and re-certification of the sale of that volume to Natgas.

Northwest Alaskan also seeks approval of an amendment of its certificate to extend the term of its sales to Natgas, Northern, and Panhandle through October 31, 2001. Northwest Alaskan further specifically requests that it be authorized to make sales for resale in interstate commerce of a maximum of 880,000 Mcf per day, plus a two percent tolerance, not to exceed on an annual average daily basis 800,000 Mcf per day.

Finally, Northwest Alaskan states that it cannot and will not accept an order which does not provide that each component of the order becomes effective simultaneously, and which does not allow for a prospective period in which it can review the contents of the order. Northwest Alaskan also wants the order to be effective only after the date it specifies in its further notice to the Commission. Northwest Alaskan further seeks waiver of § 157.20(a) which would otherwise require it to accept a certificate within thirty days of issuance.

Any person desiring to be heard or to make any protest with reference to said petition to amend should on or before November 3, 1989, file with the Federal Energy Regulatory Commission,

Washington, DC 20426, a motion to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 384.214 or 385.211) and the Regulations under the Natural Gas Act (18 CFR 157.10). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party to a proceeding or to participate as a party in any hearing therein must file a motion to intervene in accordance with the Commission's Rules.

**Lois D. Cashell,**

*Secretary.*

[FR Doc. 89-25530 Filed 10-30-89; 8:45 am]

BILLING CODE 6717-01-M

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**[Docket No. RP87-34-009]**

### Northwest Alaskan Pipeline Co.; Extension of Tariff Provisions

October 25, 1989.

Take notice that on October 24, 1989, Northwest Alaskan Pipeline Company ("Northwest Alaskan") tendered for filing in Docket No. RP87-34-009 the following tariff sheets:

**Rate Schedule and Tariff Sheets Number**

X-3

Original Sheet No. 308BBB.2;
Original Sheet No. 308FFF.2;
Original Sheet No. 358VV.2;
Original Sheet No. 358AAA.2

Northwest Alaskan proposed that these tariff sheets be effective on November 1, 1989.

Northwest Alaskan states that these tariff sheets would continue in effect certain aspects of the current interim agreement among Northwest Alaskan, United Gas Pipe Line Company ("United") and Pan-Alberta Gas Ltd. ("Pan-Alberta"), which would otherwise expire on October 31, 1989, from November 1, 1989 through December 31, 1989 (the "Extended Interim Period'). The current interim agreement (the "Interim Agreement") consists of the Tenth Amendment to the Gas Purchase Agreement between United and Northwest Alaskan, the Twentieth Amending Contract to the Gas Sales Contract between Northwest Alaskan and Pan-Alberta and the Marketing and Transportation Agreement between United and Pan-Alberta, which are contained in Northwest Alaskan's FERC Gas Tariff Original Volume No. 2, Rate Schedule X-3 at tariff sheets numbered 30800 through 308FFF and 358HH through 358AAA.

Northwest Alaskan states that the provisions of the Interim Agreement to be extended for the Extended Interim Period are paragraphs 5(b), 7, 7(a), 7(b), 7(c), 7(d), 7(e), 7(f), 7(h), 7(i), 8, 9, 9(b), 11, 12, 13, 14, 17 and 18 of the Tenth Amendment and the Twentieth Amending Contact and paragraphs 3(a), 3(b), (5(a), 5(b), 6, 7, and 8 of the Marketing and Transportation Agreement.

Northwest Alaskan states that United and Pan-Alberta have entered into a Memorandum of Understanding dated June 5, 1989 which sets forth among other things, the basic principles upon which definitive agreements shall be reached with respect to the purchase, sale and transportation of Canadian gas subsequent to the expiration of the Interim Agreement. The purpose of the requested extension is to preserve that status quo and to grant the parties an opportunity to finalize and obtain necessary approvals of those definitive agreements.

Northwest Alaskan has requested that the Commission approve the requested extension of the Interim Agreement provisions of Northwest Alaskan's tariff to be effective on November 1, 1989 and find that the extension is in the public interest.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, N.E., Washington, DC. 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 or 385.214). All such motions or protests should be filed on or before November 1, 1989. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

**Lois D. Cashell,**

*Secretary.*

[FR Doc. 89-25531 Filed 10-30-89; 8:45 am]

BILLING CODE 6717-01-M

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**[Docket Nos. RP87-103-000 and RP88-262-000, et al. (Not Consolidated)].**

### Panhandle Eastern Pipe Line Co.; Change of Date of informal Settlement Conference

(October 24, 1989).

By notice issued on October 18, 1989, an informal settlement conference was scheduled to convened in the above-proceedings on Friday, November 3, 1989, at 9:30 a.m. in a hearing room of the Federal Energy Regulatory Commission, 810 First Street, NE., Washington, DC, 20426. The settlement conference will be convened on November 2, 1989, at 2 p.m. instead of November 3, 1989 at 9:30 a.m. and, if necessary, the settlement conference will continue through November 3, 1989.

Any party, as defined by 18 CFR 385.102(c), is invited to attend. Persons wishing to become a party must move to intervene and receive intervenor status pursuant to the Commission's regulations (18 CFR 385.214).

For additional information, please contact John J. Keating, (202) 357-5762 or Donald A. Heydt, (202) 357-5248.

**Lois D. Cashell,**

*Secretary.*

[FR Doc. 89-25532 Filed 10-30-89; 8:45 am]

BILLING CODE 6717-01-M

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**[Docket No. CP79-400-004 and CP79-396-007]**

### United Gas Pipe Line Co. et al; Petition To Amend

October 24, 1989.

Take notice that on October 23, 1989, United Gas Pipe Line Company (United), Northern Natural Gas Company, Division of Enron Corp. (Northern), and Natgas U.S. Inc. (Natgas), (jointly as the applicants), filed an application in the above-captioned dockets pursuant to Sections 7(b) and (c) of the Natural Gas Act, and Section 9 of the Alaska Natural Gas Transportation Act (ANGTA), for the expedited issuance of an amendment to a certificate of public convenience and necessity.

By such application the applicants seek: (1) Approving the "partial" abandonment of the firm exchange of up to 450,000 Mcf per day of natural gas between United States and Northern authorized in Docket Nos. CP79-396 and CP79-400; (2) Authorizing the exchange on a firm basis of 75,000 Mcf per day of natural gas between Northern and Natgas, as successor to United, and the exchange of amounts in excess of 75,000 Mcf per day, up to 450,000 Mcf per day, on a best-efforts basis; and (3) Extend the term of the exchange through October 31, 2001.

The applicants' proposals are more fully set forth in the application which is on file with the Commission and open to public inspection.

United, Northern, and Natgas state that their application is one of several being filed as the result of complex, interrelated agreements reached among

the parties with respect to the sale, purchase, and transportation of Canadian gas on the pre-build Eastern Leg of the Alaskan Natural Gas Transportation System (ANGTS). This group of applications includes:

Northwest Alaskan Pipeline Co. Docket No. RP90–16–000;
Northwest Alaskan Pipeline Co. Docket No. CP78–123–028;
Northern Border Pipeline Co. Docket No. CP78–124–013;
Natgas (U.S.) Inc. Docket No. CP90–93–000;
Natgas (U.S.) Inc. Docket No. CI89–348–001.

The applicants state that United purchase up to 450,000 Mcf per day of natural gas from Northwest Alaskan Pipeline Company (Northwest Alaskan), which Northwest Alaskan imports from Pan-Alberta Gas, Ltd. (Pan-Alberta). The natural gas is then transported by the Northern Border Pipeline Company (Northern Border). United takes delivery of these volumes via a firm exchange of natural gas with Northern, which interconnects at various locations with Northern Border. This exchange is for the mutual benefit of United and Northern, and is on a cost-free basis.

The applicants state that as a result of an agreement among United, Pan-Alberta, and Northwest Alaskan, Natgas, an affiliate of Pan-Alberta, will replace United in the purchase and shipment of 450,000 Mcf per day. By this application the applicants seek to partially reassign to Natgas United's rights and obligations in the natural gas exchange with Northern.

More specifically, the applicants propose to abandon United's obligation to deliver 450,000 Mcf per day to Northern and the obligation of Northern to deliver 450,000 Mcf per day to United. Applicants request that a certificate be issued authorizing the exchange of natural gas between Northern and Natgas on a firm, cost-free basis of up to 75,000. Mcf per day, and the cost-free exchange of volumes in excess of 75,000, up to 450,000 on a best-efforts basis. The applicants state that they have amended and assigned the existing exchange agreement between Northern and United by a further agreement provided with the application. Further, this agreement contains a listing of the firm and alternative exchange points to be used by Northern and Natgas.

Any person desiring to be heard or to make any protest with reference to said petition to amend should on or before November 3, 1989, file with the Federal Energy Regulatory Commission, Washington, DC 20426, a motion to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 384.214 or 385.211) and the Regulations under the Natural Gas Act (18 CFR 157.10). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party to a proceeding or to participate as a party in any hearing therein must file a motion to intervene in accordance with the Commission's Rules.

**Lois D. Cashell,**

*Secretary.*

[FR Doc. 89–25533 Filed 10–30–89; 8:45 am]

BILLING CODE 6717–01–M

## Office of Energy Research

### Continuation of Solicitation for Special Research Grants and Research Opportunity Announcement for Research Contracts, No. 90–1

**AGENCY:** Department of Energy.

**ACTION:** Annual notice of continuation of availability of research grants and contracts.

**SUMMARY:** The Office of Energy Research (ER) of the Department of Energy hereby announces its continuing interest in receiving applications/proposals for Special Research Grants or Research Contracts supporting work in the following ER program offices: Basic Energy Sciences, Health and Environmental Research, Fusion Energy, Scientific Computing, Field Operations Management, Superconducting Supercollider, and High Energy and Nuclear Physics. Information about submission of applications/proposals, eligibility, limitations, evaluation and selection processes, and other policies and procedures are specified, for grants, in 10 CFR part 605 which was published in the **Federal Register** on April 15, 1985 (50 FR 14856) and, for contracts, in the Research Opportunity Announcement published on November 8, 1988 (53 FR 45234). The Catalog of Federal Domestic Assistance number is 81.049.

**DATES:** Applications and proposals may be submitted at any time in response to this Notice of Availability but in all cases must be received by DOE on or before October 31, 1990.

**ADDRESSES:** Applicants/proposers may obtain forms and additional information from Director, Acquisition and Assistance Management Division, Office of Energy Research, ER–64, U.S. Department of Energy, Washington, DC 20545, (301) 353–5544. Completed applications or proposals must be sent to this same address.

**SUPPLEMENTARY INFORMATION:** As mentioned above, the solicitations for Special Research Grants and the Research Opportunity Announcement for research contracts were published in the **Federal Register**. Those solicitations specify the policies and procedures which govern the application/proposal, evaluation, and selection processes for research grants and contracts. It is anticipated that approximately 409 million dollars will be available for award in FY 1990. DOE is under no obligation to pay for any costs associated with the preparation or submission of applications/proposals. DOE reserves the right to fund, in whole or in part, any, all, or none of the applications/proposals submitted in response to this notice.

Issued in Washington, DC, on October 17, 1989.

**D.D. Mayhew,**

*Deputy Director for Management, Office of Energy Research.*

[FR Doc. 89–25624 Filed 10–30–89; 8:45 am]

BILLING CODE 6450–01–M

## Office of Fossil Energy

**[FE Docket No. 89–63–NG]**

### Amerigas International Corp.; Application To Export Natural Gas to Mexico

**AGENCY:** Office of Fossil Energy, Department of Energy.

**ACTION:** Notice of application for blanket authorization to export natural gas to Mexico.

**SUMMARY:** The Office of Fossil Energy (FE) of the Department of Energy (DOE) gives notice of receipt on September 13, 1989, of an application filed by Amerigas International Corporation (Amerigas) requesting blanket authorization to export from the United States to Mexico up to 54.75 Bcf of natural gas over a two-year period beginning on the date of first delivery. Amerigas intends to use existing pipeline facilities within the United States and at the international border for transportation of the exported gas. Amerigas states that it will advise the DOE of the date of first delivery and submit quarterly reports detailing each transaction.

The application was filed under section 3 of the Natural Gas Act and DOE Delegation Order Nos. 0204–111 and 0204–127. Protests, motions to intervene, notices of intervention and written comments are invited.

**DATE:** Protests, motions to intervene, or notices of intervention, as appliable, requests for additional procedures and written comments are to be filed at the address listed below no later than 4:30 p.m., e.s.t., November 30, 1989.

**ADDRESS:** Office of Fuels Program, Fossil Energy, U.S. Department of Energy, Room 3F–056, FE–50, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585.

**FOR FURTHER INFORMATION CONTACT:**

Perry Bolger, Office of Fuels Program, Fossil Energy, U.S. Department of Energy, Forrestal Building, Room 3056, 1000 Independence Ave, SW., Washington, DC 20585. (202) 586–1789.

Diane Stubbs, Natural Gas and Mineral Leasing, Office of General Counsel, U.S. Department of Energy, Forrestal Building, Room 6E–042, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586–6667.

**SUPPLEMENTARY INFORMATION:**

Amerigas, a subsidary of AP Propane, Inc., a Delaware corporation, is located in Houston, Texas, and was organized to engage in the international marketing of natural gas, light hydrocarbons, and gaseous petroleum chemicals. Amerigas intends to export natural gas to Mexico for spot-market sales, primarily to Petroleos Mexicanos (Pemex). Amerigas currently is negotiating with Pemex a contract for the sale of up to 60,000 Mcf per day. Amerigas anticipates purchasing all the gas required to serve this authorization from natural gas producers in the states of Texas and New Mexico. Amerigas states that each sales transaction would be negotiated at arms length with Pemex and would be consistent with the public interest.

This export application will be reviewed under section 3 of the Natural Gas Act and the authority contained in DOE Delegation Order Nos. 0204–111 and 0204–127. In deciding whether the proposed export of natural gas is in the public interest, domestic need for the gas will be considered, and any other issue determined to be appropriate, including whether the arrangement is consistent with the DOE policy of promoting competition in the natural gas marketplace by allowing commercial parties to freely negotiate their own trade arrangements. Parties, especially those that may oppose this application, should comment on these matters as they relate to the requested export authority. The applicant asserts that there is no current need for the domestic gas that would be exported under the proposed arrangements. Parties opposing this arrangement bear the burden of overcoming this assertion.

All parties should be aware that if this blanket export application is granted, the authorization may permit the export of the gas at the international border point where existing transmission facilities of Del Norte Pipeline near El Paso, Texas, connect with the facilities of Pemex near Ciudad Juarz, Chihuahua, Mexico, or at any other existing border exit facility. Further, all parties should be aware that, in accordance with its present policy and past practice, if DOE approves the blanket authorization, it may limit the terms to two years. This limitation, if imposed, presumes that the exports would take place under contracts with terms of two years or less.

Amerigas requests that an authorization be granted on an expedited basis. A decision on Amerigas' request for expedited treatment will not be made until all responses to this notice have been received and evaluated.

### NEPA Compliance

The DOE has determined that compliance with the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, can be accomplished by means of a categorical exclusion. On March 29, 1989, the DOE published in the **Federal Register** (54 FR 12474) a notice of amendments to its guidelines for compliance with NEPA. In that notice, the DOE added to its list of categorical exclusions the approval or disapproval of an import/export authorization for natural gas in cases not involving new construction. Application of the categorical exclusion in any particular case raises a rebuttable presumption that the DOE's action is not a major Federal action under NEPA. Unless the DOE receives comments indicating that the presumption does not or should not apply in this case, no further NEPA review will be conducted by the DOE.

### Public Comment Procedures

In response to this notice, any person may file a protest, motion to intervene or notice of intervention, as applicable, and written comments. Any person wishing to become a party to the proceeding and to have the written comments considered as the basis for any decision on the application must, however, file a motion to intervene or notice of intervention, as applicable. The filing of a protest with respect to this application will not serve to make the protestant a party to the proceeding, although protests and comments received from persons who are not parties will be considered in determining the appropriate action to be taken on the application. All protests, motions to intervene, notices of intervention, and written comments must meet the requirements that are specified by the regulations in 10 CFR part 590.

Protests, motions to intervene, notices of intervention, requests for additional procedures, and written comments should be filed with the Office of Fuels Programs at the address listed above.

A decisional record on the application will be developed through responses to this notice by parties, including the parties' written comments and replies thereto. Additional procedures will be used as necessary to achieve a complete understanding of the facts and issues. A party seeking intervention may request that additional procedures be provided, such as additional written comments, an oral presentation, a conference, or trial-type hearing. Any request to file additional written comments should explain why they are necessary. Any request for an oral presentation should identify the substantial question of fact, law, or policy at issue, show that it is material and relevant to a decision in the proceeding, and demonstrate why an oral presentation is needed. Any request for a conference should demonstrate why the conference would materially advance the proceeding. Any request for a trial-type hearing must show that there are factual issues genuinely in dispute that are relevant and material to a decision and that a trial-type hearing is necessary for a full and true disclosure of the facts.

If an additional procedure is scheduled, notice will be provided to all parties. If no party requests additional procedures, a final opinion and order may be issued based on the official record, including the application and response filed by parties pursuant to this notice, in accordance with 10 CFR Sec. 590.316.

A copy of Amerigas's application is available for inspection and copying in the Office of Fuels Programs Docket Room, 3F–056 at the above address. The docket room is open between the hours of 8:00 a.m. and 4:30 p.m., e.s.t., Monday through Friday, except Federal holidays.

Issued in Washington, DC, on October 27, 1989.

**Constance L. Buckley,**

*Deputy Assistant Secretary for Fuels Programs, Office of Fossil Energy.*

[FR Doc. 89–25620 Filed 10–30–89; 8:45 am]

BILLING CODE 6450–01–M

[FE Docket No. 89-15-NG]

## Great Lakes Gas Transmission Co.; Conditional Order Amending Authorization To Import Natural Gas From and Export Natural Gas to Canada

**AGENCY:** Office of Fossil Energy, Department of Energy.

**ACTION:** Notice of conditional order amending authorization to import natural gas from and export natural gas to Canada.

**SUMMARY:** The Office of Fossil Energy (FE) of the Department of Energy (DOE) gives notice that it has issued a conditional order approving an amendment to Great Lakes Gas Transmission Company's (Great Lakes) authorization to import natural gas from and export natural gas to Canada. The order issued in FE docket No. 89-15-NG increases by 417,500 Mcf the currently authorized maximum daily volumes Great Lakes may import from and export to Canada and thereby raises the total maximum daily volumes Great Lakes may import and export through November 1, 2005, from 987,500 Mcf to 1,405,000 Mcf.

Final approval of this import is conditioned on DOE's completion of its responsibilities under the National Environmental Policy Act of 1969 and its reexamination at that time of this conditional order.

A copy of this order is available for inspection and copying in the Office of Fuels Program Docket Room, 3F-056, Forrestal Building, 1000 Independence Avenue SW., Washington, DC 20585, (202) 586-9478. The docket room is open between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays.

Issued in Washington, DC, October 25, 1989.

Constance L. Buckley,

*Deputy Assistant Secretary for Fuels Programs, Office of Fossil Energy.*

[FR Doc. 89-25621 Filed 10-30-89; 8:45 am]

BILLING CODE 6450-01-M

[FE Docket No. 89-64-NG]

## Libra Marketing, Inc.; Application To Export Natural Gas to Mexico

**AGENCY:** Office of Fossil Energy, Department of Energy.

**ACTION:** Notice of application for blanket authorization to export natural gas to Mexico.

**SUMMARY:** The Office of Fossil Energy (FE) of the Department of Energy (DOE) gives notice of receipt on September 14, 1989, of an application filed by Libra Marketing, Inc. (Libra), requesting blanket authorization to export from the United States to Mexico up to 146 Bcf of natural gas over a two-year period beginning on the date of first delivery. Libra intends to use existing pipeline facilities within the United States and at the international border for transportation of the exported gas. Libra states that it will advise the DOE of the date of first delivery and submit quarterly reports detailing each transaction.

The application was filed under section 3 of the Natural Gas Act and DOE Delegation Order Nos. 0204-111 and 0204-127. Protests, motions to intervene, notices of intervention and written comments are invited.

**DATE:** Protests, motions to intervene, or notices of intervention, as applicable, requests for additional procedures and written comments are to be filed at the address listed below no later than 4:30 p.m., e.s.t., November 30, 1989.

**ADDRESS:** Office of Fuels Programs, Fossil Energy, U.S. Department of Energy, Room 3F-056, FE-50, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585.

**FOR FURTHER INFORMATION CONTACT:**

Perry Bolger, Office of Fuels Programs, Fossil Energy, U.S. Department of Energy, Forrestal Building, Room 3F-055B, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586-1789.

Diane Stubbs, Natural Gas and Mineral Leasing, Office of General Counsel, U.S. Department of Energy, Forrestal Building, Room 6E-042, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586-6667.

**SUPPLEMENTARY INFORMATION:**

Libra, a Texas corporation with its principal place of business in Corpus Christi, Texas, is an international marketer of natural gas, light hydrocarbons, and gaseous petroleum chemicals. Libra intends to export natural gas to Mexico for spot market sales, primarily to Petroleos Mexicanos (Pemex). Libra anticipates purchasing all the gas required to serve this authorization from natural gas producers in the States of Texas, Louisiana, and New Mexico. Libra states that each sales transaction would be negotiated at arms length with Pemex or other purchasers and that the terms of each would reflect market conditions.

This export application will be reviewed under section 3 of the Natural Gas Act and the authority contained in DOE Delegation Order Nos. 0204-111 and 0204-127. In deciding whether the proposed export of natural gas is in the public interest, domestic need for the gas will be considered, and any other issue determined to be appropriate, including whether the arrangement is consistent with the DOE policy of promoting competition in the natural gas marketplace by allowing commercial parties to freely negotiate their own trade arrangements. Parties, especially those that may oppose this application, should comment on these matters as they relate to the requested export authority. The applicant asserts that there is no current need for the domestic gas that would be exported under the proposed arrangements. Parties opposing this arrangement bear the burden of overcoming this assertion.

All parties should be aware that if this blanket export application is granted, the authorization may permit the export of the gas at any point of exit on the international border where existing pipeline facilities are located.

Libra requests that an authorization be granted on an expedited basis. A decision on Libra's request for expedited treatment will not be made until all responses to this notice have been received and evaluated.

### NEPA Compliance

The DOE has determined that compliance with the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, can be accomplished by means of a categorical exclusion. On March 27, 1989, the DOE published in the **Federal Register** (54 FR 12474) a notice of amendments to its guidelines for compliance with NEPA. In that notice, the DOE added to its list of categorical exclusions the approval or disapproval of an import/export authorization for natural gas in cases not involving new construction. Application of the categorical exclusion in any particular case raises a rebuttable presumption that the DOE's action is not a major Federal action under NEPA. Unless the DOE receives comments indicating that the presumption does not or should not apply in this case, no further NEPA review will be conducted by the DOE.

### Public Comment Procedures

In response to this notice, any person may file a protest, motion to intervene or notice of intervention, as applicable, and written comments. Any person wishing to become a party to the proceeding and to have the written comments considered as the basis for any decision on the application must, however, file a motion to intervene or notice of intervention, as applicable. The filing of a protest with respect to

this application will not serve to make the protestant a party to the proceeding, although protests and comments received from persons who are not parties will be considered in determining the appropriate action to be taken on the application. All protests, motions to intervene, notices of intervention, and written comments must meet the requirements that are specified by the regulations in 10 CFR part 590. Protests, motions to intervene, notices of intervention, requests for additional procedures, and written comments should be filed with the Office of Fuels Programs at the address listed above.

It is intended that a decisional record on the application will be developed through responses to this notice by parties, including the parties' written comments and replies thereto. Additional procedures will be used as necessary to achieve a complete understanding of the facts and issues. A party seeking intervention may request that additional procedures be provided, such as additional written comments, an oral presentation, a conference, or trial-type hearing. Any request to file additional written comments should explain why they are necessary. Any request for an oral presentation should identify the substantial question of fact, law, or policy at issue, show that it is material and relevant to a decision in the proceeding, and demonstrate why an oral presentation is needed. Any request for a conference should demonstrate why the conference would materially advance the proceeding. Any request for a trial-type hearing must show that there are factual issues genuinely in dispute that are relevant and material to a decision and that a trial-type hearing is necessary for a full and true disclosure of the facts.

If an additional procedure is scheduled, notice will be provided to all parties. If no party requests additional procedures, a final opinion and order may be issued based on the official record, including the application and response filed by parties pursuant to this notice, in accordance with 10 CFR 590.316.

A copy of Libra's application is available for inspection and copying in the Office of Fuels Programs Docket Room, Room 3F–056 at the above address. The docket room is open between the hours of 8:00 a.m. and 4:30 p.m., e.s.t., Monday through Friday, except Federal holidays.

Issued in Washington, DC, on October 23, 1989.

**Constance L. Buckley,**

*Deputy Assistant Secretary for Fuels Programs, Office of Fossil Energy.*

[FR Doc. 89–25622 Filed 10–30–89; 8:45 am]

BILLING CODE 6450–01–M

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**[FE Docket No. 89–42–NG]**

## Panhandle Trading Co.; Order Granting Blanket Authorization To Import and Export Natural Gas

**AGENCY:** Office of Fossil Energy, Department of Energy.

**ACTION:** Notice of order granting blanket authorization to import natural gas from and export natural gas to Canada.

**SUMMARY:** The Office of Fossil Energy (FE) of the Department of Energy gives notice that it has issued an order granting Panhandle Trading Company (PTC) blanket authorization to import and export natural gas. The order issued in FE Docket No. 89–42–NG authorizes PTC to import up to 100 Bcf of Canadian natural gas and to export up to 100 Bcf of domestically produced natural gas to Canada for short-term and spot market sales over separate two-year periods beginning on the dates of the first import and the first export.

A copy of the order is available for inspection and copying in the Office of Fuels Programs Docket Room, 3F–056, Forrestal Building, 1000 Independence Avenue SW., Washington, DC 20585, (202) 586–9478. The docket room is open between the hours of 8:00 a.m. to 4:30 p.m., Monday through Friday, except Federal holidays.

Issued in Washington, DC, October 24, 1989.

**Constance L. Buckley,**

*Deputy Assistant Secretary for Fuels Programs, Office of Fossil Energy.*

[FR Doc. 89–25623 Filed 10–30–89; 8:45 am]

BILLING CODE 6450–01–M

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## ENVIRONMENTAL PROTECTION AGENCY

**[FRL–3676–4]**

## Ambient Air Monitoring Reference and Equivalent Methods; Receipt of Application for an Equivalent Method Determination

Notice is hereby given that on September 12, 1989, the Environmental Protection Agency received an application from Environics, Inc., 165 River Road, West Willington, Connecticut 06279, to determine if their Series 300 Computerized Ozone Analyzer should be designated by the Administrator of the EPA as an equivalent method under 40 CFR part 53. If, after appropriate technical study, the Administrator determines that this method should be so designated, notice thereof will be given in a subsequent issue of the **Federal Register.**

**Erich W. Bretthauer,**

*Acting Assistant Administrator for Research and Development.*

[FR Doc. 89–25580 Filed 10–30–89; 8:45 am]

BILLING CODE 6560–50–M

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**[FRL–3676–7]**

## Open Meeting of International Environmental Technology Transfer Advisory Board

Under Public Law 92–463, notice is hereby given that a meeting of the International Environmental Technology Transfer Advisory Board (IETTAB) will be held on December 7, 1989 in the Main Lounge of the National Press Club, 14th and F Streets, NW., Washington, DC. The meeting is open to the public and will run from 8:30 a.m. until approximately 5:00 p.m.

The purpose of this meeting is to review the need for transfer of environmental technolgy to low income countries to eliminate ozone depleting substances and greenhouse gases as well as similar needs regarding other pollution control or prevention. The Board will review ways and means to facilitate finance and aid for such environmental technology transfer.

Public comments can be made through written statements which will be distributed to Board Members. Written statements must be sent in care of the Executive Secretary listed below no later than November 17, 1989, in order to distribute to Members before the meeting time. Seating for interested members of the public is limited to seventy seats. Seats will be filled on a first-come basis. To confirm your interest in attending, contact the Executive Secretary by November 17, 1989.

**FOR MORE INFORMATION CONTACT:** Mark Kasman, Executive Secretary, IETTAB, Office of International Activities (A–106), U.S. Environmental Protection Agency, 401 M Street, SW, Washington, DC 20460, (202) 382–4870.

Dated: October 26, 1989.

**Timothy B. Atkeson,**

*Assistant Administrator for International Activities.*

[FR Doc. 89–25583 Filed 10–30–89; 8:45 am]

BILLING CODE 6560–50–M

[FRL-3674-5]

## Clyde Elrod Drum Site; Proposed Settlement

**AGENCY:** Environmental Protection Agency.

**ACTION:** Notice of proposed settlement.

**SUMMARY:** Under section 122(h) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), the Environmental Protection Agency (EPA) has agreed to settle claims for past response costs at the Clyde Elrod Drum Site, Kevil, Kentucky with Clyde M. Elrod and Central Service, Inc. EPA will consider public comments on the proposed settlement for thirty days. EPA may withdraw from or modify the proposed settlement should such comments disclose facts or considerations which indicate the proposed settlement is inappropriate, improper or inadequate. Copies of the proposed settlement are available from: Ms. Carolyn McCall, Investigation Support Assistant, Investigation and Cost Recovery Unit, Site Investigation and Support Branch, Waste Management Division, U.S. EPA, Region IV, 345 Courtland St., NE., Atlanta, GA 30365, (404) 347-5059.

Written comments may be submitted to the person above by 30 days from date of publication.

Dated: October 10, 1989.

**Patrick M. Tobin,**

*Director, Waste Management Division, EPA Region IV.*

[FR Doc. 89-25581 Filed 10-30-89; 8:45 am]

BILLING CODE 6560-50-M

[FRL-3676-5]

## Extension of the Public Comment Period for the Proposed Determination To Restrict the Specification of Leonard Pond and its Wetlands as Disposal Sites

**AGENCY:** Environmental Protection Agency.

**ACTION:** Notice to extend the comment period for August 30, 1989, § 404(c) proposed determination.

**SUMMARY:** A Public Notice entitled "Proposed Determination to Restrict the Specification of Leonard Pond and Its Wetlands as Disposal Sites" was published in the **Federal Register** on August 30, 1989 (54 FR 35927). That notice indicated that comments should be received at the address listed below on or before October 16, 1989.

During the public comment period landowners within the area of the proposed determination and the U.S. Fish and Wildlife Service asked for an extension to the comment period in order to obtain and submit information which pertains directly to the environmental values of the site. Since this information could influence the nature and scope of the section 404(c) action, EPA believes there is good cause for extending the comment period. Therefore, EPA is extending the period for comment on the proposed determination until close of business, November 27, 1989. This time extension is made under authority of 40 CFR 231.8.

**DATE:** Comments should be postmarked on or before November 27, 1989

**FOR FURTHER INFORMATION CONTACT:** Mr. Ralph W. Abele, EPA Water Quality Branch, JFK Federal Building, WWP-1900, Boston, MA 02203-2211, (617) 565-4438.

Dated: October 24, 1989.

**Paul G. Keough,**

*Acting Regional Administrator, Region I.*

[FR Doc. 89-25582 Filed 10-30-89; 8:45 am]

BILLING CODE 6560-50-M

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Office of the Secretary

### Social Security Administration

## 1990 Cost-of-Living Increase and Other Determinations

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

**ACTION:** Notice.

**SUMMARY:** The Secretary has determined—(1) A 4.7 percent cost-of-living increase in benefits under title II (section 215(i)) of the Social Security Act (the Act);

(2) An increase in the Federal Supplemental Security Income (SSI) (title XVI) monthly benefit amounts for 1990 to $386 for an eligible individual, $579 for an eligible individual with an eligible spouse, and $193 for an essential person (section 1617 of the Act);

(3) The average of the total wages for 1988 to be $19,334.04;

(4) The Social Security contribution and benefit base to be $50,400 for remuneration paid in 1990 and self-employment income earned in taxable years beginning in 1990;

(5) The amount of earnings a person must have to be credited with a quarter of coverage in 1990 to be $520;

(6) The monthly exempt amounts under the Social Security retirement earnings test for taxable years ending in calendar year 1990 to be $780 for beneficiaries age 65 through 69 and $570 for beneficiaries under age 65;

(7) The "old-law" contribution and benefit base to be $37,500 for 1990.

We also describe the computation of benefits for a worker and the worker's family who first become eligible for benefits in 1990, and the computation of the old-age, survivors, and disability insurance (OASDI) fund ratio used to determine whether the automatic increase in benefits under title II of the Act is affected by the "stabilizer" provision.

Finally, we are publishing a table of OASDI "special minimum" benefit amounts. This table provides the range of primary insurance amounts and the corresponding maximum family benefits under the "special minimum" benefit provision, as revised to reflect the automatic benefit increase. These benefits are payable to certain individuals with long periods of relatively low earnings.

**FOR FURTHER INFORMATION CONTACT:** Jeffrey L. Kunkel, Office of the Actuary, Social Security Administration, 6401 Security Boulevard, Baltimore, MD 21235, (301) 965-3013.

**SUPPLEMENTARY INFORMATION:** The Secretary is required by the Act to publish within 45 days after the close of the third calendar quarter of 1989 the benefit increase percentage and the revised table of "special minimum" benefits (section 215(i)(2)(D)). Also, the Secretary is required to publish before November 1 the average of the total wages for 1988 (section 215(i)(2)(C)(iii)) and the OASDI fund ratio for 1989 (section 215(i)(2)(C)(iIi)). Finally, the Secretary is required to publish on or before November 1 the contribution and benefit base for 1990 (section 230(a)), the amount of earnings required to be credited with a quarter of coverage in 1990 (section 213(d)(2)), the monthly exempt amounts under the Social Security retirement earnings test for 1990 (section 203(f)(8)(A)), the formula for computing a primary insurance amount for workers who first become eligible for benefits or die in 1990 (section 215(a)(1)(D)), and the formula for computing the maximum amount of benefits payable to the family of a worker who first becomes eligible for old-age benefits or dies in 1990 (section 203(a)(2)(C)).

### Cost-of-Living Increases

*General*

The cost-of-living increase is 4.7 percent for benefits under titles II and XVI of the Act.

Under title II, old-age, survivors, and disability insurance benefis will increase by 4.7 percent beginning with

the December 1989 benefits, which are payable on January 3, 1990. The kinds of benefits payable to individuals entitled under this program are old-age, disability, wife's, husband's, child's, widow's, widower's, mother's, father's, and parent's insurance benefits. This increase is based on the authority contained in section 215(i) of the Act (42 U.S.C. 415(i)).

Under title XVI, Federal SSI payment levels will also increase by 4.7 percent effective for payments made for the month of January 1990 but paid on December 29, 1989. This is based on the authority contained in section 1617 of the Act (42 U.S.C. 1382f). The percentage increase effective January 1990 is the same as the title II benefit increase and the annual payment amount is rounded, when not a multiple of $12, to the next lower multiple of $12.

*Automatic Benefit Increase Computation*

Under section 215(i) of the Act, the third calendar quarter of 1989 is a cost-of-living computation quarter for all the purposes of the Act. The Secretary is therefore required to increase benefits, effective with December 1989, for individuals entitled under section 227 or 228 of the Act, to increase primary insurance amounts of all other individuals entitled under title II of the Act, and to increase maximum benefits payable to a family. For December 1989, the benefit increase is the percentage increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers from the third quarter of 1988 through the third quarter of 1989. Automatic benefit increases may be modified by a "stabilizer" provision under certain adverse financial conditions that are described in the section on the OASDI fund ratio. The December 1989 benefit increase is not affected by this provision.

Section 215(i)(1) of the Act provides that the Consumer Price Index for a cost-of-living computation quarter shall be the arithmetic mean of this index for the 3 months in that quarter. The Department of Labor's Consumer Price Index for Urban Wage Earners and Clerical Workers for each month in the quarter ending September 30, 1988, was: for July 1988, 117.2; for August 1988, 117.7; and for September 1988, 118.5. The arithmetic mean for this calendar quarter is 117.8 (after rounding to the nearest 0.1). The corresponding Consumer Price Index for each month in the quarter ending September 30, 1989, was: for July 1989, 123.2; for August 1989, 123.2; and for September 1989, 123.6. The arithmetic mean for this calendar quarter is 123.3. Thus, because the Consumer Price Index for the calendar quarter ending September 30, 1989, exceeds that for the calendar quarter ending September 30, 1988, by 4.7 percent, a cost-of-living benefit increase of 4.7 percent is effective for benefits under title II of the Act beginning December 1989.

*Title II Benefit Amounts*

In accordance with section 215(i) of the Act, in the case of insured workers and family members for whom eligibility for benefits (i.e., the worker's attainment of age 62, or disability or death before age 62) occurred before 1990, benefits will increase 4.7 percent beginning with benefits for December 1989 which will be received January 3, 1990. In the case of first eligibility after 1989, the 4.7 percent increase will not apply.

For eligibility after 1978, benefits are generally determined by a benefit formula provided by the Social Security Amendments of 1977 (Pub. L. 95–216), as described later in this notice.

For eligibility before 1979, benefits are determined by means of a benefit table. In accordance with section 215(i)(4) of the Act, the primary insurance amounts and the maximum family benefits shown in this table are revised by (1) increasing by 4.7 percent the corresponding amounts established by the last cost-of-living increase and the last extension of the benefit table made under section 215(i)(4) (to reflect the increase in the contribution and benefit base for 1989); and (2) by extending the table to reflect the higher monthly wage and related benefit amounts now possible under the increased contribution and benefit base for 1990, as described later in this notice. A copy of this table may be obtained by writing to: Social Security Administration, Office of Public Affairs, Office of Public Inquiries, 4100 Annex, Baltimore, MD 21235.

Section 215(i)(2)(D) of the Act also requires that, when the Secretary determines an automatic increase in Social Security benefits, the Secretary shall publish in the **Federal Register** a revision of the range of the primary insurance amounts and corresponding maximum family benefits based on the dollar amount and other porvisions described in section 215(a)(1)(C)(i). These benefits are referred to as "special minimum" benefits and are payable to certain individuals with long periods of relatively low earnings. In accordance with section 215(a)(1)(C)(i), the attached table shows the revised range of primary insurance amounts and corresponding maximum family benefit amounts after the 4.7 percent benefit increase.

Section 227 of the Act provides flat-rate benefits to a worker who became age 72 before 1969 and was not insured under the usual requirements, and to his or her spouse or surviving spouse. Section 228 of the Act provides similar benefits at age 72 for certain uninsured persons. The current monthly benefit amount of $151.90 for an individual under sections 227 and 228 of the Act is increased by 4.7 percent to obtain the new amount of $159.00. The present monthly benefit amount of $76.10 for a spouse under section 227 is increased by 4.7 percent to $79.60.

*Title XVI Benefit Amounts*

In accordance with section 1617 of the Act, Federal SSI benefit amounts for the aged, blind, and disabled are increased by 4.7 percent effective January 1990. Therefore, the yearly Federal SSI benefit amount of $4,416 for an eligible individual, $6,636 for an eligible individual with an eligible spouse, and $2,208 for an essential person, which became effective January 1989, are increased, effective January 1990, to $4,632, $6,948, and $2,316 respectively after rounding. The corresponding monthly amounts for 1990 are determined by dividing the yearly amounts by 12, giving $386, $579, and $193, respectively. The monthly amount is reduced by subtracting monthly countable income. In the case of an eligible individual with an eligible spouse, the amount payable is further divided equally between the two spouses.

**Average of the Total Wages for 1988**

The determination of the average wage figure for 1988 is based on the 1987 average wage figure of $18,426.51 announced in the **Federal Register** on October 31, 1988 (53 FR 43932), along with the percentage increase in average wages from 1987 to 1988 measured by annual wage data tabulated by the Social Security Administration (SSA). The average amounts of wages calculated directly from this data were $17,416.59 and $18,274.38 for 1987 and 1988, respectively. To determine an average wage figure for 1988 at a level that is consistent with the series of average wages for 1951 through 1977 (published December 29, 1978, at 43 FR 61016), we multiplied the 1987 average wage figure of $18,426.51 by the percentage increase in average wages from 1987 to 1988 (based on SSA-tabulated wage data) as follows (with the result rounded to the nearest cent): Average wage for 1988 = $18,426.51 × $18,274.38 ÷ $17,416.59 = $19,334.04. Therefore, the

average wage for 1988 is determined to be $19,334.04.

**Contribution and Benefit Base**

*General*

The contribution and benefit base is $50,400 for remuneration paid in 1990 and self-employment income earned in taxable years beginning in 1990.

The contribution and benefit base serves two purposes:

(1) It is the maximum annual amount of earnings on which Social Security taxes are paid.

(2) It is the maximum annual amount used in determining a person's Social Security benefits.

*Computation*

Section 230(c) of the Act provides a table with the contribution and benefit base for each year 1978, 1979, 1980, and 1981. For years after 1981, section 230(b) of the Act contains a formula for determining the contribution and benefit base. Under the prescribed formula, the contribution and benefit base for 1990 shall be equal to the 1989 base of $48,000 multiplied by the ratio of (1) the average amount, per employee, of total wages for the calendar year 1988 to (2) the average amount of those wages for the calendar year 1987. Section 230(b) further provides that if the amount so determined is not a multiple of $300, it shall be rounded to the nearest multiple of $300.

*Average Wages*

The average wage for calendar year 1987 was previously determined to be $18,426.51. The average wage for calendar year 1988 has been determined to be $19,334.04 as stated herein.

*Amount*

The ratio of the average wage for 1988, $19,334.04, compared to that for 1987, $18,426.51, is 1.0492513. Multiplying the 1989 contribution and benefit base of $48,000 by the ratio 1.0492513 produces the amount of $50,364.06, which must then be rounded to $50,400. Accordingly, the contribution and benefit base is determined to be $50,400 for 1990.

**Quarter of Coverage Amount**

*General*

The 1990 amount of earnings required for a quarter of coverage is $520. A quarter of coverage is the basic unit for determining whether a worker is insured under the Social Security program. For years before 1978, an individual generally was credited with a quarter of coverage for each quarter in which wages of $50 or more were paid, or an individual was credited with 4 quarters of coverage for every taxable year in which $400 or more of self-employment income was earned. Beginning in 1978, wages generally are no longer reported on a quarterly basis; instead, annual reports are made. With the change to annual reporting, section 352(b) of the Social Security Amendments of 1977 (Pub. L. 95–216) amended section 213(d) of the Act to provide that a quarter of coverage would be credited for each $250 of an individual's total wages and self-employment income for calendar year 1978 (up to a maximum of 4 quarters of coverage for the year). Individuals generally must have self-employment income of at least $400 in a taxable year in order to be credited with any quarters of coverage.

*Computation*

Under the prescribed formula, the quarter of coverage amount for 1990 shall be equal to the 1978 amount of $250 multiplied by the ratio of (1) the average amount, per employee, of total wages for calendar 1988 to (2) the average amount of those wages reported for calendar year 1976. The section further provides that if the amount so determined is not a multiple of $10, it shall be rounded to the nearest multiple of $10.

*Average Wages*

The average wage for calendar year 1976 was previously determined to be $9,226.48. This was published in the **Federal Register** on December 29, 1978, at 43 FR 61016. The average wage for calendar year 1988 has been determined to be $19,334.04 as stated herein.

*Quarter of Coverage Amount*

The ratio of the average wage for 1988, $19,334.04, compared to that for 1976, $9,226.48, is 2.0954947. Multiplying the 1978 quarter of coverage amount of $250 by the ratio of 2.0954947 produces the amount of $523.87, which must then be rounded to $520. Accordingly, the quarter of coverage amount is determined to be $520 for 1990.

**Retirement Earnings Test Exempt Amounts**

*(a) Beneficiaries Aged 70 or Over*

Beginning with months after December 1982, there is no limit on the amount an individual 70 or over may earn and still receive Social Security benefits.

*(b) Beneficiaries Aged 65 through 69*

The retirement earnings test monthly exempt amount for beneficiaries aged 65 through 69 is stated in the Act at section 203(f)(8)(D) for years 1978 through 1982. A formula is provided in section 203(f)(8)(B) for computing the exempt amount applicable for years after 1982. The monthly exempt amount for 1989 was determined by this formula to be $740. Under the formula, the exempt amount for 1990 shall be the 1989 exempt amount multiplied by the ratio of (1) the average amount, per employee, of the total wages for calendar year 1988 to (2) the average amount of those wages for calendar year 1987. The section further provides that if the amount so determined is not a multiple of $10, it shall be rounded to the nearest multiple of $10.

Average Wages

Average wages for this purpose are determined in the same way as for the contribution and benefit base. Therefore, the ratio of the average wages for 1988, $19,334.04, compared to that for 1987, $18,426.51, is 1.0492513.

Exempt Amount for Beneficiaries Aged 65 through 69

Multiplying the 1989 retirement earnings test monthly exempt amount of $740 by the ratio of 1.0492513 produces the amount of $776.45. This must then be rounded to $780. The retirement earnings test monthly exempt amount for beneficiaries aged 65 through 69 is determined to be $780 for 1990. The corresponding retirement earnings test annual exempt amount for these beneficiaries is $9,360.

*(c) Beneficiaries Under Age 65*

Section 203 of the Act provides that beneficiaries under age 65 have a lower retirement earnings test monthly exempt amount than those beneficiaries aged 65 through 69. The exempt amount for beneficiaries under age 65 is determined by a formula provided in section 203(f)(8)(B) of the Act. Under the formula, the monthly exempt amount for beneficiaries under age 65 is $540 for 1989. The formula provides that the exempt amount for 1990 shall be the 1989 exempt amount for beneficiaries under age 65 multiplied by the ratio of (1) the average amount, per employee, of the total wages for calendar year 1988 to (2) the average amount of those wages for calendar year 1987. The section further provides that if the amount so determined is not a multiple of $10, it shall be rounded to the nearest multiple of $10.

Average Wages

Average wages for this purpose are determined in the same way as for the contribution and benefit base. Therefore, the ratio of the average

wages for 1988, $19,334.04, compared to that of 1987, $18,426.51, is 1.0492513.

Exempt Amount for Beneficiaries Under Age 65

Multiplying the 1989 retirement earnings test monthly exempt amount of $540 by the ratio 1.0492513 produces the amount of $566.60. This must then be rounded to $570. The retirment earnings test monthly exempt amount for beneficiaries under age 65 is thus determined to be $570 for 1990. The corresponding retirement earnings test annual exempt amount for these beneficiaries is $6,840.

**Computing Benefits After 1978**

*General*

The Social Security Amendments of 1977 provided a new method for determining an individual's primary insurance amount. This method uses a formula based on "wage indexing" and was fully explained with interim regulations and final regulations published in the **Federal Register** on December 29, 1978, at 43 FR 60877 and July 15, 1982, at 47 FR 30731 respectively. It generally applies when a worker after 1978 attains age 62, becomes disabled, or dies before age 62. The formula uses the worker's earnings after they have been adjusted, or "indexed," in proportion to the increases in average wages of all workers. Using this method, we determine the worker's "average indexed monthly earnings." We then compute the primary insurance amount, using the worker's average indexed monthly earnings. The computation formula is adjusted automatically each year to reflect changes in general wage levels.

*Average Indexed Monthly Earnings*

To assure that a worker's future benefits reflect the general rise in the standard of living that occurs during his or her working lifetime, we adjust or "index" the worker's past earnings to take into account the change in general wage levels that has occurred during the worker's years of employment. These adjusted earnings are then used to compute the worker's primary insurance amount.

For example, to compute the average indexed monthly earnings for a worker attaining age 62, becoming disabled, or dying before attaining age 62, in 1990, we divide the average of the total wages for 1988, $19,334.04, by the average of the total wages for each year prior to 1988 in which the worker had earnings. We then multiply the actual wages and self-employment income as defined in section 211(b) of the Act credited for each year by the corresponding ratio to obtain the worker's adjusted earnings for each year. After determining the number of years we must use to compute the primary insurance amount, we pick those years with highest indexed earnings, total those indexed earnings and divide by the total number of months in those years. This figure is rounded down to the next lower dollar amount, and becomes the average indexed monthly earnings figure to be used in computing the worker's primary insurance amount for 1990.

*Computing the Primary Insurance Amount*

The primary insurance amount is the sum of three separate percentages of portions of the average indexed monthly earnings. In 1979 (the first year the formula was in effect), these portions were the first $180, the amount between $180 and $1,085, and the amount over $1,085. The amounts for 1990 are obtained by multiplying the 1979 amounts by the ratio between the average of the total wages for 1988, $19,334.04, and for 1977, $9,779.44. These results were then rounded to the nearest dollar. For 1990, the ratio is 1.9770089. Multiplying the 1979 amounts of $180 and $1,085 by 1.9770089 produces the amounts of $355.86 and $2,145.05. These must then be rounded to $356 and $2,145. Accordingly, the portions of the average indexed monthly earnings to be used in 1990 are determined to be the first $356, the amount between $356 and $2,145, and the amount over $2,145.

Consequently, for individuals who first become eligible for old-age insurance benefits or disability insurance benefits in 1990, or who die in 1990 before becoming eligible for benefits, we will compute their primary insurance amount by adding the following:

(a) 90 percent of the first $356 of their average indexed monthly earnings, plus

(b) 32 percent of the average indexed monthly earnings over $356 and through $2,145, plus

(c) 15 percent of the average indexed monthly earnings over $2,145.

This amount is then rounded to the next multiple of $.10 if it is not already a multiple of $.10. This formula and the adjustments we have described are contained in section 215(a) of the Act (42 U.S.C. 415(a)).

**Maximum Benefits Payable to a Family**

*General*

The 1977 Amendments continued the long established policy of limiting the total monthly benefits which a worker's family may receive based on his or her primary insurance amount. Those amendments also continued the then existing relationship between maximum family benefits and primary insurance amounts but did change the method of computing the maximum amount of benefits which may be paid to a worker's family. The Social Security Disability Amendments of 1980 (Pub. L. 96–265) established a new formula for computing the maximum benefits payable to the family of a disabled worker. This new formula is applied to the family benefits of workers who first become entitled to disability insurance benefits after June 30, 1980, and who first become eligible for these benefits after 1978. The new formula was explained in a final rule published in the **FEDERAL REGISTER** on May 8, 1981, at 46 FR 25601. For disabled workers initially entitled to disability benefits before July 1980, or whose disability began before 1979, the family maximum payable is computed the same as the old-age and survivor family maximum.

*Computing the Old-Age and Survivor Family Maximum*

The formula used to compute the family maximum is similar to that used to compute the primary insurance amount. It involves computing the sum of four separate percentages of portions of the worker's primary insurance amount. In 1979, these portions were the first $230, the amount between $230 and $332, the amount between $332 and $433, and the amount over $433. The amounts for 1990 are obtained by multiplying the 1979 amounts by the ration between the average of the total wages for 1988, $19,334.04, and the average for 1977 $9,779.44. This amount is then rounded to the nearest dollar. For 1990, the ratio is 1.9770089. Multiplying the amounts of $230, $332, and $433 by 1.9770089 produces the amounts of $454.71, $656.37, and $856.04. These amounts are then rounded to $455, $656, and $856. Accordingly, the portions of the primary insurance amounts to be used in 1990 are determined to be the first $455, the amount between $455 and $656, the amount between $656 and $856, and the amount over $856.

Consequently, for the family of a worker who becomes age 62 or dies in 1990, the total amount of benefits payable to them will be computed so that it does not exceed:

(a) 150 percent of the first $455 of the worker's primary insurance amount, plus

(b) 272 percent of the worker's primary insurance amount over $455 through $656, plus

(c) 134 percent of the worker's primary insurance amount over $656 through $856, plus

(d) 175 percent of the worker's primary insurance amount over $856.

This amount is then rounded to the next lower multiple of $.10 if it is not already a multiple of $.10. This formula and the adjustments we have described are contained in section 203(a) of the Act (42 U.S.C. 403(a)).

**"Old-Law" Contribution and Benefit Base**

*General*

The 1990 "old-law" contribution and benefit base is $37,500. This is the base that would have been effective under the Act without the enactment of the 1977 amendments. The base is computed under section 230(b) of the Act as it read prior to the 1977 amendments.

The "old-law" contribution and benefit base is used by:

(1) the Railroad Retirement program to determine certain tax liabilities and tier II benefits payable under that program to supplement the tier I payments which correspond to basic Social Security benefits,

(2) the Pension Benefit Guaranty Corporation to determine the maximum amount of pension guaranteed under the Employee Retirement Income Security Act (as stated in section 230(d) of the Act), and

(3) Social Security to determine a "year of coverage" in computing the "special minimum" benefit and in computing benefits for persons who are also eligible to receive pensions based on employment not covered under section 210 of the Act.

*Computation*

The base is computed using the automatic adjustment formula in section 230(b) of the Act as it read prior to the enactment of the 1977 amendments. Under the formula, the "old-law" contribution and benefit base shall be the "old-law" 1989 base multiplied by the ratio of (1) the average amount, per employee, of total wages for the calendar year of 1988 to (2) the average amount of those wages for the calendar year of 1987. If the amount so determined is not a multiple of $300, it shall be rounded to the nearest multiple of $300.

*Average Wages*

The average wage for calendar year 1987 was previously determined to be $18,426.51. The average wage for calendar year 1988 has been determined to be $19,334.04, as stated herein.

*Amount*

The ratio of the average wage for 1988, $19,334.04, compared to that for 1987, $18,426.51, is 1.0492513. Multiplying the 1989 "old-law" contribution and benefit base amount of $35,700 by the ratio of 1.0492513 produces the amount of $37,458.27 which must then be rounded to $37,500. Accordingly, the "old-law" contribution and benefit base is determined to be $37,500 for 1990.

**OASDI Fund Ratio**

*General*

Section 215(i) of the Act was amended by section 112 of Public Law 98–21, the Social Security Amendments of 1983, to include a "stabilizer" provision that can limit the automatic OASDI benefit increase under certain circumstances. If the combined assets of the OASI and DI Trust Funds, as a percentage of annual expenditures, are below a specified level, the automatic benefit increase is equal to the lesser of (1) the increase in average wages or (2) the increase in prices. The threshold level specified for the OASDI fund ratio is 20.0 percent for benefit increases for December of 1989 and later. The amendments also provide for subsequent "catch-up" benefit increases for beneficiaries whose previous benefit increases were affected by this provision. "Catch-up" benefit increases occur only when trust fund assets exceed 32.0 percent of annual expenditures.

*Computation*

Section 215(i) specifies the computation and application of the OASDI fund ratio. The OASDI fund ratio for 1989 is the ratio of (1) the combined assets of the OASI and DI Trust Funds at the beginning of 1989, including advance tax transfers for January 1989, to (2) the estimated expenditures of the OASI and DI Trust Funds during 1989, excluding transfer payments between the OASI and DI Trust Funds, and reducing any transfers to the Railroad Retirement Account by any transfers from that account into either trust fund.

*Ratio*

The combined assets of the OASI and DI Trust Funds at the beginning of 1989 (including advance tax transfers for January 1989) equaled $134,428 million, and the expenditures are estimated to be $235,674 million. Thus, the OASDI fund ratio for 1989 is 57.0 percent, which exceeds the applicable threshold of 20.0 percent. As a result, the "stabilizer" provision does not affect the benefit increase for December 1989.

(Catalog of Federal Domestic Assistance Programs Nos. 13.802–13.805, and 13.807 Social Security Programs.)

Dated: October 26, 1989.

**Louis W. Sullivan,**

*Secretary of Health and Human Services.*

SPECIAL MINIMUM PRIMARY INSURANCE AMOUNTS AND MAXIMUM FAMILY BENEFITS

| Special minimum primary insurance amount payable for Dec. 1988 | Number of years required at minimum earnings level | Special minimum primary insurance amount payable for Dec. 1989 | Special minimum family benefit payable for Dec. 1989 |
|---|---|---|---|
| $21.00 | 11 | $21.90 | $33.00 |
| 41.70 | 12 | 43.60 | 65.70 |
| 62.70 | 13 | 65.60 | 98.70 |
| 83.80 | 14 | 87.40 | 131.30 |
| 104.40 | 15 | 109.30 | 164.00 |
| 125.40 | 16 | 131.20 | 197.20 |
| 146.30 | 17 | 153.10 | 229.90 |
| 167.20 | 18 | 175.00 | 262.70 |
| 188.10 | 19 | 196.90 | 295.50 |
| 208.80 | 20 | 218.60 | 328.20 |
| 230.00 | 21 | 240.80 | 361.30 |
| 250.80 | 22 | 262.50 | 394.00 |
| 271.90 | 23 | 284.60 | 427.30 |
| 292.70 | 24 | 306.40 | 460.00 |
| 313.50 | 25 | 328.20 | 492.50 |
| 334.60 | 26 | 350.30 | 525.90 |
| 355.50 | 27 | 372.20 | 558.60 |
| 376.30 | 28 | 393.90 | 591.20 |
| 397.10 | 29 | 415.70 | 624.20 |
| 418.00 | 30 | 437.60 | 656.80 |

[FR Doc. 89–25625 Filed 10–30–89; 8:45 am]

BILLING CODE 4190–11–M

## National Institutes of Health

### Meeting of the Program Advisory Committee on the Human Genome

Pursuant to Public Law 92–463, notice is hereby given of the meeting of the Program Advisory Committee on the Human Genome on December 4, and a joint NIH and DOE subcommittee meeting on December 5, 1989, (as specified in the Memorandum of Understanding) at the National Institutes of Health, Bethesda, Maryland. The meeting will take place from 8:30 a.m. to 5:30 p.m. on December 4, and the joint subcommittee meeting will take place from 9:00 a.m. to 1:00 p.m. on December 5 in the Shannon Building, Wilson Hall, 9000 Rockville Pike, Bethesda, Maryland. The meeting will be open to the public.

This will be the third meeting of the Program Advisory Committee on the Human Genome. The purpose of the meeting is to discuss the planning, organization, and progress of the human genome project at the National Institutes of Health.

Dr. Elke Jordan, Deputy Director of the National Center for Human Genome Research, National Institutes of Health, Shannon Building, Room 201, Bethesda, Maryland 20892, (301) 496–0844, will furnish the meeting agenda, rosters of Committee members and consultants, and substantive program information upon request.

Dated: October 24, 1989.

**Betty J. Beveridge,**

*Committee Management Office, NIH.*

[FR Doc. 89–25510 Filed 10–30–89; 8:45 am]

BILLING CODE 4140–01–M

## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

**[Docket No. N–89–2076]**

### Submission of Proposed Information Collection to OMB

**AGENCY:** Office of Administration, HUD.

**ACTION:** Notice.

**SUMMARY:** The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

**ADDRESS:** Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and should be sent to: John Allison, OMB Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503.

**FOR FURTHER INFORMATION CONTACT:** David S. Cristy, Reports Management Officer, Department of Housing and Urban Development, 451 7th Street, Southwest, Washington, DC 20410, telephone (202) 755–6050. This is not a toll-free number. Copies of the proposed forms and other available documents submitted to OMB may be obtained from Mr. Cristy.

**SUPPLEMENTARY INFORMATION:** The Department has submitted the proposal for the collection of information, as described below, to OMB for review, as required by the Paperwork Reduction Act (44 U.S.C. chapter 35).

The Notice lists the following information: (1) The title of the information collection proposal; (2) the office of the agency to collect the information; (3) the description of the need for the information and its proposed use; (4) the agency form number, if applicable; (5) what members of the public will be affected by the proposal; (6) how frequently information submissions will be required; (7) an estimate of the total numbers of hours needed to prepare the information submission including number of respondents, frequency of response, and hours of response; (8) whether the proposal is new or an extension, reinstatement, or revision of an information collection requirement; and (9) the names and telephone numbers of an agency official familiar with the proposal and of the OMB Desk Officer for the Department.

**Authority:** Section 3507 of the Paperwork Reduction Act, 44 U.S.C. 3507; Section 7(d) of the Department of Housing and Urban Development Act, 42 U.S.C. 3535(d).

Dated: October 21, 1989.

**John T. Murphy,**

*Director, Information Policy and Management Division.*

*Proposal:* Letter of Transmittal, 24 CFR part 390

*Office:* Government National Mortgage Association (GNMA)

*Description of the Need for the Information and its Proposed Use:* GNMA provides these forms for use by issuers of mortgage-backed securities to transmit the required materials to request approval of an application, to provide GNMA with a Resolution of the Board of Directors and Certificate of Authorized Signatures, and to furnish the servicing agreement.

*Form Number:* HUD–11700, 11702, and 11707

*Respondents:* Businesses or Other For-Profit

*Frequency of Submission:* On Occasion

*Reporting Burden:*

| | Number of respondents | X | Frequency of response | X | Hours per response | = | Burden hours |
|---|---|---|---|---|---|---|---|
| HUD–11700 | 1,250 | | 3.78 | | 0.25 | | 1,180 |
| HUD–11702 | 50 | | 1 | | .50 | | 25 |
| HUD–11707 | 1,250 | | 18.7 | | .25 | | 5,845 |

*Total Estimated Burden Hours:* 7,050

*Status:* Extension

*Contact:* Brenda Countee, HUD, (202) 755–5535. John Allison, OMB, (202) 395–6880.

Dated: October 24, 1989.

[FR Doc. 89–25542 Filed 10–30–89; 8:45 am]

BILLING CODE 4210–01–M

**[Docket No. N–89–2077]**

### Submission of Proposed Information Collections to OMB

**AGENCY:** Office of Administration, HUD.

**ACTION:** Notices.

**SUMMARY:** The proposed information collection requirements described below have been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comment on the subject proposals.

**ADDRESS:** Interested persons are invited to submit comment regarding these proposals. Comments should refer to the proposal by name and should be sent to: John Allison, OMB Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503.

**FOR FURTHER INFORMATION CONTACT:** David S. Cristy, Reports Management Officer, Department of Housing and Urban Development, 451 7th Street, Southwest, Washington, DC 20410, telephone (202) 755–6050. This is not a toll-free number. Copies of the proposed forms and other available documents submitted to OMB may be obtained from Mr. Cristy.

**SUPPLEMENTARY INFORMATION:** The Department has submitted the proposals for the collections of information, as described below, to OMB for review, as required by the Paperwork Reduction Act (44 U.S.C. chapter 35).

The Notices list the following information: (1) The title of the information collection proposal; (2) the office of the agency to collect the information; (3) the description of the need for the information and its proposed use; (4) the agency form number, if applicable; (5) what members of the public will be affected by the proposal; (6) how frequently information submissions will be required; (7) an estimate of the total numbers of hours needed to prepare the information submission including number of respondents, frequency of response, and hours of response; (8) whether the

proposal is new or an extension, reinstatement, or revision of an information collection requirement; and (9) the names and telephone numbers of an agency official familiar with the proposal and of the OMB Desk Officer for the Department.

**Authority:** Section 3507 of the Paperwork Reduction Act, 44 U.S.C. 3507; Sec. 7(d) of the Department of Housing and Urban Development Act, 42 U.S.C. 3535(d).

Dated: October 25, 1989.

**John T. Murphy,**

*Director, Information Policy and Management Division.*

*Proposal:* Summary of Guaranty Agreements (To include recordkeeping requirements contained in the Guaranty Agreements)

*Office:* Government National Mortgage Association (GNMA)

*Description of the Need for the Information and Its Proposed Use:* The information furnished on the forms incorporates the terms and conditions of the Guaranty Agreements for each type of mortgage pool. Execution by the issuer indicates compliance with the terms and conditions of the Guaranty Agreement.

*Form Number:* HUD–11716, 1723, 11727, 1730, and 11733

*Respondents:* Businesses or Other For-Profit

*Frequency of Submission:* On Occasion

*Reporting Burden:*

| | Number of respondents | X | Frequency of response | X | Hours per response | = | Burden hours |
|---|---|---|---|---|---|---|---|
| Information Collection | 1,250 | | 18.7 | | .25 | | 5,845 |

*Total Estimated Burden Hours:* 5,845

*Status:* Extension

*Contact:* Brenda Countee, HUD, (202) 755–5535. John Allison, OMB, (202) 395–6880.

Dated: October 25, 1989.

*Proposal:* Request for Release of Document and Debit Authorization

*Office:* Government National Mortgage Association (GNMA)

*Description of the Need for the Information and Its Proposed Use:* The documents: (1) Provide for the releases of mortgage documents held by the pool custodian, and (2) show evidence that the issuers have established a central account with a designated custodian in connection with the issuance of mortgage-backed securities.

*Form Number:* HUD–11708 and 11709–A

*Respondents:* Businesses or Other For-Profit

*Frequency of Submission:* On Occasion

*Reporting Burden:*

| | Number of respondents | X | Frequency of response | X | Hours per response | = | Burden hours |
|---|---|---|---|---|---|---|---|
| HUD–11708 | 1,250 | | 192 | | 0.017 | | 4,000 |
| HUD–11709–A | 50 | | 1 | | .25 | | 12 |

*Total Estimated Burden Hours:* 4,012

*Status:* Extension

*Contact:* Brenda Countee, HUD, (202) 755–5535., John Allison, OMB, (202) 395–6880

Dated: October 25, 1989.

*Proposal:* Mandatory Meals Program in Multifamily Rental and Cooperative Projects for the Elderly, FR–2179.

*Office:* Housing

*Description of the Need for the Information and Its Proposed Use:* Housing project owners may require tenants of elderly assisted housing to participate in and pay for a mandatory meals program as a condition of occupancy in projects equipped with central kitchen and dining facilities.

*Form Number:* None

*Respondents:* Individuals or Households, Businesses or Other For-Profit, Federal Agencies or Employees, and Non-Profit Organizations.

*Frequency of Submission:* On Occasion

*Reporting Burden:*

| | Number of respondents | X | Frequency of response | X | Hours per response | = | Burden hours |
|---|---|---|---|---|---|---|---|
| Requests | 400 | | 1 | | 3 | | 1,200 |
| Recordkeepers | 400 | | 1 | | 2 | | 800 |

*Total Estimated Burden Hours:* 2,000

*Status:* Reinstatement

*Contact:* James J. Tahash, HUD, (202) 426–3944., John Allison, OMB, (202) 395–6880

Dated: October 25, 1989.

[FR Doc. 89–25543 Filed 10–30–89; 8:45 am]

BILLING CODE 4210–01–M

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[UT–060–00–4410–14]**

### Moab District Advisory Council Meeting

**AGENCY:** Bureau of Land Management, Moab.

**ACTION:** Moab District Advisory Council Meeting.

**SUMMARY:** The Moab District Advisory Council will meet Tuesday, November 21, 1989. The meeting will be held in the BLM Moab District Office Conference Room beginning at 10:00 a.m. and adjourning at 4:30 p.m. The agenda includes an update on current planning

efforts and the drought situation in southeast Utah. Also, selected program updates, new business, opportunity for public comment, finalization of resolutions, and adjournment.

All Advisory Council meetings are open to the public. Persons wishing to make a comment to the Council must notify the BLM by Friday, November 17. Depending on the number of people desiring to make a statement, a per-person time limit may be established.

**Gene Nodine,**

*District Manager.*

[FR Doc. 89-25693 Filed 10-30-89; 8:45 am]

BILLING CODE 4310-DQ-M

[ID-942-00-4730-12]

## Idaho: Filing of Plats of Survey; Idaho

The plats of survey of the following described lands were officially filed in the Idaho State Office, Bureau of Land Management, Boise, Idaho, effective 10:00 A.M., date October 23, 1989.

The plat representing the dependent resurvey of the west boundary, portions of the south and north boundaries, and subdivisional lines, and the subdivision of certain sections in T. 14, S., R. 46 E., Boise Meridian, Idaho, Group No. 732, was accepted September 27, 1989.

This survey was executed to meet certain administrative needs of this Bureau.

The plat representing the dependent resurvey of portions of the east and north boundaries and a portion of the subdivisional lines, the subdivision of section 1, and the survey of Lot 1, T. 3 N., R. 41 E., Boise Meridian, Idaho, Group No. 766, was accepted October 11, 1989.

The plat representing the dependent resurvey of portions of the north boundary and subdivisional lines, H.E.S. 260 and a portion of H.E.S. No. 555, the subdivision of section 6, and the survey of certain lots in section 6 and 7, T. 3 N., R. 42 E., Boise Meridian, Idaho, Group No. 766, was accepted October 11, 1989.

These surveys were executed to meet certain administrative needs of the U.S. Forest Service.

All inquires about these lands should be sent to the Idaho State Office, Bureau of Land Management, 3380 Americana Terrace, Boise, Idaho, 83706.

**Duane E. Olsen,**

*Chief Cadastral Surveyor for Idaho.*

October 23, 1989

[FR Doc. 89-25592 Filed 10-30-89; 8:45 am]

BILLING CODE 4310-GG-M

[OR-942-00-4730-12: GPO-027]

## Filing of Plats of Survey: Oregon/Washington

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice.

**SUMMARY:** The plats of survey of the following described lands are scheduled to be officially filed in the Oregon State Office, Portland, Oregon, thirty (30) calendar days from the date of this publication.

**Willamette Meridian**

*Oregon*

T. 3 N., R. 2 W., accepted 9/15/89
T. 3 N., R. 3 W., accepted 9/29/89
T. 2 N., R. 3 W., accepted 10/6/89
T. 29 S., R. 3 W., accepted 9/29/89
T. 30 S., R. 7 W., accepted 9/15/89
T. 13 S., R. 8 W., accepted 9/15/89
T. 5 S., R. 3 E., accepted 10/6/89
T. 5 S., R. 4 E., accepted 10/6/89
T. 28 S., R. 14 E., accepted 10/6/89

*Washington*

T. 39 N., R. 25 E., accepted 9/29/89
T. 32 N., R. 35 E., accepted 8/25/89

If protests against a survey, as shown on any of the above plat(s), are received prior to the date of official filing, the filing will be stayed pending consideration of the protest(s). A plat will not be officially filed until the day after all protests have been dismissed and become final or appeals from the dismissal affirmed.

The plat(s) will be placed in the open files of the Oregon State Office, Bureau of Land Management, 825 NE Multnomah, Portland, Oregon 97208, and will be available to the public as a matter of information only. Copies of the plat(s) may be obtained from the above office upon required payment. A person or party who wishes to protest against a survey must file with the State Director, Bureau of Land Management, Portland, Oregon, a notice that they wish to protest prior to the proposed official filing date given above. A statement of reasons for a protest may be filed with the notice of protest to the State Director, or the statement of reasons must be filed with the State Director within thirty (30) days after the proposed official filing date.

The above-listed plats represent dependent resurveys, survey and subdivision.

**FOR FURTHER INFORMATION CONTACT:** Bureau of Land Management, 825 NE Multnomah Street, P.O. Box 2965, Portland, Oregon 97208.

Dated: October 20, 1989.

**Robert E. Mollohan,**

*Acting Chief, Branch of Lands and Minerals Operations.*

[FR Doc. 89-25591 Filed 10-30-89; 8:45 am]

BILLING CODE 4310-33-M

## National Park Service

## National Register of Historic Places; Notification of Pending Nominations

Nominations for the following properties being considered for listing in the National Register were received by the National Park Service before October 21, 1989. Pursuant to § 60.13 of 36 CFR part 60 written comments concerning the significance of these properties under the National Register criteria for evaluation may be forwarded to the National Register, National Park Service, P.O. Box 37127, Washington, DC 20013-7127. Written comments should be submitted by November 15, 1989.

**Carol D. Shull,**

*Chief of Registration, National Register.*

ARKANSAS

**Carroll County**

*Chaney, James C., House*, AR 68, Osage, 89002012

GEORGIA

**Floyd County**

*Mayo's Bar Lock and Dam*, On the Coosa River, 8 mi. SW of Rome, Rome vicinity, 89002020

**Thomas County**

*Box Hall Plantation*, Lower Cairo Rd. at Pinetree Blvd., Thomasville, 89002015

HAWAII

**Kauai County**

*US Post Office—Lihue*, 4441 Rice St., Lihue, 89002011

IDAHO

**Butte County**

*Mackenzie's Donald, Campground*, Fallert Springs in Challis National Forest, City Unavailable, 89001990

**Clark County**

*Spencer Rock House*, Off US 91 at Huntley Canyon, Spencer, 89001991

IOWA

**Linn County**

*Armstrong, Robert and Esther, House*, 370 34th St., SE., Cedar Rapids, 89002009

**Polk County**

*Rumely—Des Moines Drug Company Building*, 110 SW. Fourth St., Des Moines, 89002008

KENTUCKY

Henderson County

*Ehlen, E. L., Livery and Sale Stable*, 110 First St., Henderson, 89002007
*Klee Funeral Parlor*, 13—17 S. Main St., Henderson, 89002006

Jefferson County

*Widman's Saloon and Grocery*, 2317—19 Frankfort Ave., Louisville, 89002016

Nelson County

*Cobblestone Path*, E end of Flaget Ave., NE to Broadway, Bardstown, 89002018

Oldham County

*Bondurant—Hustin House (Peewee Valley MPS)*, 104 Castlewood Dr., Peewee Valley, 89001989
*Ellis, Joseph H., House (Peewee Valley MPS)*, 320 Maple Ave., Peewee Valley, 89001988
*Forrester—Duvall House (Peewee Valley MPS)*, 115 Old Forest Rd., Peewee Valley, 89001987
*House at 301 La Grange Road (Peewee Valley MPS)*, 301 La Grange Rd., Peewee Valley, 89001980
*Miller, George, House (Peewee Valley MPS)*, 331 Central Ave., Peewee Valley, 89001986
*Peebles, Dr. Thomas C., House (Peewee Valley MPS)*, 114 Maple Ave., Peewee Valley, 89001985
*Peewee Valley Confederate Cemetery (Peewee Valley MPS)*, Maple Ave., SE of jct. with Old Floydsburg Rd., Peewee Valley vicinity, 89001984
*Smith, William Alexander, House (Peewee Valley MPS)*, 108 Mt. Mercy Dr., Peewee Valley, 89001982
*St. Aloysius Church (Peewee Valley MPS)*, 202 Mt. Mercy Dr., Peewee Valley, 89001983
*Tanglewood (Peewee Valley MPS)*, 417 La Grange Rd., Peewee Valley, 89001981
*Tuliphurst (Peewee Valley MPS)*, 15 La Grange Rd., Peewee Valley, 89001979
*Van Horn—Ross House (Peewee Valley MPS)*, 138 Rosswoods Dr., Peewee Valley, 89001978

Warren County

*Magnolia Street Historic District*, Magnolia St. between Broadway and Tenth St., Bowling Green, 89002017

LOUISIANA

Iberia Parish

*First United Methodist Church*, 119 Jefferson St., New Iberia, 89002002

Natchitoches Parish

*Prud'homme, Jean Pierre Emmanuel, Plantation (Boundary Decrease)*, LA 494, E of Natchez, Natchez vicinity, 89002024

NEW JERSEY

Cape May County

*Marshallville Historic District*, Roughly Marshallville Rd. at Co. Rt. 557, Marshallville, 89002013

NEW YORK

Dutchess County

*De Peyster, Watts, Fireman's Hall*, 86 Broadway at Pine St., Tivoli, 89002005
*Rock Ledge (Rhinebeck Town MRA)*, Roughly Ackert Hook Rd., Haggerty Hill Rd., and Troy Dr., Rhinebeck vicinity, 89002010

Essex County

*Liberty Monument (Ticonderoga MRA)*, MY 9M at Montcalm St., Ticonderoga, 89002014

Monroe County

*Blackwell, Antoinette Louisa Brown, Childhood Home*, 1099 Pinnacle Rd., Henrietta, 89002003
*Our Mother of Sorrows Roman Catholic Church Complex*, 1785 Latta Rd., Greece, 89002001

Suffolk County

*Longbotham, Nathaniel, House*, 1541 Stony Brook Rd., Stony Brook, 89002022
*Smith—Rourke House*, 350 S. Country Rd., East Patchogue, 89002021

Ulster County

*Lafevre, John A., House and School*, NY 208, S of New Paltz, New Paltz vicinity, 89002023

Westchester County

*Anawalk Friends Meeting House*, Quaker Church Rd., Anawalk, 89002004

SOUTH CAROLINA

Darlington County

*Wilds, Peter Abel, House*, Skufful Farm Rd., Mont Clare vicinity, 89002019

UTAH

Beaver County

*US Post Office—Beaver Main (US Post Offices in Utah 1900–1941 MPS)*, 20 S. Main St., Beaver, 89001992

Carbon County

*US Post Office—Helper Main (US Post Offices in Utah 1900–1941 MPS)*, 45 S. Main, Helper, 89001995
*US Post Office—Price Main (US Post Offices in Utah 1900–1941 MPS)*, 95 S. Carbon Ave., Price, 89001998

Iron County

*US Post Office—Cedar City Main (US Post Offices in Utah 1900–1941 MPS)*, 10 N. Main, Cedar City, 89001993

Juab County

*US Post Office—Eureka Main (US Post Offices in Utah 1900–1941 MPS)*, Main and Wallace, Eureka, 89001994
*US Post Office—Nephi Main (US Post Offices in Utah 1900–1941 MPS)*, 10 N. Main, Nephi, 89001996

Sanpete County

*US Post Office—Springville Main (US Post Offices in Utah 1900–1941 MPS)*, 309 S. Main, Springville, 89002000

Sevier County

*US Post Office—Richfield Main (US Post Offices in Utah 1900–1941 MPS)*, 93 N. Main, Richfield, 89001999

Summit County

*US Post Office—Park City Main (US Post Offices in Utah 1900–1941 MPS)*, Main and 5th Sts., Park City, 89001997

The following property was erroneously published in the **Federal Register** as a pending boundary increase and accepted as such on 9/14/89. This acceptance has been retracted as of 10/18/89.

LOUISIANA

Natchitoches Parish

*Oakland Plantation (Boundary Increase)* E of Natchez on LA 494, Natchez vicinity 89001444

The following property was erroneously published in the **Federal Register** as a pending nomination.

VIRGINIA

Colonial Heights Independent City

*Conjurer's Field Archeological Site (44CF20)* Address Restricted, Colonial Heights (Independent City) vicinity 89001924

[FR Doc. 89–25552 Filed 10–30–89; 8:45 am]
BILLING CODE 4310–70–M

## INTERNATIONAL TRADE COMMISSION

**[Investigation No. 337–TA–295]**

### Certain Novelty Teleidoscopes; Initial Determination Terminating Respondents on the Basis of Settlement Agreement

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Notice is hereby given that the Commission has received an initial determination from the presiding officer in the above-captioned investigation terminating the following respondents on the basis of a settlement agreement: China Toy and Novelty Co. and Western Novelty Co.

**SUPPLEMENTARY INFORMATION:** This investigation is being conducted pursuant to section 337 of the Tariff Act of 1930 (19 U.S.C. S1337). Under the Commission's rules, the presiding officer's initial determination will become the determination of the Commission thirty (30) days after the date of its service upon the parties, unless the Commission orders review of the initial determination. The initial determination in this matter was served upon the parties on October 20, 1989.

Copies of the initial detrmination, the settlement agreement, and all other nonconfidential documents filed in connection with this investigation are available for inspection during official

business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW. Washington, DC 20436, telephone 202–252–1000. Hearing impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202–252–1810.

**WRITTEN COMMENTS:** Interested persons may file written comments with the Commission concerning termination of the aforementioned respondents. The original and 14 copies of all such comments must be filed with the Secretary to the Commission, 500 E Street, SW. Washington, DC 20436, no later than 10 days after publication of this notice in the **Federal Register**. Any person desirng to submit a document (or portion thereof) to the Commission in confidence must request confidential treatment. Such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why confidential treatment should be granted. The Commission will either accept the submission in confidence or return it.

**FOR FURTHER INFORMATION CONTACT:** Ruby J. Dionne, Office of the Secretary, U.S. International Trade Commission, telephone 202–252–1805.

By order of the Commission.

Issued: October 25, 1989.

Kenneth R. Mason,

*Secretary.*

[FR Doc. 89–25546 Filed 10–30–89; 8:45 am]

BILLING CODE 7020–02–M

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**[Investigation No. 337–TA–295]**

## Certain Novelty Teleidoscopes; Initial Determination Terminating Respondent on the Basis of Settlement Agreement

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Notice is hereby given that the Commission has received an initial determination from the presiding officer in the above-captioned investigation terminating the following respondent on the basis of a settlement agreement: Universal Specialties Co.

**SUPPLEMENTARY INFORMATION:** This investigation is being conducted pursuant to section 337 of the Tariff Act of 1930 (19 U.S.C. S1337). Under the Commission's rules, the presiding officer's initial determination will become the determination of the Commission thirty (30) days after the date of its service upon the parties, unless the Commission orders review of the initial determination. The initial determination in this matter was served upon the parties on October 20, 1989.

Copies of the initial determination, the settlement agreement, and all other nonconfidential documents filed in connection with this investigation are available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW. Washington, DC 20436, telephone 202–252–1000. Hearing impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202–252–1810.

**WRITTEN COMMENTS:** Interested persons may file written comments with the Commission concerning termination of the aforementioned respondents. The original and 14 copies of all such comments must be filed with the Secretary to the Commission, 500 E Street, SW., Washington, DC 20436, no later than 10 days after publication of this notice in the **Federal Register**. Any person desiring to submit a document (or portion thereof) to the Commission in confidence must request confidential treatment. Such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why confidential treatment should be granted. The Commission will either accept the submission in confidence or return it.

**FOR FURTHER INFORMATION CONTACT:** Ruby J. Dionne, Office of the Secretary, U.S. International Trade Commission, telephone 202–252–1805.

By order of the Commission.

Issued: October 25, 1989.

Kenneth R. Mason,

*Secretary.*

FR Doc. 89–25547 Filed 10–30–89; 8:45 am]

BILLING CODE 7020–02–M

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**[Inv. Nos. 731–TA–426–428]**

## Certain Telephone Systems and Subassemblies Thereof From Japan, Korea, and Taiwan; Commission Determination to Conduct a Portion of its Hearing in Camera

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Closure of a portion of Commission hearing to the public.

**SUMMARY:** Upon request of certain respondents and without objection from the petitioner, the U.S. International Trade Commission has unanimously determined that the unique circumstances of this investigation warrant that a portion of its hearing be conducted *in camera*. *See* 19 CFR 201.13, 201.35(b)(3). The *in camera*. portion of the hearing will consist of two phases. In phase one, the presentations will be limited to arguments relevant to the proper analysis of AT&T's financial data and the relevance of its McKinsey study. In phase two, the parties will be allowed to comment on all other business proprietary information.

In determining to undertake this unusual procedural step, the Commission strongly reaffirms the desirability of conducting its business in public. However, given the dominant position of the petitioner in the domestic industry and its involvement in a wide array of activities in addition to, but also related to, the production of small business telephone equipment, including refurbishing, renting, leasing, selling and distributing such equipment, an *in camera* session devoted to the proper understanding of its financial condition is appropriate. Moreover, none of the parties to this investigation have raised any objection to this procedure. *See* 19 CFR 201.35(b)(4). In the interests of procedural equity, the Commission has determined not to limit the *in camera* session solely to the petitioner's business proprietary information.

After the completion of the petitioner's public presentation and questioning of the petitioner by the Commission, the hearing will be recessed. The *in camera* session will take place when the Commission reconvenes following the recess. Only those individuals who have been granted access to business proprietary information under a Commission Administrative Protective Order (APO) and are included on the Commission's APO service list will be allowed to attend the *in camera* session. *See* 19 CFR 201.35(b)(1), (2). During phase one of the *in camera* session, the relevant AT&T and McKinsey personnel will be allowed to attend. They will, however, be excused at the end of phase one. All those planning to attend that session should present proper identification in order to be admitted to the hearing room.

During phase one of the *in camera* hearing, respondents will first present their arguments relating to the financial condition of AT&T and the relevance of its McKinsey study. The Commission will then question the respondents as appropriate. Petitioner may then respond. Petitioner also will be questioned by the Commission. At the

conclusion of phase one, all AT&T and McKinsey personnel will be excused.

During phase two of the *in camera session,* petitioner will be allowed to address all other BPI matters. Respondents may then reply. Both groups will be questioned by the Commission as appropriate.

Respondents will be allowed up to 20 minutes to make their collective presentation, allocated as they choose between phase one and phase two, with that amount deducted from their allotted time. Petitioner will be allowed up to 15 minutes to make its collective presentation, allocated as it chooses between phase one and phase two, with that amount of time deducted from its allotted time.

At the conclusion of the *in camera* portion of the hearing, the Commission will take a brief recess and will reconvene in public session to complete their public questioning of the petitioner, if necessary. The Commission will then consider the public presentation of respondents.

**FOR FURTHER INFORMATION CONTACT:** Stephen A. McLaughlin, Esq., Office of the General Counsel, U.S. International Trade Commission, tel. 202–252–1095.

**AUTHORITY:** The General Counsel has certified, pursuant to Commission Rule 201.39, 19 CFR 201.39, that, in her opinion, a portion of the Commission's hearing in *Telephone Systems and Subassemblies Thereof from Japan, Korea, and Taiwan,* Inv. Nos. 731–TA–426–428 (Final) may be closed to the public to prevent the disclosure of confidential financial information.

By order of the Commission.

Issued: October 26, 1989.

**Kenneth R. Mason,**

*Secretary.*

[FR Doc. 89–25689 Filed 10–27–89; 10:23 am]

BILLING CODE 7020–02–M

## INTERSTATE COMMERCE COMMISSION

**[Finance Docket No. 31544]**

### Jaxport Terminal Railway Co.; Lease and Operation Exemption—Terminal Railroad Facilities in Jacksonville, Duvall County, FL

Jaxport Terminal Railway Company (JTR), a noncarrier, has filed a notice of exemption to lease and operate 8.72 miles of rail line owned by the Municipal Docks Railroad (MDR), a unit of the Jacksonville Port Authority. The line is located between Norfolk Southern milepost 5–C and CSX Transportation, Inc., milepost 632.08, and extends eastward from the F&J junction to the Talleyrand Docks and Terminal. The transaction was to be consummated on the effective date of this notice, September 14, 1989.[1]

Any comments must be filed with the Commission and served on Frank J. Pergolizzi, Slover & Loftus, 1224 Seventeenth Street, NW., Washington, DC 20036.

Applicant must retain its interest in and maintain the historic integrity of all sites and structures on the line that are 50 years old or older until completion of the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470 is achieved. *See Class Exemption—Acq. of Oper. of R. Lines Under 49 U.S.C. 10901,* 4 I.C.C.2d 305 (1988).[2]

This notice is filed under 49 CFR 1150.31. If the notice contains false or misleading information, the exemption is void *ab initio.* Petitions to revoke the exemption under 49 U.S.C. 10505(d), may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

Decided: October 25, 1989.

By the Commission, Jane F. Mackall, Director, Office of Proceedings.

**Noreta R. McGee,**

*Secretary.*

[FR Doc. 89–25558 Filed 10–30–89; 8:45 am]

BILLING CODE 7035–01–M

## DEPARTMENT OF LABOR

### Review Panel for the Job Training Partnership Act Presidential Awards; Meeting

The Review Panel for the Job Training Partnership Act (JTPA) Presidential Awards was renewed by Notice dated August 8, 1988, for a two-year period, and published August 12, 1988, 53 FR 30482, to advise the Secretary of Labor on the selection of the Presidential Awards recipients.

Notice is hereby given of the meetings of the Review Panel for the JTPA Presidential Awards and its working groups during a two-week period to begin November 20, 1989.

**TIME AND PLACE:** 10:00 a.m., Room S5515, Seminar Room 2, Frances Perkins Department of Labor Building, 200 Constitution Avenue, NW., Washington, DC 20210.

These meetings will be closed under the authority of section 10(d) of the Federal Advisory Committee Act. The Panel will review and discuss personal information regarding the nominees, disclosure of which would constitute a clearly unwarranted invasion of privacy.

**FOR FURTHER INFORMATION, CONTACT:** Robert N. Colombo, Director, Office of Employment and Training Programs, U.S. Department of Labor, Employment and Training Administration, 200 Constitution Avenue, NW., Room N–4703, Washington, DC 20210. Telephone: 202–535–0577.

Signed at Washington, DC, this 25th day of October, 1989.

**Roberts T. Jones,**

*Assistant Secretary of Labor.*

[FR Doc. 80–25595 Filed 10–30–89; 8:45 am]

BILLING CODE 4510–30–M

## Employment and Training Administration

**[TA–W–21,739]**

### Myers Drilling Co.; Midland, Texas; Termination of Investigation; Correction

This notice corrects the language in the **Federal Register** of March 3, 1989 at page 9096 (54 FR 9096), FR Document 89–5029, denoting the TA–W number of the active certification covering the instant worker group.

Under Myers Drilling Co., Midland TX; Termination of Investigation, the last line on page 9096, the active certification number covering the petitioning group of workers should be "TA–W–21,592" instead of TA–W–21,739.

Signed at Washington, DC, this 20th day of October 1989.

**Marvin M. Fooks,**

*Director, Office of Trade Adjustment Assistance.*

[FR Doc. 89–25596 Filed 10–30–89; 8:45 am]

BILLING CODE 4510–30–M

### Determinations Regarding Eligibility to Apply for Worker Adjustment Assistance

In accordance with section 223 of the Trade Act of 1974 (19 U.S.C. 2273) the Department of Labor herein presents summaries of determinations regarding eligibility to apply for adjustment assistance issued druing the period of October 1989.

[1] JTR states that even though the lease became effective on July 24, 1989, common carrier operations would not begin until the notice became effective. It notes that it has performed all terminal railroad operations on the property during the interim period, solely as contract agent of MDR, in MDR's name and pursuant to MDR's filed tariffs.

[2] JTR certifies that it has identified to the appropriate State Historic Preservation Officer all sites and structures 50 years old and older that will be transferred as a result of this transaction.

In order for an affirmative determination to be made and a certification of eligibility to apply for adjustment assistance to be issued, each of the group eligibility requirements of section 222 of the Act must be met.

(1) That a significant number or proportion of the workers in the workers' firm, or an appropriate subdivision thereof, have become totally or partially separated,

(2) That sales or production, or both, of the firm or subdivision have decreased absolutely, and

(3) That increases of imports of articles like or directly competitive with articles produced by the firm or appropriate subdivision have contributed importantly to the separations, or threat thereof, and to the absoulte decline in sales or production.

**Negative Determinations**

In each of the following cases the investigation revealed that criterion (3) has not been met. A survey of customers indicated that increased imports did not contribute importantly to worker separations at the firm.

*TA-W-23,282; V'Lora Swimwear, Inc., Bloomfield, NJ*

*TA-W-23,270; Parker Seal Co., Berea, KY*

*TA-W-23,277; Snyder Tank Corp., Galeton, PA*

*TA-W-23,229; Honeywell, Inc., Solid State Electronics Div, Colorado Springs, CO*

*TA-W-23,272; Pharoah Corp., East Newark, NJ*

*TA-W-23,330; Syltron, Inc., PMG, Luquillo PR*

*TA-W-23,252; Dotti Original, Inc., Elizabeth, NJ*

*TA-W-23,286; Circuline Fabrics, Inc., Brooklyn, NY*

In the following cases, the investigation revealed that the criteria for eligibility has not been met for the reasons specified.

*TA-W-23,264; Michel T. Halbouty Energy Co., Houston, TX*

The workers' firm does not produce an article as required for certification under section 222 of the Trade Act of 1974.

*TA-W-23,289; GE Lighting, Troy, MI*

The workers' firm does not produce an article as required for certification under section 222 of the Trade Act of 1974.

*TA-W-23,267; North Central Oil Corp., Houston, TX*

The investigation revealed that criterion (2) has not been met. Sales or production did not decline during the relevant period as required for certification.

*TA-W-23,315; L & S Shirt Co., Inc., New York, NY*

Increased imports did not contribute importantly to workers separations at the firm.

*TA-W-23,292; Grant Oil Country Tubular Corp., Houston, TX*

Increased imports did not contribute importantly to workers separations at the firm.

*TA-W-23,329; Sooner Completion Co., Enid, OK*

The workers' firm does not produce an article as required for certification under section 222 of the Trade Act of 1974.

*TA-W-21,635; Kerr Finishing, Inc., Travelers Rest, SC*

Increased imports did not contribute importantly to workers separations at the firm.

*TA-W-23,336; B & B Tool & Supply Co., Inc., Casper, WY*

U.S. imports of oilfield machinery are negligible.

*TA-W-23,339; BOP Repair & Machine, Inc., Casper, WY*

U.S. imports of oilfield machinery are negligible.

*TA-W-23,318; Miller Taxidermy, Aransas Pass, TX*

The investigation revealed that criterion (1) has not been met. Employment did not decline during the relevant period as required for certification.

*TA-W-23,309; Dailey Petroleum Services, Inc., Lafayette, LA*

Increased imports did not contribute importantly to workers separations at the firm.

*TA-W-23,394; National Semiconductor Corp., Danbury, CT*

Increased imports did not contribute importantly to workers separations at the firm.

*TA-W-23,279; Sovonics Solar Systems, Troy, MI*

Increased imports did not contribute importantly to workers separations at the firm.

*TA-W-23,320; Moriarty Welding & Fabrication, Buffalo, NY*

The workers' firm does not produce an article as required for certification under section 222 of the Trade Act of 1974.

*TA-W-23,290; GNB, Inc., Dunmore, PA*

Increased imports did not contribute importantly to workers separations at the firm.

*TA-W-23,276; Service America Corp., Springdale, AR*

The workers' firm does not produce an article as required for certification under Section 222 of the Trade Act of 1974.

*TA-W-23,275; SSMC, Inc., Fairfield, NJ*

The workers' firm does not produce an article as required for certification under Section 222 of the Trade Act of 1974.

*TA-W-23,256; First Financial Management Corp., Thrift Services Div., Englewood, CO*

The workers' firm does not produce an article as required for certification under Section 222 of the Trade Act of 1974.

*TA-W-23,260; J.C. Penny Co., Inc., Merchandise Testing Center, New York, NY*

The workers' firm does not produce an article as required for certification under Section 222 of the Trade Act of 1974.

*TA-W-23,230; Harnischfeger Corp., Cedar Rapids, IA*

Increased imports did not contribute importantly to workers separations at the firm.

*TA-W-23,298; PPG Industries, Inc., Glass Research Center, Pittsburgh, PA*

The workers' firm does not produce an article as required for certification under Section 222 of the Trade Act of 1974.

*TA-W-23,236; MCENA, Inc., Midland, TX*

The workers' firm does not produce an article as required for certification under Section 222 of the Trade Act of 1974.

*TA-W-23,263; Meilink Steel Safe Co., Toledo, OH*

Increased imports did not contribute importantly to workers separations at the firm.

*TA-W-23,257; Guy Friel & Sons, Inc., Smyrna Mills, ME*

Increased imports did not contribute importantly to workers separations at the firm.

**Affirmative Determination**

*TA-W-23,142; Garan, Inc., Adamsville, TN*

A certification was issued covering all workers separated on or after June 27, 1988.

*TA-W-23,262; Koelling Metals, St. Louis, MO*

A certification was issued covering all workers separated on or after August 1, 1988.

*TA-W-23,233; Leviton Manufacturing Co., Inc., West Kingston, RI*

A certification was issued covering all workers separated on or after July 19, 1988.

*TA-W-23,244; Teledyne Wisconsin Motors, West Allis, WI*

A certification was issued covering all workers separated on or after April 1, 1989.

*TA–W–23,231; Joy Footwear Co., Hialeah, FL*

A certification was issued covering all workers separated on or after July 19, 1988 and before April 30, 1989.

*TA–W–23,251; Diamond Well Service, Inc., Casper, WY*

A certification was issued covering all workers separated on or after July 27, 1988.

*TA–W–23,249; Beta Manufacturing Co., Warren, MI*

A certification was issued covering all workers separated on or after August 3, 1988.

*TA–W–23,273; Rod Ric Corp., Odessa, TX*

A certification was issued covering all workers separated on or after January 1, 1989.

*TA–W–23,223; Edmar Creations, Inc./ The Edmar Co., Clifton, NJ*

A certification was issued covering all workers separated on or after July 13, 1988.

*TA–W–23,248; Barlyn Manufacturing Corp., Newark, NJ*

A certification was issued covering all workers separated on or after June 7, 1988.

*TA–W–22,860; Kaypro Corp., Solana Beach, CA*

A certification was issued covering all workers separated on or after April 14, 1988.

*TA–W–23,293; Harris Graphics Corp., Pawcatuck, CT*

A certification was issued covering all workers separated on or after August 7, 1988.

*TA–W–23,297; Ottenheimer & Co., Inc., Bozarth Facility, Vichy, MO*

A certification was issued covering all workers separated on or after August 8, 1988 and before May 30, 1989.

*TA–W–23,301; Sherwood Medical Co., Tucson, AZ*

A certification was issued covering all workers separated on or after June 30, 1988.

*TA–W–23,327; RPI International, Inc., Boulder, CO*

A certification was issued covering all workers separated on or after January 1, 1989.

*TA–W–23,302; Teledyne Exploration Co., Metairie, LA*

A certification was issued covering all workers separated on or after July 28, 1988.

*TA–W–23,303; Teledyne Exploration Co., Houston TX*

A certification was issued covering all workers separated on or after July 28, 1988.

*TA–W–23,242; Samsung International, Inc., Ledgewood, NJ*

A certification was issued covering all workers separated on or after July 20, 1988.

*TA–W–23,278; Somerset Knitting Mills, Philadelphia, PA*

A certification was issued covering all workers separated on or after August 7, 1988.

*TA–W–23,274; RWIMCO, Inc., Cisco, TX*

A certification was issued covering all workers separated on or after August 7, 1988.

*TA–W–23,322; Niagara Paper Co., Inc., Buffalo, NY*

A certification was issued covering all workers separated on or after August 21, 1988.

*TA–W–23,266; Nichols Casing Crews, Inc., Oklahoma City, OK*

A certification was issued covering all workers separated on or after August 2, 1988

*TA–W–23,280; Texaco USA, West Region, Producing Dept., Casper, WY*

A certification was issued covering all workers separated on or after August 2, 1988.

*TA–W–23,280A; Texaco USA, West Region, Producing Dept., Operating at Other Locations in WY*

A certification was issued covering all workers separated on or after August 2, 1988.

*TA–W–23,280; Texaco USA. West Region, Producing Dept., Operating at Various Locations in The Following States:*

*A–W–23,280B CO*
*A–W–23,280C MT*
*A–W–23,280F UT*
*A–W–23,280D NM*
*A–W–23,280E ND*

A certification was issued covering all workers separated on or after August 2, 1988.

*TA–W–23,281; Texaco USA, Midland Div., Midland, TX*

A certification was issued covering all workers separated on or after January 23, 1989.

*TA–W–23,281A; Texaco USA, Midland Div., Operating at Other Locations in Texas*

A certification was issued covering all workers separated on or after January 23, 1989.

*TA–W–23,281B; Texaco USA, Midland Div., Operating at Other Locations in New Mexico.*

A certification was issued covering all workers separated on or after August 1, 1988.

*TA–W–23,268; Oil Well Perforators, Inc., Englewood, CO*

A certification was issued covering all workers separated on or after August 3, 1988.

*TA–W–23,268; Oil Well Perforators, Inc., & Operating at Various Locations in The Following States*

*A–W–23,268A CO*
*A–W–23,268B WY*
*A–W–23,268C UT*
*A–W–23,268D MT*

A certification was issued covering all workers separated on or after August 3, 1988.

*TA–W–21,807; Catus Drilling Co., Midland, TX*

A certification was issued covering all workers separated on or after October 1, 1985.

I hereby certify that the aforementioned determinations were issued during the month of October 1989. Copies of these determinations are available for inspection in Room 6434. U.S. Department of Labor, 601 D Street, NW., Washington, DC 20213 during normal business hours or will be mailed to persons who write to the above address.

Dated: October 24, 1989.

**Marvin M. Fooks,**

*Director, Office of Trade Adjustment Assistance.*

[FR Doc. 89–25594 Filed 10–30–89; 8:45 am]

BILLING CODE 4510–30–M

## Job Training Partnership Act; State Designations of Entities as Dislocated Worker Units Under Title III, as Amended by Economic Dislocation and Worker Adjustment Assistance Act

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

**ACTION:** Notice.

**SUMMARY:** The Department of Labor is publishing for public information an update of a listing of names, addresses, and telephone numbers of entities designated by State as Dislocated Worker Units.

**FOR FURTHER INFORMATION CONTACT:** Mr. Robert N. Colombo, Director, Office of Employment and Training Programs, Employment and Training Administration, Department of Labor, Room N–4469, 200 Constitution Avenue, NW., Washington, DC 20210. Telephone: 202–535–0577 (this is not a toll-free number).

**SUPPLEMENTARY INFORMATION:** Title III of the Job Training Partnership Act (JTPA), as amended by the Economic

Dislocation and Worker Adjustment Assistance Act (EDWAA) provides that the Department of Labor (DOL or Department) shall fund programs for States to assist dislocated workers. Section 311(b)(2) of JTPA provides that States will designate or create an identifiable State Dislocated Worker Unit (DWU) or office with the capability to respond rapidly, onsite, to permanent plant closures and substantial layoffs throughout the State. The DWU is a key feature of the States' implementation of the new programs under EDWAA.

On March 6, 1989, the Assistant Secretary of Labor sent a letter to each of the Governors to verify a listing of their State DWU designated entity, and on April 25, 1989 the original list was published. Revisions to the listing have been received, so DOL is publishing this notice.

Signed at Washington, DC this 24th day of October, 1989.

**Roberts T. Jones,**

*Assistant Secretary of Labor.*

**Dislocated Worker Units Nationwide**

*Alabama*

Mrs. Ruth Ott, Employment and Training Division, Department of Economic and Community Affairs, 3465 Norman Bridge Road, P.O. Box 250347, Montgomery, Alabama 36205–0939, Telephone: 205–284–8800

*Alaska*

Mr. William Mailer, JTPA Program Manager, Rural Development Division, Department of Community and Regional Affairs, 949 East 36th Avenue, Suite 403, Anchorage, Alaska 99508, Telephone: 907–563–1955

*Arizona*

Ms. Delia Walters, Department of Economic Security, Division of Employment and Rehabilitation Services, 1300 West Washington, 3rd Site Code 901A, Phoenix, Arizona 85005, Telephone: 602–542–4910

*Arkansas*

Mr. William D. Gaddy, Administrator, Arkansas Employment Security Division, P.O. Box 2981, Little Rock, Arkansas 72203, Telephone: 501–682–2121

*California*

Mr. Werner O. Schink, Acting Chief, Job Training Partnership Division, MIC 69, Employment Development Department, California Response Team, P.O. Box 942880, Sacramento, California 94280–0001, Telephone: 916–322–4440

*Colorado*

Mr. Dick Rautio, Director, DWU, Governor's Job Training Office, 1391 N. Speer Boulevard, #440, Denver, Colorado 80204, Telephone: 303–620–4400

*Connecticut*

Mr. Arthur Franklin, Director, State Department of Labor Dislocated, Worker Unit, 200 Folly Brook Boulevard, Whethersfield, Connecticut 06109, Telephone: 203–566–7433

*Delaware*

Ms. Alice Mitchell, Technical Services Manager, Delaware Department of Labor, P.O. Box 9499, Newark, Delaware 19714–9499, Telephone: 302–368–6913

*District of Columbia*

Ms. Brenda Boykins, Division Chief, Division of Program Operations, Department of Employment Services, Office of Employability Development, 500 C Street, NW., Room 301, Washington, DC 20001, Telephone: 202–639–1269

*Florida*

Mr. Shelton Kemp, Chief, Bureau of Job Training, Division of Labor, Employment and Training, Department of Labor and Employment Security, 1320 Executive Center Drive, Suite 201, Tallahassee, Florida 32399–0667, Telephone: 904–488–9250

*Georgia*

Ms. Andrea Harper, (All correspondence should be addressed to Mr. James A. Lowe), Georgia Department of Labor, Sussex Place, Suite 600, 148 International Boulevard NE., Atlanta, Georgia 30303, Telephone: 404–656–3031

*Hawaii*

Mr. Mario Ramil, Director, Department of Labor and Industrial Relations, 830 Punchbowl Street, Room 321, Honolulu, Hawaii 96813, Telephone: 808–548–3150

*Idaho*

Ms. Julie Kilgrow, Director, Department of Employment, 317 Main Street, Boise, Idaho 83735–0001, Telephone: 208–334–6110

*Illinois*

Mr. John Taylor, Manager, Job Training Programs Division, Illinois Dept. of Commerce and Comm. Affairs, 620 E. Adams Street, Springfield, Illinois 62704, Telephone: 217–785–6006

*Indiana*

Ms. Nina White, Manager, Operational Planning and Support, Program Operations Division, Indiana Department of Employment and Training Service, 10 N. Senate Avenue, Room 325, Indianapolis, Indiana 46204, Telephone: 317–232–8086

*Iowa*

Mr. Jeff Nall, Administrator, Job Training Division, Department of Econ. Development, 200 East Grand Avenue, Des Moines, Iowa 50309, Telephone: 515–281–3759

*Kansas*

Mr. Patrick Pritchard, Director, Program and Support Services, Department of Human Resources, 401 Topeka Avenue, Topeka, Kansas 66603, Telephone: 913–296–2063

*Kentucky*

Mr. Charles Furr, Director, Division for Job Training, Department for Employment Services, 275 East Main, 2 West, Frankfort, Kentucky 40621, Telephone: 502–564–5360

*Louisiana*

Mrs. Phyllis C. Mouton, Secretary of Labor, ATTN. DWU, Copy to: Robert Dupre, Louisiana Department of Labor, P.O. Box 94094, Baton Rouge, Louisiana 70804–9094, Telephone: 504–342–3016

*Maine*

Mr. James H. McGowan, Director, Bureau of Labor Standards, Department of Labor, State House Station #45, Augusta, Maine 04333, Telephone: 207–289–6400

*Maryland*

Mr. Vernon J. Thompson, Director, Contracts and Operations, Office of Employment Training, Department of Economic and Employment Development, 1100 N. Eutaw Street, Rm. 310, Baltimore, Maryland 21201, Telephone: 301–333–5149

*Massachusetts*

Dr. Patricia Hanratty, Executive Director, Industrial Services Program, One Ashburton Place, Room 1413, Boston, Massachusetts 02108, Telephone: 617–727–8158

*Michigan*

Mr. James Houck, Manager, Dislocated Workers Unit, Michigan Department of Labor, Governor's Office For Job Training, 222 Hollister Building, P.O.

Box 30039, Lansing, Michigan 48909, Telephone: 517–373–6227

*Minnesota*

Mr. Edward Retka, Employment and Training Specialist III, Minnesota Department of Jobs and Training, State Job Training Office, 690 American Center Building, 150 E. Kellogg Boulevard, St. Paul, Minnesota 55101, Telephone: 612–296–7918

*Mississippi*

Ms. Jane Black, Director, DWU, Department of Job Development and Training, Governor's Office of Federal-State Programs, 301 West Pearl Street, Jackson, Mississippi 39203–3089, Telephone: 601–949–2128

*Missouri*

Mr. Michael Hartmann, Director, Department of Econ. Dev., Division of Job Development and Training, 221 Metro Drive, Jefferson City, Missouri 65109, Telephone: 314–751–7796

*Montana*

Ms. Patricia Gross, Program Manager, DWU, Employment Policy Division, Department of Labor and Industry, P.O. Box 1728, Helena, Montana 59624, Telephone: 406–444–4500

*Nebraska*

Ms. Patricia Meisenholder/Mr. Edward Kosark, Nebraska Department of Labor, Job Training Program Division, 550 South 16th Street, Box 95004, Lincoln, Nebraska 68509–5004, Telephone: 402–471–2127

*Nevada*

Ms. Barbara Weinberg, State Job Training Office, Capitol Complex, Carson City, Nevada 89710, Telephone: 702–885–4310

*New Hampshire*

Mr. Robert Steiner, Director, Dislocated Worker Unit, NH Job Training Coordinating Council, 64B Old Suncook Road, Concord, New Hampshire 03301, Telephone: 603–228–9500

*New Jersey*

Mr. Thomas Draybik, Coordinator, New Jersey Department of Labor Response Team, New Jersey Department of Labor Room 1013, John Fitch Plaza, Trenton, New Jersey 08625, Telephone: 609–292–2074

*New Mexico*

Mr. Patrick Newman, Chief, Dislocated Worker Unit, State Administrative Entity, P.O. Box 4218, 1596 Pacheco Street, Santa Fe, New Mexico 87501 Telephone: 505–827–6824, copy to: Mr. Paul Garcia, Secretary, New Mexico Department of Labor, P.O. Box 1928, Albuquerque, New Mexico 87102

*New York*

Mr. David Mance, Early Warning Notification Unit, Room 162, Building 12, State Office Building Campus, Albany, New York 12240, Telephone: 518–457–0206 (Within State—1–800–548–1158)

*North Carolina*

Mr. Joel C. New, Director, Division of Employment and Training, P.O. Box 27687, Raleigh, North Carolina 27611–7687, Telephone: 919–733–6383

*North Dakota*

Mr. James Hirsch, Director, Employment and Training Division, Job Service of ND, P.O. Box 1537, Bismarck, North Dakota 58502, Telephone: 701–224–2843

*Ohio*

Ms. Ellen O'Brien Saunders, Administrator, Ohio Bureau of Employment Services, 145 S. Front Street, Columbus, Ohio 43215, Telephone: 614–466–8032

*Oklahoma*

Mr. Eddie Foreman, Supervisor, EDWAA Unit, Oklahoma Employment Security Commission, Will Rodgers Building, Room 308, 22401 N. Lincoln Boulevard, Oklahoma City, Oklahoma 73105, Telephone: 405–557–7128

*Oregon*

Ms. Gale Castillo, Manager, Job Training Partnership Administration, Economic Development Department, 155 Cottage Street N.E., Salem, Oregon 97310, Telephone: 503–373–1995

*Pennsylvania*

Mr. Franklin G. Mont, Deputy Secretary for Employment, Security and Job Training, 7th and Forster Streets, Harrisburg, Pennsylvania 17120, Telephone: 717–787–1745

*Rhode Island*

Mr. Richard D'Iorio, Director, The Dislocated Workers Resources Center, 555 Valley Street, Building 51, Providence, Rhode Island 02908, Telephone: 401–277–2090

*South Carolina*

Ms. Regina D. Ratterree, Program Coordinator, South Carolina Employment Security Commission, Manpower Training Unit, Rapid Response Unit, 1550 Gadsden Street, Columbia, South Carolina 29201–3430, Telephone: 803–737–2600 or 1–800–922–6332

*South Dakota*

Dislocated Worker Unit, South Dakota Department of Labor, 700 Governor's Drive, Pierre, South Dakota 57501, Telephone: 605–773–5017

*Tennessee*

Mr. Jimmy White, Commissioner, Tennessee Department of Labor, Dislocated Worker Unit, 501 Union Building, 6th Floor, Nashville, Tennessee 37219–5388, Telephone: 615–741–2582

*Texas*

Ms. Joyce Leidy, Associate Director, Texas Department of Commerce, Industrial Development Training, P.O. Box 12728, Austin, Texas 78711, Telephone: 512–834–6237

*Utah*

Mr. Gary Gardner, Director, DWU, Office of Job Training and Economic Development, 6136 State Office Building, Salt Lake City, Utah 84114, Telephone: 801–538–3619

*Vermont*

Mr. Thomas Douse, Director, Office of Employment and Training Programs, Department of Employment and Training, P.O. Box 488, Montpelier, Vermont 05602, Telephone: 802–229–0311

*Virginia*

Mr. Ralph Cantrell, Commissioner, Virginia Employment Commission, P.O. Box 1358, 703 E. Main Street, Richmond, Virginia 23211, Telephone: 804–786–3001, Copy to: Dr. James E. Price, Executive Director, Governor's Employment and Training Department, The Commonwealth Building, 4615 West Broad Street, Third Floor, Richmond, Virginia 23230, Telephone: 804–367–9800

*Washington*

Ms. Susan Dunn, Commissioner, Employment Security Department, Training and Employment Analysis Division, 605 Woodview Drive S.E., KG 11, Olympia, Washington 98504, Telephone: 206–438–4611

*West Virginia*

Mr. Paul Skaff, Administrative Manager, State DWU, Employment and Training Division, Governor's Office of Community and Industrial Development, 5790–A Mac Corkle Avenue S.E., Charleston, West Virginia 25304, Telephone: 304–348–5920

*Wisconsin*

Mr. Dan Bond, Division of Employment and Training Policy, State Job Training Program Section, Jobs Bureau—DILHR, 201 E. Washington Avenue, P.O. Box 7972, Madison, Wisconsin 53707, Telephone: 608–266–0745

*Wyoming*

Mr. Jerry Baldwin, Coordinator, DWU, Department of Employment, Job Training Administration, Barrett Building, 3rd Floor, 2301 Central Avenue, Cheyenne, Wyoming 82002, Telephone: 307–777–7745

*Puerto Rico*

Mr. Jose Reyes Herrerro, Director, DWU, Office of Economic Opportunity, La Fortaleza, Call Box 50067, Old San Juan, Puerto Rico 00901, Telephone: 809–724–7900

[FR Doc. 89–25597 Filed 10–30–89; 8:45am]

BILLING CODE 4510–30–M

## Job Training Partnership Act: Announcement of Proposed Noncompetitive Grant Awards

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

**ACTION:** Notice of intent to award a noncompetitive grant.

**SUMMARY:** The Employment and Training Administration (ETA) announces its intent to award a grant on a basis noncompetitive to National Council on the Aging to provide specialized services under the authority of the Job Training Partnership Act (JTPA).

**DATES:** It is anticipated that this grant agreement will be executed by November 22, 1989 and will be funded for one year. Submit comments by 4:45 p.m. (Eastern Time), on November 15, 1989.

**ADDRESS:** Submit comments regarding the proposed award to: U.S. Department of Labor, Employment and Training Administration, Room C–4305, 200 Constitution Avenue NW., Washington, DC 20210, Attention: Betty Koonce; Reference FR–DAA–104.

**SUPPLEMENTARY INFORMATION:** The Employment and Training Administration (ETA) announces its intent to award a noncompetitive grant to the National Council on the Aging. The proposed grantee will help the JTPA system to promote the increased utilization of Older Workers in private industry through the provision of technical information services and materials to the business sector regarding the productivity and profitability of employing and retaining older workers. Grantee will conduct seminars to build the capacity of the states and SDAs in conducting more effective programs for older workers. Funds for this activity are authorized by the Job Training Partnership Act (JTPA), as amended, title IV—Federally Administered programs. The proposed funding is $250,000 for a period of twelve (12) months.

Signed at Washington, DC, on October 17, 1989.

**Robert D. Parker,**

*ETA Grant Officer.*

[FR Doc. 89–25593 Filed 10–30–89; 8:45am]

BILLING CODE 4510–30–M

## Pension and Welfare Benefits Administration

**[Prohibited Transaction Exemption 89–93; Exemption Application No. D–7364 et al.]**

## Grant of Individual Exemptions; National Rural Utilities Cooperative Finance Corp. (CFC), et al.

**AGENCY:** Pension and Welfare Benefits Administration, Labor.

**ACTION:** Grant of individual exemptions.

**SUMMARY:** This document contains exemptions issued by the Department of Labor (the Department) from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (the Act) and/or the Internal Revenue Code of 1954 (the Code).

Notices were published in the Federal Register of the pendency before the Department of proposals to grant such exemptions. The notices set forth a summary of facts and representations contained in each application for exemption and referred interested persons to the respective applications for a complete statement of the facts and representations. The applications have been available for public inspection at the Department in Washington, DC. The notices also invited interested persons to submit comments on the requested exemptions to the Department. In addition the notices stated that any interested person might submit a written request that a public hearing be held (where appropriate). The applicants have represented that they have complied with the requirements of the notification to interested persons. No public comments and no requests for a hearing, unless otherwise stated, were received by the Department.

The notices of pendency were issued and the exemptions are being granted solely by the Department because, effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978) transferred the authority of the Secretary of the Treasury to issue exemptions of the type proposed to the Secretary of Labor.

### Statutory Findings

In accordance with section 408(a) of the Act and/or section 4975(c)(2) of the Code and the procedures set forth in ERISA Procedure 75–1 (40 FR 18471, April 28, 1975), and based upon the entire record, the Department makes the following findings:

(a) The exemptions are administratively feasible;

(b) They are in the interests of the plans and their participants and beneficiaries; and

(c) They are protective of the rights of the participants and beneficiaries of the plans.

National Rural Utilities Cooperative, Finance Corporation (CFC)
Located in Washington, DC.

[Prohibited Transaction Exemption 89–93; Exemption Application No. D–7364]

### Exemption

The restrictions of section 406(a) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (D) of the Code, shall not apply to certain transactions, described in the summary of facts and representations of the notice of proposed exemption (referred to below), between CFC and certain employee benefit plans (the Plans). CFC may be deemed to be a party in interest with respect to the Plans as a result of providing services to a trust in situations where the assets of the trust are considered to be "plan assets" as a result of the Plans acquiring significant equity interests in the trust in the form of pass-through certificates (the Certificates). The exemption will be effective provided that:

A. The decision by a Plan to engage in the transactions is made by a fiduciary of the Plan which is independent of CFC as well as the trustee of the trust; and

B. The terms of each such transaction are no less favorable to the Plan than the terms available in a similar transaction involving unrelated parties.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption refer to the notice of proposed exemption published on June 14, 1989 at 54 FR 25356.

*Effective Date:* The effective date of this exemption is July 22, 1987.

*Written Comments:* The applicant submitted a few written comments with respect to the notice of proposed exemption (the Notice).

Paragraph 4 of the Notice states that in June 1986, Congress passed legislation (the Legislation) permitting rural electric utilities to take advantage of the reductions in interest rates by prepaying their high interest loans from the Federal Financing Bank of the United States Treasury (the FFB Loans), without any prepayment penalty or fees, through the issuance of debt to private lenders (i.e. private notes) which would be guaranteed by the Rural Electrification Agency (REA). Paragraph 4 states further that REA has adopted regulations (the Regulations) implementing the Legislation, and has accepted prepayment applications submitted by a number of cooperative electric utilities (the Cooperatives).

In addition, paragraph 5 of the Notice states that CFC has formulated a program (the Program) to permit the Cooperatives to refinance their FFB Loans in accordance with the Regulations at competitive rates, and that the Program has been approved by REA as complying with the Regulations.

The third paragraph of Paragraph 5 of the Notice states that the Regulations require that the interest rates on the private notes issued by the Cooperatives must be at least 50 basis points lower than the weighted average interests rate borne by the FFB Loans being repaid.

The applicant states that the Regulations have been revised, effective as of February 1988, to require that the interest rates on the private notes be equal to or lower than the weighted average interest rate borne by the FFB Loans being repaid, taking into account savings achieved during earlier periods following the refinancing of such FFB Loans. CFC states that it continues to assume all risks associated with interest rate fluctuations.

Paragraph 13 of the Notice states that a number of Cooperatives have submitted applications to REA to refinance their FFB Loans under the Program. The applicant states that all of the Cooperatives mentioned in paragraph 13 have refinanced their FFB loans in accordance with the Program, except for Cajun Electric Power Cooperative, Inc. The applicant states further that Western Illinois Power Cooperative, Inc., which was not mentioned in paragraph 13, has also refinanced its FFB Loan under the Program, although the Certificates resulting from such refinancing have not yet been resold by CFC.

After consideration of the entire record, the Department has determined to grant the exemption.

**FOR FURTHER INFORMATION CONTACT:** Mr. E. F. Williams of the Department, telephone (202) 523-8883. (This is not a toll-free number.)

Ophthalmic Associates, P.A. Employees' Pension Plan (the Pension Plan) and Ophthalmic Associates, P.A. Employees' Money Purchase Pension Plan (the Money Purchase Pension Plan; collectively, the Plans)
Located in Lansdale, PA

[Prohibited Transaction Exemption 89-94; Exemption Application Nos. D-7684 and D-7685, respectively]

**Exemption**

The restrictions of section 406(b)(2) of the Act shall not apply to the transfer by the Pension Plan to the Money Purchase Pension Plan of a 50 percent tenant-in-common interest in certain improved real property and cash, provided the terms of the transaction are at least as favorable to the Money Purchase Pension Plan as those obtainable in an arm's-length transaction with an unrelated party. In addition, the restrictions of section 406(a), 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code shall not apply to the assumption, by the Money Purchase Pension Plan, of certain pre-existing loan, lease and sublease obligations of the Pension Plan with persons who are parties in interest with respect to both Plans, provided the terms of the transaction are at least as favorable to the Money Purchase Pension Plan as those obtainable in an arm's length transaction with an unrelated party.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption refer to the notice of proposed exemption published on August 23, 1989 at 54 FR 35094.

**FOR FURTHER INFORMATION CONTACT:** Ms. Jan D. Broady of the Department, telephone (202) 523-8881. (This is not a toll-free number.)

Jon A. Harding, D.M.D., P.S., Employees' Amended and Restated Money Purchase Pension Plan and Trust (the Plan)
Located in Spokane, Washington

Prohibited Transaction Exemption 89-95; Exemption Application No. D-8030]

**Exemption**

The restrictions of section 406(a), 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) (A) through (E) of the Code, shall not apply to the sale for cash by the Plan of certain real property (the Real Property) to Helen M. Harding, a party in interest with respect to the Plan, provided that the price paid be no less than the fair market value of the Real Property on the date of sale, as established by an independent and qualified appraiser of real estate.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption refer to the notice of proposed exemption published on August 8, 1989 at 54 FR 32542.

*For Further Information Contact:* Joseph L. Roberts III of the Department, telephone (202) 523-8881. (This is not a toll-free number.)

**General Information**

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions of the Act and/or the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which among other things require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(B) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) These exemptions are supplemental to and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction.

(3) The availability of these exemptions is subject to the express condition that the material facts and representations contained in each application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC, this 25th day of October, 1989.

Ivan Strasfeld,

*Director of Exemption Determinations, Pension and Welfare Benefits Administration, U.S. Department of Labor.*

[FR Doc. 89-25565 Filed 10-30-89; 8:45 am]

BILLING CODE 4510-29-M

[Application No. D-7902, et al.]

## Proposed Exemptions; Ohio Bank & Savings Company Employees' Profit Sharing Plan and Trust, et al.

**AGENCY:** Pension and Welfare Benefits Administration, Labor.

**ACTION:** Notice of proposed exemptions.

**SUMMARY:** This document contains notices of pendency before the Department of Labor (the Department) of proposed exemptions from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (the Act) and/or the Internal Revenue Code of 1954 (the Code).

### Written Comments and Hearing Requests

All interested persons are invited to submit written comments or requests for a hearing on the pending exemptions, unless otherwise stated in the Notice of Pendency, within 45 days from the date of publication of this **Federal Register** Notice. Comments and requests for a hearing should state the reasons for the writer's interest in the pending exemption.

**ADDRESS:** All written comments and requests for a hearing (at least three copies) should be sent to the Pension and Welfare Benefits Administration, Office of Regulations and Interpretations, Room N-5671, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. Attention: Application No. stated in each Notice of Pendency. The applications for exemption and the comments received will be available for public inspection in the Public Documents Room of Pension and Welfare Benefit Programs, U.S. Department of Labor, Room N-5507, 200 Constitution Avenue, NW., Washington, DC 20210.

### Notice to Interested Persons

Notice of the proposed exemptions will be provided to all interested persons in the manner agreed upon by the applicant and the Department within 15 days of the date of publication in the **Federal Register**. Such notice shall include a copy of the notice of pendency of the exemption as published in the **Federal Register** and shall inform interested persons of their right to comment and to request a hearing (where appropriate).

**SUPPLEMENTARY INFORMATION:** The proposed exemptions were requested in applications filed pursuant to section 408(a) of the Act and/or section 4975(c)(2) of the Code, and in accordance with procedures set forth in ERISA Procedure 75-1 (40 FR 18471, April 28, 1975). Effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978) transferred the authority of the Secretary of the Treasury to issue exemptions of the type requested to the Secretary of Labor. Therefore, these notices of pendency are issued solely by the Department.

The applications contain representations with regard to the proposed exemptions which are summarized below. Interested persons are referred to the applications on file with the Department for a complete statement of the facts and representations.

### Ohio Bank and Savings Company Employees' Profit Sharing Plan and Trust (the Plan) Located in Findlay, OH

[Exemption Application No. D-7902]

*Proposed Exemption*

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in ERISA Procedure 75-1 (40 FR 18471, April 28, 1975). If the exemption is granted, the restrictions of sections 406(a), 406 (b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) (A) through (E) of the Code, shall not apply to (1) the proposed purchase by the Plan of certain real property (the Property) located in Findlay, Ohio which is leased to the Ohio Bank and Savings Company (the Employer), the sponsor of the Plan; (2) the proposed lease of the Property by the Plan to the Employer; and (3) the proposed potential purchase of the Property by the Employer from the Plan; provided that all terms of such transactions are no less favorable to the Plan than those which the Plan could obtain in arm's-length transactions with an unrelated party.

*Summary of Facts and Representations*

1. The Plan is a defined contribution plan with 143 participants and total assets of $959,718.00 as of December 31, 1988. The Employer is a state-chartered bank organized under the laws of the state of Ohio with its corporate headquarters in Findlay, Ohio. The Employer serves as the trustee and administrator of the Plan through committees appointed from among its employees, officers and directors.

2. The Employer maintains its principal place of business in premises located in downtown Findlay, Ohio at 236 South Main Street. Situated nearby is the Property, which is utilized as a parking lot by the Employer. The Employer leases the Property (the Original Lease) from W. Dean Fouts and Joyce M. Fouts (Fouts), whom the Employer represents to be unrelated to the Plan and the Employer. The Original Lease, a ten-year triple-net lease effective November 1, 1988, was executed after the Employer loaned the Fouts $140,000 (the Loan) to adapt the Property for use as the Employer's parking lot. Since the Original Lease was executed, the Fouts have expressed a desire to sell the Property and the Employer has determined that ownership of the Property and income therefrom under a lease to the Employer would constitute a desirable investment for the Plan. Accordingly, the Employer is proposing that the Plan purchase the Property for cash from the Fouts and immediately commence leasing the Property to the Employer under an agreement which provides for the Employer's potential future purchase of the Property from the Plan. The Employer is requesting an exemption to permit such transactions under the terms and conditions described herein.

3. The interests of the Plan with respect to the proposed transactions will be represented by an independent fiduciary, Ronald C. Pfeiffer (the Fiduciary), an institutional investment services professional with the firm of McDonald & Company Securities, Inc. in Findlay, Ohio, who represents that he has substantial knowledge and experience in fiduciary responsibilities under the Act and that he is independent of the Employer. The Fiduciary will represent the Plan in the Plan's proposed purchase of the Property from the Fouts, in the execution of the proposed lease with the Employer (the New Lease) and in the oversight and enforcement of the Employer's obligations under the New Lease for its duration. The Fiduciary will also represent the Plan in any potential sale of the Property to the Employer pursuant to one of three provisions in the New Lease as described herein.

4. The Property consists of eight contiguous lots of commercially-zoned real property located at 100 North Main Street in the central business district in

the City of Findlay, County of Hancock, Ohio. All buildings on the Property, having been condemned, were removed by the Fouts in preparation of the Property's 19,200 square feet of surface area for asphalt paving suitable for automobile parking. This adaptation of the Property has resulted in the creation of fifty-six parking spaces and the Property remains accessible to full utilities and municipal police and fire protection. As of August 17, 1988, the Property had a fair market value of $149,000, according to Larry E. McCormick and J.F. Lamberjack, professional real property appraisers with the firm of Midwest Appraisal Service (Midwest) in Findlay, Ohio.

5. It is proposed that the Plan will pay the Fouts cash for the Property in the amount of $142,000, a price negotiated with and accepted by the Fouts. The Fouts will deliver to the Plan fee simple title in the Property free of all liens and mortgages. The Loan will be repaid in full before the transfer of the Property.

6. The New Lease will be a triple-net lease for an initial term of ten years commencing on the date of the Plan's purchase of the Property. The Plan's interests as landlord under the New Lease will be represented exclusively by the Fiduciary. With the Fiduciary's approval and ninety days advance written notice, the New Lease is renewable at the expiration of the initial term for one additional term of five years under the same terms applicable to the initial term. The New Lease authorizes the Fiduciary to terminate the New Lease without penalty of any sort to the Plan in the event, during the New Lease, the Fiduciary receives and accepts a bona fide offer for the purchase of the Property. Under the New Lease the Employer will pay annual rent in monthly installments at the rate of no less than the Property's fair market annual rental value. The New Lease provides that during its first three years the annual rent will be the greater of $14,784 or the Property's fair market annual rental value upon commencement of the New Lease as determined by an independent professional real estate appraiser selected by the Fiduciary. Thereafter, the Fiduciary shall cause the Property to be appraised every three years by an independent appraiser, at the expense of the Employer, and the annual rent will be increased in the amount, if any, by which the Property's fair market rental value has increased since the previous appraisal.

In addition to obligations for payment of all taxes and all costs of maintenance and repair on the Property, the Employer is required under the New Lease to provide full fire and extended coverage insurance of the Plan's interests in the Property and to provide general public liability insurance. The Employer is also required to obtain rent insurance in the amount of six months net rent. Under the New Lease the Employer will agree to indemnify and hold harmless the Plan against and from any and all claims of any nature arising from the Employer's use of the Property.

7. The New Lease will include a provision granting the Employer a right of first refusal (the Right) with respect to the Property. Accordingly, upon the Fiduciary's acceptance of a bona fide offer for the purchase of the Property or any part thereof during the New Lease, including any renewal, and after the Fiduciary has determined such acceptance to be in the best interests of the Plan's participants and beneficiaries, the Employer will be entitled to purchase the Property or part thereof from the Plan upon the same terms as the bona fide offer accepted by the Fiduciary. However, the Right authorizes only a cash purchase of the Property by the Employer, regardless of other non-cash terms of the bona fide offer, and the bona fide offer is limited to one which equals or exceeds the Property's fair market value at the time of the offer as determined by an independent professional real estate appraiser selected by the Fiduciary.

8. A purchase option (the Option) on the part of the Employer will also be among the New Lease's provisions. Pursuant to the Option, the Employer will have the right, subject to the approval of the Fiduciary, to purchase the Property from the Plan by providing written notice in compliance with the Option at least ninety days prior to the expiration of the initial or renewal term of the New Lease. The Fiduciary represents that it will approve of a sale of the Property by the Plan only after having determined that the continued holding of the Property would not be in the best interests of the participants and beneficiaries of the Plan. The Option provides that any purchase of the Property thereunder will be for cash in the amount of no less than the greater of $142,000 or the Property's fair market value as determined at the time of such purchase by an independent professional real estate appraiser selected by the Fiduciary. In any sale pursuant to the Option the Employer will pay all closing costs and other fees and expenses related to the transfer of the Property.

9. The New Lease also includes a provision (the Put) which empowers the Fiduciary to require the Employer to Purchase the Property from the Plan any time after the tenth year of the New Lease, following two consecutive years of unsuccessful efforts to sell the Property, if the Fiduciary so elects. Any purchase of the Property pursuant to the Put will be for cash in the amount of the greater of $142,000 or the fair market value of the Property at the time of the Put's exercise as determined by an independent professional real property appraiser selected by the Fiduciary. In any sale pursuant to the Put the Employer will pay closing costs and other expenses related to the transfer of the Property.

10. The Fiduciary represents that after a complete investigation of the proposed transactions, including an inspection of the Property, he has determined that the Plan's acquisition of the Property and its lease to the Employer under the New Lease would be in the best interests and protective of the participants and beneficiaries of the Plan. The Fiduciary has ascertained that the Plan's investment in the Property will leave the Plan appropriately liquid and diverse, as it will constitute the Plan's sole investment in real property and will represent less than twenty five percent of the Plan assets. In this regard, the Fiduciary notes that, because of the particular provisions of the New Lease, the Plan will not be compelled to retain the Property among its assets in the event, which he represents to be unlikely, that ownership of the Property ceases to be in the best interests of the participants and beneficiaries of the Plan. The Fiduciary finds little or no risks to the Plan from the proposed transactions due to the protective provisions of the New Lease.

The Fiduciary represents that he will continually monitor and oversee the performance by the Employer of the tenant obligations under the New Lease and will move without delay to remedy any breaches or defaults thereunder. The Fiduciary states that in the event the Right, the Put or the Option are exercised under the New Lease, he will cause the Property to be sold only at such time as he determines that continuing to hold the Property is not in the best interests of the Plan and will ensure that the Property is sold only for no less than its fair market value.

11. In summary, the applicant represents that the proposed transactions satisfy the criteria of section 408(a) of the Act for the following reasons: (1) The interests of the Plan with respect to the purchase of the Property, the execution and maintenance of the New Lease and the

potential sale of the Property to the Employer pursuant to the New Lease will be represented exclusively by the Fiduciary, who represents himself to be independent of the Employer; (2) The Plan will pay the Fouts cash for the Property in an amount not exceeding its fair market value and will obtain fee simple title free of all liens; (3) The Plan's ownership of the Property as proposed will present little or no risks to the Plan due to the protective and triple-net provisions of the New Lease which ensure that the Plan will receive rental payments of no less than the Property's fair rental market value; (4) The New Lease provides for its termination if the Fiduciary determines to sell the Property before the completion of the initial or renewal terms of the New Lease; (5) The Put enables the Plan to require the Employer to purchase the Property in the event the Fiduciary determines that it is not in the best interests of the Plan to retain the Property and is not able to sell the Property to an unrelated buyer; (6) Any sale of the Property to the Employer under the New Lease will occur only after the Fiduciary has determined that continued ownership of the Property would not be in the best interests of the Plan; and (7) The sale provisions of the New Lease ensure that the Plan will receive cash in the amount of no less than the Property's fair market value.

**FOR FURTHER INFORMATION CONTACT:** Ronald Willett of the Department, telephone (202) 523–8881. (This is not a toll-free number.)

**Capital Guardian Trust Company (Capital Guardian) Located in Los Angeles, CA**

(Application No. D–7929)

*Proposed Exemption*

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in ERISA Procedure 75–1 (40 FR 18471, April 28, 1975). If the exemption is granted, the restrictions of section 406(b)(2) of the Act shall not apply to the cross-trading of securities by Capital Guardian for employee benefit plan accounts (Plans) for which Capital Guardian acts as a fiduciary.

*Conditions and Definitions*

1. This exemption is subject to the following conditions:

(a) A Plan's participation in the cross-trade program is subject to a written authorization executed in advance by a fiduciary with respect to each such Plan, the fiduciary of which is independent of Capital Guardian;

(b) The authorization referred to in paragraph (a) is terminable at will without penalty to such Plan, upon receipt by Capital Guardian of written notice of termination; and

(c) Before an authorization is made, the authorizing Plan fiduciary must be furnished with any reasonably available information necessary for the authorizing fiduciary to determine whether the authorization should be made, including (but not limited to) a copy of this exemption, an explanation of how the authorization may be terminated, a description of Capital Guardian's cross-trade practices, and any other reasonably available information regarding the matter that the authorizing fiduciary requests;

2. (a) No more than three (3) business days prior to the execution of any cross-trade transaction, Capital Guardian must inform an independent fiduciary of each Plan involved in the cross-trade transaction: (i) That Capital Guardian proposes to buy or sell specified securities in a cross-trade transaction if an appropriate opportunity is available; (ii) the current trading price for such securities; and (iii) the total number of shares to be acquired or sold by each such Plan;

(b) Prior to each cross-trade transaction, the transaction must be authorized either orally or in writing by the independent fiduciary of each Plan involved in the cross-trade transaction;

(c) If a cross-trade transaction is authorized orally by an independent fiduciary, Capital Guardian will provide written confirmation of such authorization in a manner reasonably calculated to be received by such independent fiduciary within one (1) business day from the date of such authorization;

(d) The authorization referred to in this paragraph (2) will be effective for a period of three (3) business days; and

(e) No more than ten (10) days after the completion of a cross-trade transaction, the independent fiduciary authorizing the cross-trade transaction must be provided a written confirmation of the transaction and the price at which the transaction was executed;

3. (a) The cross-trade transaction is effected at the closing price for the security on the date of the transaction, and such price is within 10 percent of the closing price of the security on the day before the date on which Capital Guardian receives authorization by the independent Plan fiduciary to engage in the cross-trade transaction;

(b) The securities involved in the cross-trade transaction are those for which there is a generally recognized market; and

(c) The cross-trade transaction is affected only where the trade involves less than 5 percent of the aggregate average daily trading volume of the securities which are the subject of the transaction for the week immediately preceding the authorization of the transaction;

4. (a) Capital Guardian furnishes the authorizing Plan fiduciary at least once every three months, and not later than 45 days following the period to which it relates, a report disclosing: (i) A list of all cross-trade transactions engaged in on behalf of the Plan; and (ii) with respect to each cross-trade transaction, the highest and lowest prices at which the securities involved in the transaction were traded on the date of such transaction; and

(b) The authorizing Plan fiduciary is furnished with a summary of the information required under this paragraph 4(a) at least once per year. The summary must be furnished within 45 days after the end of the period to which it relates, and must contain the following: (i) A description of the total amount of Plan assets involved in cross-trade transactions during the period; (ii) a description of Capital Guardian's cross-trade practices, if such practices have changed materially during the period covered by the summary; (iii) a statement that the Plan fiduciary's authorization of cross-trade transactions may be terminated upon receipt by Capital Guardian of the fiduciary's written notice to that effect; and (iv) a statement that the Plan fiduciary's authorization of the cross-trade transactions will continue in effect unless it is terminated;

5. The cross-trade transaction does not involve assets of any Plan established or maintained by Capital Guardian or any of its affiliates;

6. All Plans which will participate in the cross-trade program will have total assets of at least $25 million;

7. Capital Guardian receives no fee or other compensation (other than its agreed investment management fee) with respect to any cross-trade transaction;

8. Capital Guardian is a discretionary investment manager with respect to Plans participating in the cross-trade program;

9. For purposes of this exemption:

(a) "cross-trade" transaction means a purchase and sale of securities between accounts for which Capital Guardian or an affiliate of Capital Guardian is acting as a trustee or investment manager;

(b) "affiliate" means any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with Capital Guardian;

(c) "Plan account" means an account holding assets of one or more employee benefit plans which are subject to the Act, for which Capital Guardian acts as a fiduciary.

*Summary of Facts and Representations*

1. Capital Guardian is a trust company organized under the laws of the State of California and supervised by the California banking authorities. Capital Guardian is a wholly-owned subsidiary of the Capital Group, an organization which, through its subsidiaries, provides a broad range of financial services to a variety of different clients, including employee benefit plans, registered investment companies, college endowment funds, and foundations.[1] Capital Guardian currently provides investment management services to 120 employee benefit plans. Other companies affiliated with the Capital Group provide investment advisory services to accounts, principally mutual funds, the underlying securities of which the applicant represents are not plan assets subject to the Act. Capital Guardian currently has more than $16 billion in assets under management. With respect to the Plans participating in the cross-trading program, it is represented that Capital Guardian is a discretionary investment manager.

2. Capital Guardian sometimes receives instructions from an employee benefit plan or other client to liquidate all or a portion of an investment account. In addition, Capital Guardian sometimes must dispose of securities held in a client account in order to bring the portfolio into compliance with client-imposed investment guidelines. For example, such investment guidelines for an account may require the sale of a security that has increased in value which Capital Guardian might otherwise continue to hold in the account. In addition, an affiliate of Capital Guardian may make a discretionary determination to dispose of securities for an account not involving plan assets. However, it is represented that cross-trade transactions will not involve assets of any Plan established or maintained by Capital Guardian or any of its affiliates.

3. It is represented that Capital Guardian's disposition of a particular security for one client account may involve a security which a portfolio manager may desire to purchase for one or more of Capital Guardian's other accounts. If Capital Guardian acquires such securities for one of its other accounts, it has an opportunity to save substantial commissions for both the liquidating account and the acquiring account. This saving is caused by an independent broker effecting a cross-trade transaction, which involves matching Capital Guardian's sell orders for a particular day with its buy orders for the same day and the execution of trades between the accounts in off-market transactions. The independent broker is prepared to execute these transactions for Capital Guardian for one cent per share. By contrast, if Capital Guardian were to execute the same trades on the open market, it is represented that the commission would be six to seven cents per share for each of the purchase and sale transactions. Accordingly, cross-trade transactions can be made at lower costs than open market trades.

4. Capital Guardian's portfolio managers make decisions regarding which securities to purchase or sell for client accounts considering all of the relevant facts and circumstances, including the composition of the portfolios and the liquidity requirements of the Plan accounts. Such decisions, it is represented, are not influenced by the fact that an opportunity for a cross-trade transaction may, or may not, be available. The matching of sale and purchase orders is represented to be largely automatic.

5. Under the proposed exemption, only Plans with at least $25 million in assets will participate in the cross-trade program. A Plan fiduciary which is independent of Capital Guardian must provide written authorization allowing the Plan's participation in Capital Guardian's cross-trade program before any specific cross-trade transactions are executed. This authorization will be terminable at will upon written notice by the appropriate independent Plan fiduciary. Capital Guardian will receive no additional fee for providing such service. No penalty or other charge will be made as a result of the termination of a Plan's participation in the program. In addition, before any such general authorization is granted, Capital Guardian will provide the authorizing Plan fiduciary with all materials necessary to permit an evaluation of the cross-trade program. These materials will include a copy of the exemption, an explanation of how the authorization may be terminated, a description of Capital Guardian's cross-trade practices, and any other available information which the authorizing Plan fiduciary may reasonably request.

6. In addition to requiring a general authorization of a Plan's participation in Capital Guardian's cross-trade program, an independent fiduciary of each Plan must specifically authorize each cross-trade transaction. Any such authorization will be effective only for a period of three (3) business days and will be subject to certain pricing and volume limitations (see representations 9 and 10, respectively). The authorization to proceed with the transaction may be either oral or written. If a cross-trade transaction is authorized orally by an independent fiduciary, Capital Guardian will provide a written confirmation of such authorization in a manner reasonably calculated to be received by such independent fiduciary within one (1) business day from the date of such authorization. The Plan fiduciary will be sent a written confirmation of the cross-trade, including the price at which it was executed, within ten (10) days of the completion of the transaction.

7. At least once every three months and not later than forty-five (45) days following the period to which it relates, Capital Guardian will provide the authorizing Plan fiduciary with a report setting forth: (a) A list of all the cross-trade transactions conducted on behalf of the Plan account during the previous period; and (b) with respect to each cross-trade transaction, the highest and lowest prices at which the subject securities were traded on the date of such transaction. In addition, at least once a year, and not later than 45 days after the end of the period to which it relates, each Plan fiduciary will be provided with a summary of the quarterly reports, including: (a) A description of the total amount of Plan assets involved in cross-trade transactions completed during the year; (b) a statement that the Plan's fiduciary's authorization to participate in the cross-trade program can be terminated without penalty upon Capital Guardian's receipt of a written notice to that effect; (c) a statement that the fiduciary's authorization of the Plan's participation in the program will continue unless it is terminated; and (d) a description of any material change, if any, in Capital Guardian's cross-trade practices during the period covered by the summary. It is represented that these reports will provide the Plan fiduciaries with a mechanism for monitoring the operation of the cross-trade program. The applicant further represents that the authorization procedures, particularly

[1] All future references to Capital Guardian will also include affiliated companies in the Capital Group.

the requirement of specific authorization for each cross-trade transaction, would prevent Capital Guardian from favoring one account at the expense of another in a cross-trade transaction.

8. The securities involved in the cross-trade transaction will be those only for which there is a generally recognized market.

9. A cross-trade transaction will be effected at the closing price for the security on the date of the transaction. Such price must be within 10 percent of the closing price of the security on the day before the date on which Capital Guardian receives authorization by the independent Plan fiduciary to engage in the cross-trade transaction. This condition, together with the specific authorization requirements, it is represented, would prevent Capital Guardian from using cross-trade transactions to benefit one client to the detriment of another client. This safeguard requires monitoring market activity and avoids executing trades at prices that were not contemplated at the time the independent fiduciaries authorized such transactions.

10. A cross-trade transaction will be effected only where the trade involves less than 5 percent of the aggregate average daily trading volume for the securities involved in the transaction for the week immediately preceding the authorization of the transaction. It is represented that this condition will help to minimize the potential impact which a large trade might have in the sale of securities on the open market.

11. Capital Guardian represents that it is highly unlikely that situations will arise in which it will be necessary to allocate cross-trade opportunities among several accounts. It is possible, however, that situations may arise where securities to be sold for a client account present an attractive investment opportunity for more than one other account. In this regard, the applicant represents that the issues presented in allocating cross-trade opportunities among client accounts are no different than the issues which Capital Guardian must face daily in determining the allocation of limited investment opportunities among client accounts. Capital Guardian will make these decisions considering all the relevant facts and circumstances in a manner which it believes to be consistent with its fiduciary responsibilities under the Act and which is equitable to all accounts involved. In making such allocation decisions, Capital Guardian will consider, among other things, the relative liquidity needs of the accounts, the composition of the portfolios and the number of cross-trade opportunities which have been made available to the accounts. In this regard, Capital Guardian does not believe that an automatic allocation system would be appropriate because it would interfere with the proper discharge of its fiduciary duties as an investment manager.[2]

12. In summary, the applicant represents that the proposed transaction satisfies the criteria of section 408(a) of the Act because among other things:

(a) An independent Plan fiduciary must provide written authorization, which is terminable at will, to Capital Guardian to permit the Plan to participate in the cross-trading program;

(b) Oral or written authorization must be provided by the independent Plan fiduciary to Capital Guardian prior to each cross-trade transaction;

(c) All cross-trades will be executed at the closing price for the security on the date of the transaction;

(d) A cross-trade transaction will be effected only if certain price and volume requirements are satisfied;

(e) All securities involved in cross-trades will be ones for which there is a generally recognized market;

(f) Capital Guardian will receive no additional fees as a result of the proposed cross-trades;

(g) Capital Guardian will provide periodic reporting of the cross-trade transactions to the participating Plan's independent fiduciary;

(h) The Plans participating in the cross-trade program will save significant sums of money because of reduced brokerage commissions;

(i) All Plans participating in the cross-trade program must have assets of not less than $25 million; and

(j) The cross-trade trapsaction does not involve the assets of any Plan established or maintained by Capital Guardian or any affiliates thereof.

*For Further Information Contact:* Mrs. B.S. Scott of the Department, telephone (202) 523-8883. (This is not a toll-free number.)

**Samuel Shapiro & Co., Inc. Profit Sharing Trust (the Plan) Located in Baltimore, Maryland**

[Exemption Application No. D-8072]

*Proposed Exemption*

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedure set forth in ERISA Procedures 75-1 (40 FR 18471, April 28, 1975). If the exemption is granted the restrictions of section 406(a), 406 (b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) (A) through (E) of the Code, shall not apply to the proposed sale by the Plan of common stock of Samuel Shapiro & Co. (of D.C.), Inc. (the D.C. Company), to Samuel Shapiro & Co., Inc. (the Company), the sponsor of the Plan and a Subchapter S Corporation under the Code, in connection with the proposed merger of the Company and the D.C. Company, provided that the sales price for the stock is not less than the fair market value of the stock on the date of sale.

*Summary of Facts and Representations*

1. The Plan is a profit sharing plan which, as of December 31, 1988, had approximately 54 participants and total assets of approximately $6,491,114. The Profit Sharing Trust Committee (the Committee) is the named fiduciary of the Plan. The members of the Committee are M. Sigmund Shapiro (Mr. Shapiro), Morris E. Horwitz and Julius Braverman. The trustee of the Plan (the Trustee) is the Mercantile-Safe Deposit & Trust Company, located in Baltimore, Maryland.

The Committee has the authority under the Plan to appoint an investment advisor to invest the Plan's assets. The Committee has appointed Rothchild and Company of Baltimore, Maryland (the Advisor) as an investment advisor. The applicant states that the decision-makers for investment of the Plan's assets are the Committee and the Advisor.

2. The Company is a Maryland corporation and the D.C. Company is a Delaware corporation (together, the Companies). The Companies are engaged in the business of providing customs brokerage and freight forwarding services. Mr. Shapiro is the President and the Chairman of the Board of Directors of the Company. Mr. Shapiro owns 92.5% of the stock of the Company (the Company Stock).

The Company owns 72% of the common stock of the D.C. Company (the D.C. Company Stock) and Mr. Shapiro owns 3% of the D.C. Company Stock. The Plan owns 25% of the D.C. Company Stock. The Plan acquired the D.C. Company Stock as a contribution from the Company in 1969 prior to the effective date of the Act. The applicant represents that because the Company is a Subchapter S Corporation under the Code, Mr. Shapiro is a shareholder-

[2] The Department is expressing no opinion herein as to the applicability of any of the provisions of part 4 of title I of the Act to the allocation decisions made by Capital Guardian on behalf of the Plans participating in the cross-trading program.

employee with respect to the Plan as the owner of more than 5% of the Company Stock.[3] However, the D.C. Company is not a Subchapter S Corporation under the Code. The applicant states that the D.C. Company presently cannot operate as a Subchapter S Corporation due to the Plan's ownership of the D.C. Company Stock (see section 1361 of the Code).

3. The applicant represents that a proposal has been made to merge the Companies (the Merger), in order to simplify administration and eliminate duplication of operational expenses. After the Merger, the combined organization will be a Subchapter S Corporation.

The applicant states that the Merger would be accomplished as follows: (1) The Board of Directors of the Companies would recommend to the stockholders that the Companies be merged; (2) the stockholders of each of the Companies would approve the Merger by at least a two-thirds vote; (3) an Agreement of Merger (the Agreement) would be filed with the Secretary of State of Delaware and Articles of Merger (the Articles) would be filed with the State Department of Assessments and Taxation of Maryland; (4) pursuant to the Agreement and the Articles, the D.C. Company would be merged into the Company, and the assets and liabilities of the D.C. Company would be transferred to the Company; (5) pursuant to the Merger all stockholders of the D.C. Company (except the Plan) would receive Company Stock in exchange for their D.C. Company Stock; and (6) the Plan would receive cash in change for its D.C. Company Stock. Therefore, the Plan would not own any D.C. Company Stock after the Merger and would not own any Company Stock as a result of the Merger.

4. The Committee and the Advisor (together, the Plan Fiduciaries) represent that the Plan's continued investment in the D.C. Company Stock is not in the best interest of the Plan. The Plan Fiduciaries state that the D.C. Company Stock has limited potential for appreciation and that the interest of the Plan's participants and beneficiaries would be served better by an investment which is more likely to appreciate in value. In this regard, the Plan Fiduciaries state that the D.C. Company has had an erratic earnings history and that the future profitability of the D.C. Company is uncertain. Moreover, the Plan Fiduciaries note that the long-term management direction of the D.C. Company is unclear due to the age of the key executive, Mr. Shapiro. In addition, the Plan Fiduciaries believe that the progressively increasing expenses of operating the D.C. Company may cause a decline in the value of the D.C. Company Stock. Finally, the Plan Fiduciaries state that the D.C. Company Stock is not publicly traded and the Plan should have an investment which is more liquid in nature.

5. The D.C. Company Stock was appraised on July 10, 1989 by Harvey D. Gold (Mr. Gold), an independent, qualified appraiser in Baltimore, Maryland, as having a fair market value of $9000 per share as of May 31, 1989. The applicant states that Mr. Gold will update his appraisal of the D.C. Company Stock prior to the Merger.

6. The Plan Fiduciaries represent that the proposed sale of the D.C. Company Stock to the Company would be in the best interest of the Plan and its participants and beneficiaries. The Plan Fiduciaries state that the Plan will receive cash equal to the value of the D.C. Company Stock, as established by Mr. Gold's appraisal. In addition, the proposed ttansaction will provide the Plan with funds which can be invested in assets with more certain income earning potential and greater likelihood for future appreciation. The Plan will not pay any commissions or other expenses with respect to the proposed sale.

7. In summary, the applicant represents that the proposed transaction will meet the statutory criteria of section 408(a) of the Act and section 4975(c)(2) of the Code because: (a) the sale will be a one-time transaction for cash; (b) the Plan will receive an amount which is not less than the fair market value of the D.C. Company Stock, as established by an independent, qualified appraiser; (c) the Plan will not pay any commissions or other expenses with respect to the sale; and (d) the transaction will allow the Plan to divest itself of the D.C. Company Stock and acquire investments yielding a higher rate of return.

*For Further Information Contact:* Mr. E.F. Williams of the Department at (202) 523–8883. (This is not a toll-free number.)

[3] Section 408(d) of the Act prohibits any transaction in which a plan acquires for the plan any property from or sells any property to any person who is with respect to the plan an owner-employee, as defined under section 401(c)(3) of the Code, or shareholder-employee, as defined under section 1379 of the Code. However, the Department has the authority under section 408(a) of the Act to provide an exemption for such a transaction.

**Dudley M. Baker, M.D. Profit Sharing Plan and Trust (the Plan) Located in Bennington, Vermont**

[Application No. D–8157]

*Proposed Exemption*

The Department is considering granting an exemption under the authority of section 408 (a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in ERISA Procedure 75–1 (40 FR 18471, April 28, 1975). If the exemption is granted, the restrictions of section 406(a), (406)(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the proposed loan of $25,000 (the Loan) to Dudley M. Baker, M.D. (Dr. Baker), a party in interest with respect to the Plan, by Dr. Baker's individually directed account in the Plan, provided that the terms and conditions of the proposed Loan are no less favorable to the Plan than those obtainable in an arm's-length transaction with an unrelated third party at the time of the making of the proposed Loan.

*Summary of Facts and Representations*

1. The Plan is a frozen Keogh plan with two participants, one of whom is Dr. Baker. As of the end of the Plan's 1988 plan year the assets in Dr. Baker's individually directed separate account amounted to $160,033. Dr. Baker, a surgeon doing business as a sole proprietor, is an owner-employee as defined in section 401(c)(3) of the Code.

2. It is proposed that a loan of $25,000 be made to Dr. Baker from his separate account in the Plan. The Loan will not affect the account of the Plan's other participant. The Loan would be secured by the account of Mrs. Geraldine Baker (Dr. Baker's wife) in Massachusetts Financial Services' Managed Municipal Bond Trust which held 8,143.098 shares worth $10.71 each as of July 19, 1989. The applicant represents that the account balance securing the Loan will at all times exceed the outstanding Loan balance.

3. The Loan will be at a rate 2 percent over the prime rate charged for similar loans on the date of the Loan by First Vermont Bank and Trust Company (the Bank) of Bennington, Vermont, an unrelated bank, and will be repaid over a five-year period with equal quarterly payments of principle and interest. The applicant and the Bank represent that these terms are no less favorable to the Plan than those obtainable from an unrelated third party.

4. In summary, the applicant represents that the proposed transaction will satisfy the provisions of section 408 (a) of the Act because: (a) The Loan will be adequately secured at all times; (b) Only 15.6% of Dr. Baker's account will be invested in the Loan; (c) The terms and conditions of the Loan are no less favorable to the Plan than those obtainable from an unrelated party; and (d) Dr. Baker, the only participant whose account is affected by this proposed transaction, has determined that the proposed transaction would be in the interest of his account in the Plan, and desires that the proposed transaction be consummated.

*Notice to Interested Persons:* Because Dr. Baker is the only person in the Plan to be affected by the proposed transaction, it has been determined that there is no need distribute the notice of proposed exemption to interested persons. Comments and requests for a public hearing are due 30 days from the date of publication of this notice of proposed exemption in the **Federal Register.**

*For Further Information Contact:* Joseph L. Roberts III of the Department, telephone (202) 523–8881. (This is not a toll-free number.)

**Hotel Employees and Restaurant Employees International Union Welfare Plan (the Plan) Located in Naperville, Illinois**

[Application No. L–7754]

*Proposed Exemption*

The Department is considering granting an exemption under the authority of section 408(a) of the Act and in accordance with the procedures set forth in ERISA Procedure 75–1 (40 FR 18471, April 28, 1975). If the exemption is granted, the restrictions of section 406(a) of the Act shall not apply to: the lease arrangement (the Arrangement) comprising five written agreements executed on July 6, 1988—namely: a Lease of Personal Property, a Computer Security Agreement, an Option To Purchase (covering leased computer equipment), a Software Program License Agreement, and a Software System Support Agreement—between (a) the Plan and (b) Resource Information Management Systems (RIMS) and its wholly owned subsidiary, Winthrop Financial Group, Inc. (Winthrop), parties in interest with respect to the Plan, covering computer equipment and software previously leased to the Plan's former administrator, William L. Meyers, Inc. (Meyers), provided the terms of the Arrangement are as favorable to the Plan as those the Plan could obtain in a similar transaction with unrelated parties.

**EFFECTIVE DATE:** If the proposed exemption is granted, the exemption will be effective as of July 6, 1988, the date the agreements comprising the Arrangement were executed.

*Summary of Facts and Representations*

1. The Plan

The Plan was established by the Hotel Employees and Restaurant Employees International Union to provide health and welfare benefits for its members. It is administered by a Taft-Hartley joint board of trustees (the Trustees), of whom there are currently seventeen. As of September 12, 1988, the Plan covered approximately 106,000 participants. The approximate fair market value of the total assets of the Plan was $65,749,327 as of March 31, 1987. The percentage of the fair market value of the Plan's total assets involved in the exemption transaction is 0.5%. As of September 12, 1988, no Plan assets were invested in loans to any party in interest involved in this exemption transaction, in property leased to any such party in interest, or in securities issued by such party in interest.

2. Meyers

From its inception to July 31, 1988, the Plan was administered by Meyers. The applicant, the Martin E. Segal Company (Segal), the independent fiduciary in charge of (among other things) the Plan's agreements with RIMS and Winthrop, states that as the size of the Plan increased, the Trustees became aware of the development of a number of administrative problems and delays in claim processing. Consequently, in 1986 the Trustees retained Segal as a consultant to evaluate Plan administration, particularly relating to the services provided by Meyers.

3. Segal—General Information

The applicant, Segal, represents that it: was founded in 1939, is among the largest employee benefit consulting firms in the country, is headquartered in New York, has 15 regional offices around the country, and provides, through its 600 employees, consulting and actuarial services to more than 3,000 employee benefit plans covering nearly eight million employees and their dependents. Segal also represents that it has substantial experience with the establishment and operation of welfare benefit plans and that, as a major employee benefit consulting firm, it has substantial experience in advising clients on the selection of computer equipment and software and is familiar with current state-of-the-art systems. Segal states that it was already familiar with the RIMS system before Segal became involved in the termination of Meyers' contract with the Plan (described below) and that in Segal's November 1986 report to the Trustees, Segal commented favorably on the RIMS system. Segal represents that it has no interest in or relation to Meyers, RIMS, or Winthrop.

4. Segal's Evaluation of and Recommendations re: Plan Administration

In November 1986, Segal submitted its report on Meyers' administrative services. This report was critical of the Meyers operation, particularly with respect to the abilities of its management-level executives, while noting, nevertheless, that a number of very capable and knowledgeable employees were trying to do a competent job. This report also identified alternative solutions to the Plan's administrative problems, suggesting that the Trustees (a) select another third-party administrator to replace Meyers, or (b) self-administer the Plan, either by acquiring the services of Meyers' staff or by hiring entirely new employees. After studying the relative merits of each proposal, the Trustees decided to self-administer the Plan. The Trustees at that time hoped to acquire the services of many of Meyers' employees and to acquire Meyers' offices, equipment, and computer systems, either by purchase or lease.

5. The Plan's Negotiations with Meyers

In September 1987, the Trustees authorized Segal, along with outside counsel for the Trustees, to begin negotiations with Meyers concerning the termination of Meyers' administrative contract and the possible sale of Meyers' assets to the Plan. On November 13, 1987, the Trustees formally adopted a resolution to terminate Meyers for cause as Plan administrator. The Trustees directed Segal to discharge Meyers at an appropriate time, based on the progress of Segal's negotiations with Meyers, and to negotiate the acquisition of Meyers' assets at a price determined by Segal.

On January 28, 1988, Segal notified Meyers that, pursuant to the six-month termination provision in Meyers' contract with the Plan, Meyers would be terminated as Plan administrator effective July 31, 1988. Segal then continued negotiations with Meyers regarding Meyers' termination and the transition to self-administration. Segal states that these negotiations were

lengthy and difficult, involving a number of disputes with Meyers, some of which were not resolved as of the date of the exemption application. Segal represents that in conducting these negotiations, it was guided by the following principles and concerns:

(a) Meyers must remain in operation to provide services to the Plan until July 31, 1988, thereby avoiding any disruption in Plan administration;

(b) The Plan must obtain access to Meyers' employees to arrange for their employment by the Plan;

(c) Plan employees must be provided with full, active cooperation by Meyers and its employees, and complete access to those documents, information, data, and software that are the Plan's property in Meyers' possession;

(d) It would be more efficient and less expensive for the Plan to use certain equipment and office space currently used by Meyers; and

(e) The Plan's new administrative system must be operational as of August 1, 1988. For this reason, time deadlines were imposed on negotiations, and alternative courses of action, including court enforcement actions, were considered.

In the negotiation process, Segal initially explored the possibility of the Plan's purchasing all of Meyers' assets, including its office furniture, computer software, and equipment leases, but because the parties involved were unable to agree to the terms for these transactions, this possibility was rejected. However, the Plan has sublet some office space leased by Meyers in connection with its Plan administration activities.[4]

6. Segal's Appointment as Independent Fiduciary for the Plan

By May 12, 1988, Segal was appointed Independent Fiduciary for the Plan in connection with the settlement of litigation concerning the administration of the Plan. In both *McLaughlin* v. *Hanley*, No. 86–421–LDG (D. Nev. 1988) and *McLaughlin* v. *Gerace*, No. 85–3669 (D. N.J. 1988), the Secretary of Labor alleged violations of Part 4 of Subtitle B, Title I of the Act in connection with certain aspects of the Plan's administration. These cases were settled pursuant to the entry of two substantially similar Consent Decrees, on May 12, 1988 and April 12, 1988, respectively, after lengthy negotiations among the parties. Segal was not a party to this litigation and therefore had no direct role in the settlement negotiations or the preparation of the Consent Decrees. Among other things, these Consent Decrees provided for the appointment of an independent named fiduciary with certain specifically enumerated responsibilities relating to Plan administration, including, for example, the authority to terminate Meyers as Plan administrator, to oversee benefit delivery arrangements, to monitor performance of Plan service and benefit providers, and to oversee record keeping and claims processing.

Segal's authority as Independent Fiduciary is limited to the authority granted under the Consent Decrees, which provide that Segal, as Independent Fiduciary, must generally make either binding or non-binding recommendations to the Trustees for their approval before undertaking actions on behalf of the Plan. The Consent Decrees allocate to the Trustees authority in a number of areas involving Plan investments and operation, as well as the authority to monitor the activities of the Independent Fiduciary and to petition the courts for its removal. By the terms of the Consent Decrees, the district courts retain jurisdiction over the parties and Segal "for the purpose of administration, application and interpretation" of the Consent Decrees. Segal is required to provide to the courts, the Trustees, and the Secretary semi–annual reports describing its activities as Independent Fiduciary for the Plan.

7. Termination of Meyers' Contracts

Meyers, Segal, and the Trustees executed a severance agreement on July 6, 1988, governing all aspects of the termination of Meyers and the transition to self-administration. The termination of Meyers' position as Plan administrator became effective on July 31, 1988, as scheduled. Segal states that as of August 1, 1988, the Plan commenced administration at its new offices in Naperville, Illinois.

Segal advises that through the period ending July 31, 1988, the payment of benefits on behalf of the Plan was made by Meyers through a computer system supplied by RIMS. As part of this system, Meyers entered into an exclusive licensing agreement with RIMS for the use of RIMS software. Segal explains that under the terms of the licensing agreement, Meyers alone had the right to use this software and could not transfer that right to any other entity, including the Plan.

Segal states that because Meyers' position as administrator of the Plan was terminated as of July 31, 1988, a termination of the lease between RIMS and Meyers was made possible. Meyers and RIMS and Winthrop executed a termination agreement on July 6, 1988, under which Meyers relinquished all its rights and title to the RIMS equipment and software it had leased. In return, RIMS released Meyers from its obligations, including the financial obligations incurred by Meyers in connection with the lease and exclusive software licensing agreement.

8. The Plan's Acquisition of Computer Equipment and Software

Segal represents that in connection with the transition to self-administration, it considered various methods of acquiring or leasing computer equipment and software for the Plan. Among other things, Segal took into account that a major cost of the change to self-administration would be the expense of computer conversion, part of which is attributable to the cost of software and hardware (programming and equipment). Segal explains that this expense also involves the cost of moving the equipment, the effort needed to identify the data elements and acquaint new technical staff with the style and location of information within the existing computer files, the transfer and control of the current and historical data from the old computers to their replacements, and the start-up and training of technical and operation staff handling the new systems. Segal states that all these conversion efforts require expertise and a great deal of staff time.

Segal considered purchasing or leasing computer equipment and software different from that which had been used by Meyers. However, Segal concluded that the acquisition of an entirely different computer system would be impractical because the Plan would have to transfer all its data from the old system to the new system as well as to spend time correcting the inevitable errors accompanying such a transfer. Segal noted that an important consideration was that staff would have to be retrained to operate the new equipment and software. Segal determined that this alternative was unnecessarily costly and impractical at this time.

In considering possible computer systems for the Plan, Segal contacted RIMS to discuss leasing new, upgraded equipment and software which would be generally compatible with the then-existing system. Although the software used by Meyers would be compatible with the new system the software licensed exclusively to Meyers would not be available to the Plan absent a

[4] The Department is proposing no exemption with respect to such subleasing and is expressing no opinion herein as to whether or not such subleasing satisfies the requirements of either section 408(b)(2) or section 404(a)(1) of the Act.

separate agreement between the Plan and RIMS. Segal states that RIMS was willing to sell a new computer system and to license software to the Plan for approximately $480,000.

At the same time, Segal considered the possibility of leasing the RIMS system then leased to Meyers. Segal asserts that using this system would avoid the disruption of services which would be inherent in any change of computer systems, particularly as the Plan planned to hire employees who had experience using the same RIMS system. Segal states that RIMS was willing to lease the equipment and software to the Plan (assuming that it was available and no longer used by Meyers) for approximately $360,000, a present value equivalent of $315,000 after discounting for time payments over three years at ten percent.

Segal determined that leasing the RIMS system previously used by Meyers was the most cost effective and efficient method of securing computer services for the Plan. Segal's prior experience had shown that the RIMS system was competitively priced and a good system. In Segal's opinion, continued use of the existing system would reduce the start-up costs for switching to self-administration of the Plan. Moreover, significant training and start-up costs would be eliminated due to the familiarity with the system of Meyers' staff, whom the Plan intended to hire. Furthermore, the computer software was already in place to handle the Plan's benefit claims. Thus, service to participants and beneficiaries would suffer the least disruption through this decision. Consequently, Segal began negotiations with RIMS to lease the system then used by Meyers.

In connection with the severance agreement, and in light of the termination agreement between RIMS and Meyers, Segal made a binding recommendation to the Trustees for the approval of the RIMS lease for the computer system used by Meyers. The Trustees reviewed this recommendation at their meeting on June 29, 1988, and approved a resolution putting this recommendation into effect. Pursuant to this resolution, RIMS (and its wholly owned subsidiary, Winthrop) and the Plan entered into an agreement providing for a 32-month lease for the computer system. They also executed an option-to-purchase agreement which gives the Plan the ability to purchase the equipment it currently leases.

The lease of computer equipment and software from RIMS and Winthrop by the Plan comnenced on August 1, 1988, pursuant to the contracts between the Plan and RIMS or Winthrop executed July 6, 1988. Because the RIMS system was already substantially in place when the Plan took over its own administration on August 1, 1988, no shutdown of administrative services was necessary. Segal states that some RIMS computers were installed in the Naperville, Illinois office over the weekend of July 30–31, and they were operational and paying claims on August 1; while in other Plan offices, the systems were already in place. Segal asserts that only leasing the equipment previously used by Meyers could have achieved this result, and that leasing this system successfully avoided any shutdown of Plan operations. Thus, Segal opines that the leasing of the subject computer equipment and software was clearly in the best interests of the Plan's participants and beneficiaries, and necessary and appropriate for the efficient and economical administration of the Plan.

9. The Party-in-Interest Status of RIMS and Winthrop

Segal asserts that although RIMS has had a contractual relationship with Meyers, RIMS has had no relationship (as a service provider or otherwise) with the Plan prior to the Plan's lease with RIMS and Winthrop. Segal also represents that although the Plan entered into a lease for the same equipment and software previously leased by Meyers, the Plan did not assume Meyers' lease, and Meyers is not a party, directly or indirectly, to the lease agreement between RIMS and the Plan. Segal explains that Winthrop is the leasing agent for RIMS and, as such, provided no services with respect to the hardware or software formerly leased to Meyers. However, upon execution of the Software System Support Agreement (described below), RIMS became a service provider to the Plan and, therefore, a party in interest thereto, as did Winthrop due to its status as a wholly owned subsidiary of RIMS, pursuant to paragraphs (B) and (G), respectively, of section 3(14) of the Act.

10. Current RIMS/Winthrop Contractual Arrangements

Segal explains that the Plan currently has the following contractual relationships with RIMS or Winthrop:

(a) A Lease of Personal Property between the Plan and Winthrop;

(b) A Computer Equipment Security Agreement between the Plan and Winthrop;

(c) The Option: An Option To Purchase the computer equipment leased by the Plan from Winthrop;

(d) A Software Program License Agreement between the Plan and RIMS; and

(e) A Software System Support Agreement between the Plan and RIMS.

Segal represents that all of these agreements are standard form contracts which represent the common practice within the industry and summarizes the terms of these agreements as follows:

(a) Lease of Personal Property: This is the lease of computer hardware for 32 months by the Plan from Winthrop. The equipment was installed at the Plan's administrative offices in Naperville, Illinois and Atlantic City, New Jersey. For the first 27 months of the lease, rental payments are $13,039.10 per month; for months 28 through 32, the rental payments are reduced to $2,811.96. (The last five payments are reduced to reflect the deposit supplied to Winthrop by the Plan.)

(b) Computer Equipment Security Agreement: The Plan provided to Winthrop a security interest in the Qantel computer and computer-related equipment until the Plan's obligations under the Lease of Personal Property are satisfied.

(c) The Option: The Plan has the right to purchase the computer equipment from Winthrop for approximately $19,000, representing 10 percent of the initial computer equipment cost, at the expiration of the term of the computer equipment lease (see (a), above) or any renewal or extension term thereof. The computer equipment would be sold in an "as is" condition.

(d) Software Program License Agreement: RIMS provides to the Plan a non-exclusive license to use its programs on the equipment rented from Winthrop and will also provide training for Plan personnel. In return, the Plan will pay RIMS $96,500.

(e) Software System Support Agreement: RIMS agrees to provide the Plan with telephone support services for the use of its licensed programs. In addition, RIMS will supply all final versions of all new releases of the programs during the terms of the lease. The Plan is required to maintain at each installation site a key operator who has taken the RIMS training program. These key operators will be the sole Plan employees to request support from RIMS. This agreement has a term of one year, beginning August 1, 1988, with automatic one-year renewals unless either party provides the other party with 30-days prior written notice of its intent not to renew. The Plan will pay RIMS a fee of $1,845.58 per month for the first one year term.

11. Comparison of the Plan's and Meyers' Contracts

Segal states that Meyers and RIMS/Winthrop had standard form contracts which represented the common practice within the industry and that Meyers had the following agreements with RIMS or Winthrop:

(a) Lease of Personal Property,

(b) Software Program Licenses Agreement, and

(c) System Support Agreement.

Segal also represents that the agreements between the Plan and RIMS/Winthrop and the agreements between Meyers and RIMS/Winthrop are substantially the same and are all the standard form contracts developed by RIMS/Winthrop which were in use at the time the parties entered into the contracts.

Segal represents that although the first year fee paid by the Plan for system support services is greater than the initial fee paid by Meyers under its 1985 systems support services agreement with RIMS, the increase in the amount of the fee from 1985 (payable by Meyers) to 1988 (payable by the Plan) was a result of changing market conditions. Segal represents further that the fee currently charged by RIMS reflects industry fee levels and is reasonable in light of the services to be provided. Further, Segal represents that the overall cost increases reflected in the Plan's 1988 agreements with RIMS and Winthrop merely indicate changes in the market for this equipment and these services since 1985. Segal notes that the lease payments by the Plan are essentially the same as those paid by Meyers and will result in a significant savings for the Plan. While the systems servicing fees have increased, Segal states that those increased fees represent reasonable compensation for the services rendered and that leasing the RIMS equipment previously used by Meyers is clearly in the best interests of the Plan and its participants and beneficiaries because of the efficiencies and cost savings involved.

12. Monitoring by Segal

Segal represents that as court-appointed independent fiduciary to the Plan, Segal will monitor the Plan's agreements with RIMS and Winthrop and will act to protect the Plan's interest therein throughout the duration of said agreements. With regard to the Option (see 10(c), above), Segal makes the following representations:

(a) The Option is appropriate and commercially reasonable in a lease of this type (see 10(a), above);

(b) If Segal elects to exercise the Option, such election will only be made to the extent that the purchase of the equipment is in the Plan's best interest;

(c) Segal will ensure that the Option is not exercised if Segal determines that the Plan's purchase of the equipment is not in the Plan's best interests; and

(d) If the Option is to be exercised, Segal will determine the leased equipment's fair market value as of the date of purchase by the Plan and will ensure that the purchase price to be paid by the Plan does not exceed said fair market value.

13. Summary

In summary, Segal (the applicant) represents that the Arrangement satisfies the exemption criteria set forth in section 408(a) of the Act because:

(a) Having considered alternative arrangements, Segal, an independent fiduciary with respect to the Plan, believes that the Arrangement is in the best interests of the Plan and its participants and beneficiaries because it preserves the continuity of Plan administration, including the processing of participants' and beneficiaries' claims, while conserving the Plan's assets;

(b) Segal, which has extensive experience in the operation of multiemployer benefit plans and is familiar with state-of-the-art computer systems, has negotiated the terms of the Arrangement on behalf of the Plan, with the approval of the Trustees;

(c) As independent fiduciary to the Plan, Segal has expressed the opinions that (i) the increases (compared to the amounts payable by Meyers under its contracts with RIMS/Winthrop) in payments required from the Plan under its Lease of Personal Property with Winthrop (see 10(a), above) and under its Software System Support Agreement with RIMS (see 10(e), above) are due to changing market conditions, and (ii) although the first year fee paid by the Plan for system support services is more than the initial fee paid by Meyers under its 1985 systems support services agreement, the fee currently charged to the Plan reflects industry fee levels and is reasonable in light of the services to be provided;

(d) As independent fiduciary to the Plan, Segal is responsible for oversight of record keeping and claims processing for the Plan, among other duties, and will monitor the contracts between the Plan and RIMS or Winthrop, pursuant to the Arrangement, acting to protect the Plan's interests therein throughout their duration; and

(e) With respect to the Option, Segal represents that: (i) the Option is appropriate and commercially reasonable in a lease of this type (see 10(a), above); (ii) if Segal elects to exercise the Option, such election will only be made to the extent that the purchase of the equipment is in the Plan's best interest; (iii) Segal will ensure that the Option is not exercised if Segal determines that the Plan's purchase of the equipment is not in the Plan's best interests; and (iv) if the Option is to be exercised, Segal will determine the leased equipment's fair market value as of the date of purchase by the Plan and will ensure that the purchase price to be paid by the Plan does not exceed said fair market value.

*For Further Information Contact:* Mrs. Miriam Freund, of the Department, telephone (202) 523-8194. (This is not a toll-free number.)

**General Information**

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions of the Act and/or the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which among other things require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(B) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) Before an exemption may be granted under section 408(a) of the Act and/or section 4975(c)(2) of the Code, the Department must find that the exemption is administratively feasible, in the interests of the plan and of its participants and beneficiaries and protective of the rights of participants and beneficiaries of the plan; and

(3) The proposed exemptions, if granted, will be supplemental to, and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction.

(4) The proposed exemptions, if granted, will be subject to the express condition that the material facts and representations contained in each application are true and complete, and that each application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC, this 25th day of October 1989.

**Ivan Strasfeld,**

*Director of Exemption Determinations, Pension and Welfare Benefits Administration, U.S. Department of Labor.*

[FR Doc. 89-25566 Filed 10-30-89; 8:45 am]

BILLING CODE 4510-29-M

## NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

**[Notice 89-75]**

### Intent To Grant Co-Exclusive Patent Licenses

**AGENCY:** National Aeronautics and Space Administration.

**ACTION:** Notice of intent to grant co-exclusive licenses.

**SUMMARY:** NASA hereby gives notice of intent to grant National Water Management Corporation of San Jose, California, Stearman Industries, Incorporated, of Tavares, Florida, and Alten Water Treatment Corporation of Palo Alto, California, each a limited, revocable, royalty-bearing, co-exclusive license to practice the invention as described in U.S. Patent No. 4,172,786 for "Ozonation of Cooling Tower Waters," which issued October 30, 1979, to the Administrator of the National Aeronautics and Space Administration on behalf of the United States of America. The proposed co-exclusive licenses will contain appropriate terms, limitations and conditions in accordance with NASA Patent Licensing Regulations, 14 CFR part 1245, subpart 2. NASA will negotiate the final terms and conditions and grant the co-exclusive licenses, unless written objections to this Notice are received within 60 days of the date of this Notice. The Director of Patent Licensing will review the written objections and then recommend to the Associate General Counsel (Intellectual Property) whether to grant the co-exclusive licenses.

**DATE:** Comments to this notice must be received January 2, 1989.

**ADDRESS:** National Aeronautics and Space Administration, Code GP, Washington, DC 20546.

**FOR FURTHER INFORMATION CONTACT:** Mr. Harry Lupuloff, (202) 453-2430.

Dated: October 19, 1989.

**Edward A. Frankle,**

*General Counsel.*

[FR Doc. 89-25549 Filed 10-30-89; 8:45 am]

BILLING CODE 7510-01-M

## NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

### National Endowment for the Arts; Cooperative Agreement

**AGENCY:** National Endowment for the Arts.

**ACTION:** Notification of availability.

**SUMMARY:** The National Endowment for the Arts is requesting proposals leading to the award of a Cooperative Agreement for the design and implementation of a process for conducting independent assessments of the readiness of approximately 80 panel-recommended organizations which have applied to the Endowment to participate in the Advancement Program. The recipient of the Cooperative Agreement will prepare written reports which will provide professional judgment on each organization's financial and organizational status and capacity to develop through the 15-month period of technical assistance services provided by the program. The recipient will also identify principal areas of need in order to ensure the assignment of appropriate consultants and to permit planning for supplementary workshops or specialized assistance. Those interested in receiving the Solicitation package should reference Program Solicitation PS 90-03 in their written request and include two (2) self-addressed labels. Verbal requests for the Solicitation will not be honored.

**DATES:** Program Solicitation PS 90-03 will be available approximately November 8, 1989, with proposals due on December 8, 1989.

**ADDRESS:** Requests for the Solicitation should be addressed to National Endowment for the Arts, Contracts Division, Room 217, 1100 Pennsylvania Avenue NW., Washington, DC 20506.

**FOR FURTHER INFORMATION CONTACT:** William Hummel or Anna Mott, Contracts Division, National Endowment for the Arts, 1100 Pennsylvania Avenue NW., Washington, DC 20506 (202/682-5482).

**William I. Hummel,**

*Director, Contracts and Procurement Division.*

[FR Doc. 89-25519 Filed 10-30-89; 8:45 am]

BILLING CODE 7537-01-M

### Arts and Artifacts Indemnity Panel Advisory Committee; Meeting

Pursuant to the provisions of the Federal Advisory Committee Act (Pub. Law 92-463 as amended) notice is hereby given that a meeting of the Arts and Artifacts Indemnity Panel of the Federal Council on the Arts and the Humanities will be held at 1100 Pennsylvania Avenue, NW., Washington, DC 20506, in Room 730, from 9:00 a.m. to 5:00 p.m. on Tuesday, November 21, 1989.

The purpose of the meeting is to review applications for Certificates of Indemnity submitted to the Federal Council on the Arts and the Humanities for exhibitions beginning after January 1, 1990.

Because the proposed meeting will consider financial and commercial data and because it is important to keep value of objects, methods of transportation and security measures confidential, pursuant to the authority granted me by the Chairman's Delegation of Authority to Close Advisory Committee Meetings, dated April 16, 1978, I have determined that the meeting would fall within exemptions (4) and (9) of U.S.C. 552(b) and that it is essential to close the meeting to protect the free exchange of views and to avoid interference with the operations of the Committee.

It is suggested that those desiring more specific information contact the Advisory Committee Management Officer, Stephen J. McCleary, 1100 Pennsylvania Avenue, NW., Washington, DC 20506, or call 202/786-0322.

**Stephen J. McCleary,**

*Advisory Committee Management Officer.*

[FR Doc. 89-25572 Filed 10-30-89; 8:45 am]

BILLING CODE 7537-01-M

## NATIONAL SCIENCE FOUNDATION

### Establishment of a Routine Use for Microdata for the Survey of Doctorate Recipients

*Background*

The National Science Foundation (NSF) collects information on the characteristics of a sample of individuals who have received a doctoral-level degree in science and engineering fields. This biennial survey is referred to as the Survey of Doctoral Scientists and Engineers. The survey results are currently analyzed

statistically by employees and contractors of the National Science Foundation and the co-sponsors of the survey (the National Institutes of Health, the Department of Agriculture and the Department of Energy). There have been numerous requests from the research community to make the microdata from this survey more readily available for secondary analysis.

*Plans for the Release of Microdata*

It is NSF's intent to release microdata from the 1989 and subsequent Surveys of Doctoral Scientists and Engineers in two formats that are intended to be used only for statistical purposes. For the 1989 survey we intend to produce the following:

(1) A public use tape will be prepared with selected information on 1989 survey respondents. This tape will include information obtained from these 1989 respondents prior to 1989 in addition to their 1989 responses. All direct identifiers (e.g., name, social security number, address, and phone number) will be stripped from this tape. In addition, information which could be easily used to identify someone indirectly will either be stripped from the tape or otherwise disguised. For example, sex and race will not be included on the tape. Instead of identifying colleges and universities by name, these institutions will be grouped by type of institution. This tape will be made available to the public.

(2) A limited access tape for 1989 survey respondents designed to serve statistical research needs that cannot be met by the public use tape will be prepared. This tape will be stripped of direct identifiers, but it will contain other information stripped from the public use tape (e.g., sex and race). Release of the limited access tape will only be made under stringent safeguards. It is expected that researchers wishing to use this tape will need to:

(a) Submit a prospectus explaining the research to be conducted. This prospectus will be reviewed by relevant NSF program staff.

(b) Sign a non-disclosure form.

(c) Use the tape at a computer facility designated by NSF.

(d) Agree to cite NSF and the Survey of Doctoral Recipients in any published results.

(e) Agree to provide two copies of all resulting publications to NSF.

(f) Comply with other procedures developed by NSF to protect the privacy of individuals.

For survey years after 1989 we will produce similar tapes to the 1989 tapes. These tapes will only include information for individuals responding to the 1989 or subsequent surveys.

Individuals wishing to comment on the proposed routine use of the microdata from the Survey of Doctoral Scientists and Engineers should submit comments in writing to the following address within thirty days of the publication date of this notice: Dr. Carolyn F. Shettle, National Science Foundation, Room L–611, 1800 G Street, NW., Washington, DC 20550.

Dated: October 26, 1989.

**William L. Stewart,**

*Director, Division of Science Resources Studies, National Science Foundation.*

[FR Doc. 89–25555 Filed 10–30–89; 8:45 am]

BILLING CODE 7555–01–M

## NUCLEAR REGULATORY COMMISSION

**[Docket No. 50–423]**

### Northeast Nuclear Energy Co.; Millstone Nuclear Power Station, Unit No. 3; Environmental Assessment and Finding of No Significant Impact

The U.S. Nuclear Regulatory Commission (NRC or the Commission) is considering issuance of an amendment to Facility Operating License No. NPF–49 to Northeast Nuclear Energy Company (the licensee), for Millstone Unit 3 located in the Town of Waterford, Connecticut.

**Environmental Assessment**

*Identification of Proposed Action*

The proposed amendment would provide revised Technical Specifications to decrease the reactor trip set point and allowable value for the reactor coolant pump (RCP) low shaft speed (underspeed trip set point) from 97.8 to 95.8 percent of rated speed and from 94.6 to 92.5 percent rated speed, respectively.

The proposed action is in accordance with the licensee's application dated August 1, 1989.

*The Need for the Proposed Action:*

The proposed changes are needed to prevent unnecessary plant trips which could result from electrical grid disturbances.

*Environmental Impacts of the Proposed Action:*

The proposed changes to the Technical Specifications would not affect plant effluents during normal or accident conditions. Accordingly, there are no significant radiological/non-radiological environmental impacts associated with the proposed licensing action.

*Alternatives to the Proposed Action:*

Since the staff concluded that there are no significant environmental effects that would result from the proposed action, any alternatives with equal or greater environmental impacts need not be evaluated.

The principal alternative would be to deny the requested amendment. This would not reduce environmental impacts of plant operation and might result in additional plant trips.

*Alternative Use of Resources:*

The action would involve no use of resources not previously considered in the "Final Environmental Statement related to the operation of Millstone Nuclear Power Station Unit No. 3" dated December 1984.

*Agencies and Persons Consulted:*

The NRC staff reviewed the licensee's request and did not consult other agencies or persons.

**Finding No Significant Impact**

The staff has determined not to prepare an environmental impact statement for the proposed license amendment.

Based upon the forgoing environmental assessment, we conclude that the proposed actions will not have a significant effect on the quality of the human environment.

For further details with respect to this action, see the application for amendment dated August 1, 1989, which is available for public inspection at the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC 20555 and at the Waterford Public Library, 49 Rope Ferry Road, Waterford, Connecticut 06385.

For the Nuclear Regulatory Commission.

**John F. Stolz,**

*Director, Project Directorate I–4, Division of Reactor Projects—I/II, Office of Nuclear Reactor Regulation.*

[FR Doc. 89–25561 Filed 10–30–89; 8:45 am]

BILLING CODE 7590–01–M

### Advisory Committee on Reactor Safeguards Meeting; Agenda

In accordance with the purposes of sections 29 and 182b. of the Atomic Energy Act (42 U.S.C. 2039, 2232b), the advisory Committee on Reactor Safeguards will hold a meeting on November 16–18 1989 in Room P–110, 7920 Norfolk Avenue, Bethesda, Maryland. Notice of this meeting was published in the **Federal Register** on October 18, 1989.

**Thursday, November 16, 1989**

*Room P–110, 7920 Norfolk Avenue, Bethesda, MD.*

*8:30 a.m.–8:45 a.m.: Comments by ACRS Chairman* (Open)—The ACRS Chairman will report on items of current interest.

*8:45 a.m.–11:00 a.m.: Nuclear Power Plant Accident Management* (Open)—The Committee will review and report on a proposed NRC generic letter and NUREG/CR report on accident management at nuclear power plants. Representatives of the NRC staff will participate.

*11:00 a.m.–12:00 Noon: Definition of "Adequate Protection"* (Open)—The Committee will discuss a proposed report to the Commission on ACRS and NRC staff positions regarding the definition of "adequate protection" as it relates to the NRC quantitative safety goals. Representatives from the NRC staff will participate, as appropriate.

*1:00 p.m.–1:45 p.m.: Standardized PWRs* (Open)—The Committee will hear a briefing regarding the status of the NRC staff's review of proposed standardized PWRs, including the WAPWR SP/90, Westinghouse AP–600, and the CESSAR-System 80 plus.

*1:45 p.m.–3:15 p.m.: Access Authorization at Nuclear Power Plants* (Open/Closed)—The Committee will review and report on the proposed final rule, 10 CFR part 743, "Access Authorization Program for Nuclear Power Plants." Representatives of the NRC staff will participate, as appropriate.

Portions of the session will be closed as required to discuss safeguards and security information at nuclear power plants.

*3:30 p.m.–5:00 p.m.: Integration of the Nuclear Regulatory Process* (Open)—The Committee will discuss proposed ACRS recommendations on how best to integrate the nuclear regulatory process.

*5:00 p.m.–6:00 p.m.: Three Mile Island Nuclear Station, Unit 2* (Open)—The Committee will hear a briefing regarding analysis of the loss of cooling accident at TMI–2.

**Friday, November 17, 1989**

*8:30 a.m.–12:30 p.m.: GE Advanced Boiling Water Reactor* (Open/Closed)—The Committee will review and report on the initial portion (Mod 1) of the NRC staff's review of the GE Advanced boiling Water Reactor.

Representatives of the NRC staff and the GE Company will participate as appropriate in the discussion regarding this standardized plant design.

Portions of this session will be closed as necessary to discuss Proprietary Information applicable to this design. Representatives from the NRC staff will participate, as appropriate.

*1:30 p.m.–4:30 p.m.: Nine Mile Point Nuclear Station, Unit 1* (Open)—The Committee will review and report on the proposed restart of this nuclear plant which has been shut down for an extended period due to safety-related reasons. Representatives from the NRC staff and licensee will participate, as appropriate.

*4:45 p.m.–5:15 p.m.: Future Activities* (Open)—The Committee will discuss anticipated ACRS subcommittee activities, items proposed for consideration by the full Committee, and ACRS meeting dates for CY 1990.

*5:15 p.m.–6:15 p.m.: Generic Issue—87, HPCI Steam Line Break Without Isolation* (Open)—The Committee will discuss a proposed ACRS report to the NRC regarding the resolution of this generic issue proposed by the NRC staff.

**Saturday, November 18, 1989**

*8:30 a.m.–12:30 p.m.: Preparation of ACRS Reports to the NRC* (Open)—The Committee will discuss proposed ACRS reports to the NRC regarding items considered during this meeting.

*1:30 p.m.–2:30 p.m.: ACRS Subcommittee Activities* (Open)—The Committee will hear and discuss reports of ACRS subcommittee activities including thermal-hydraulic phenomena and ACRS policies and practices.

*2:30 p.m.–2:45 p.m.: Appointment of ACRS Members* (Open/Closed)—The Committee will hear and discuss a report regarding the status of the appointment of candidates proposed for selection as ACRS members.

Portions of this session will be closed as necessary to discuss information the release of which would represent a clearly unwarrranted invasion of personal privacy.

*2:345 p.m.–3:00 p.m.: Activities of ACRS Members* (Open)—The Committee will discuss related activities of ACRS members.

*3:00 p.m.–3:30 p.m.: Miscellaneous* (Open)—The Committee will complete discussion of items considered during this meeting.

Procedures for the conduct of and participation in ACRS meetings were published in the **Federal Register** on September 27, 1989 (54 FR 39594). In accordance with these procedures, oral or written statements may be presented by members of the public, recordings will be permitted only during those portions of the meeting when a transcript is being kept, and questions may be asked only by members of the Committee, its consultants, and Staff. Persons desiring to make oral statements should notify the ACRS Executive Director as far in advance as practicable so that appropriate arrangements can be made to allow the necessary time during the meeting for such statements. Use of still, motion picture and televison cameras during this meeting may be limited to selected portions of the meeting as determined by the Chairman. Information regarding the time to be set aside for this purpose may be obtained by a prepaid telephone call to the ACRS Executive Director, Mr. Raymond F. Fraley, prior to the meeting. In view of the possibility that the schedule for ACRS meetings may be adjusted by the Chairman as necessary to facilitate the conduct of the meeting, persons planning to attend should check with the ACRS Executive Director if such rescheduling would result in major inconvenience.

I have determined in accordance with subsection 10(d) Public Law 92–463 that it is necessary to close portions of this meeting as noted above to discuss safeguards and security information at nuclear plants (5 U.S.C. 552b(c)(3), information the release of which would represent a clearly unwarranted invasion of personal privacy (5 U.S.C. 552b(c)(6)), and Proprietary Information applicable to matters being discussed (5 U.S.C. 552b(c)(4)).

Further information regarding topics to be discussed, whether the meeting has been cancelled or rescheduled, the Chairman's ruling on requests for the opportunity to present oral statements and the time allotted can be obtained by a prepaid telephone call to the ACRS Executive Director, Mr. Raymond F. Fraley (telephone 301/492–8049), between 7:30 a.m. and 4:15 p.m.

Dated: October 26, 1989.

**John C. Hoyle,**

*Advisory Committee Management Officer.*

[FR Doc. 89–25563 Filed 10–30–89; 8:45 am]

BILLING CODE 7590–01–M

## OFFICE OF PERSONNEL MANAGEMENT

### Request for Approval of OPM Attitudinal Survey Submitted to OMB for Expedited Clearance

**AGENCY:** Office of Personnel Management.

**ACTION:** Expedited Notice.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1980 (title 44, U.S. Code, chapter 35), this notice announces an expedited request for clearance of the attached OPM attitudinal telephone survey. This

survey is required to carry out OPM's statutory mandate to study the operation and administration of the Federal Employees Health Benefits Program and to formulate a comprehensive reform package for Congress by February 7, 1990, as required by Public Law 101–76.

Approximately 1,500 annuitants are expected to be contacted by telephone on a one time only basis; each telephone survey requires approximately 10 minutes to complete, for a total burden of 250 hours. A copy of the proposed survey questions appear below.

For copies of this proposal, call Larry Dambrose on (202) 632–0199.

**DATES:** Comments on this proposal should be received within 5 working days from the date of this publication. This is an expedited clearance and OMB approval is requested within 1 day after the fifth working day of this publication.

**ADDRESSES:** Send or deliver comments to—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:** Abby Block, (202) 632–4958.

U.S. Office of Personnel Management

**Constance Berry Newman,**

*Director.*

**FEHB Annuitant Telephone Survey**

I am conducting a survey for the Office of Personnel Management about the Federal Employees Health Benefits Program. We are interested in your opinions about the program. The information you provide will be used by OPM in developing proposed changes to the Federal Employees Health Benefits Program.

First I'd like to ask you some questions about yourself.

ABOUT YOURSELF

1. Are you married? yes no
2. How much per month is your gross annuity, to the closest hundred dollars?
3. To which of the following age groups do you belong?
   a. under 55
   b. 55 to 64
   c. 65 or older
4. To which health plan do you belong? _____
5. Are you enrolled as Self Only or Self and Family?
6. If family, how many dependents, including your spouse, are covered under your FEHB Plan? _____
7. How long have you been in your current plan? _____
8. How many years have you been covered under the FEHB Program? _____
9. How many times did you and/or your covered family members visit a health care provider, other than a dentist, during the past year? _____
10. Were you and/or a covered family member an overnight patient in a hospital during 1989? yes no
11. Are you now covered by Medicare? _____ Own Coverage _____ Spouse Coverage _____ Not Covered
12. Will you be covered at age 65? _____ Own _____ Spouse _____ Will Not Be Covered

ABOUT FEHB

Now I'm going to ask you a few questions about the Federal Employees Health Benefit Program.

1. Why did you choose your current health plan?
   1. price
   2. special benefits
   3. wanted an HMO
   4. familiar with plan
   5. recommended
   6. covered by plan under another's enrollment
   7. organizational sponsorship
   8. other _____

Please answer A or B to the next two questions.

2. If the premiums were the same, would you pick (A) a plan that required you to pay a $300 deductible after which the plan then paid 80% of hospital and doctors' bills, or (B) a plan that had a $100 deductible and then paid 70% of hospital and doctors' bills?
3. If the premiums were the same, would you pick (A) a plan that paid 80% of hospital and doctors' bills and had a $3000 limit on your total out of pocket expenses for the year, or (B) a plan that paid 70% of hospital and doctors' bills and had a $1500 limit on your total out of pocket expenses for the year?

Please answer AGREE or DISAGREE to the rest of the questions.

4. I think that every FEHB plan should provide, at a minimum, the same basic benefits package.
5. I would prefer a health plan that is strong in basic benefits, such as hospital, physician services and prescription drugs, without extras such as dental, vision, and hearing.
6. I would prefer a plan that covers my typical expenses such as visits to the dentist or to my physician for regular check-ups over a plan that emphasizes hospital and major medical coverage.
7. I think the FEHB Program should be simpler and have fewer plans to choose from than the current program.
8. Employee organization plans should be able to offer benefits in a restructured FEHB Program.
9. There should be an HMO alternative wherever one is available.
10. There should be benefits packages tailored specifically for employees, annuitants, and Medicare covered annuitants.
11. There should be different Government contribution rates for employees, annuitants, and Medicare covered annuitants.

[FR Doc. 89–25571 Filed 10–30–89; 8:45 am]

BILLING CODE 6325–01–M

## SECURITIES AND EXCHANGE COMMISSION

### Forms Under Review of the Office of Management and Budget

*Agency Clearance Officer:* Kenneth A. Fogash (202) 272–2142

*Upon Written Request Copy Available From:* Securities & Exchange Commission, Public Reference Branch, 450 Fifth Street, NW., Washington, DC 20549

*Reinstatement;* Rule 17a–3; File No. 270–26, Rule 17a–4; File No. 270–242

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission has submitted for reinstatement for OMB clearance, Rule 17a–3 which requires certain reports to be made by exchange members, brokers, and dealers. Six thousand respondents incur an estimated burden of two hundred and forty nine hours to comply with the rule; and Rule 17a–4 which requires exchange members, brokers and dealers to preserve for prescribed periods of time certain records required to be made by Rule 17a–3 and other Commission rules. Eight thousand and eight hundred respondents incur an estimated average of two hundred and fifty burden hours to comply with the rule.

The estimated average burden hours are made solely for the purpose of the Paperwork Reduction Act and are not derived from a comprehensive or even a representative survey or study of costs of SEC rules. Direct general comments to Gary Waxman at the address below. Direct any comments concerning the accuracy of the estimated average burden hours for compliance with SEC rules and forms to Kenneth A. Fogash, Deputy Executive Director, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549, and Gary Waxman, Clearance Officer, Office of Management and Budget, Room 3208, New Executive Office Building, Washington, DC 20503.

Dated: October 23, 1989.

**Jonathan Katz,**

*Secretary.*

[FR Doc. 89–25499 Filed 10–30–89; 8:45 am]

BILLING CODE 8010–01–M

[Rel. No. 34-27369; File No. SR-NASD-89-48]

**Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Filing and Immediate Effectiveness of Proposed Rule Change Relating to Modification of Grace Period to Establish New SOES Exposure Limit**

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("the Act"), notice is hereby given that on October 16, 1989, the National Association of Securities Dealers, Inc. ("NASD") 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 NASD. 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 modifies the grace period for restoration of SOES exposure limits in NASDAQ/NMS securities.

**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 NASD 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 NASD 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 proposed rule change increases the grace period allowed by the NASD for renewal by NASDAQ/NMS market makers of their SOES exposure limit.[1] Failure by a market maker to renew its exposure limit results in a suspension from SOES. This modification has been necessitated by the extraordinary market conditions encountered on Friday, October 13, 1989. Section (c)(2)(E) of the SOES rules provides that the duration of the standard grace period will be established and published by the Association. Article VII Section 3 of the By-Laws allows Association action regarding the operation of a system owned by the NASD or its subsidiaries under emergency or extraordinary market conditions.

The NASD believes that the rule change is consistent with Section 15 A (b)(6) of the Act which, among other things, requires the rules of the Association to be designed to perfect the mechanism of a free and open market and national system and in general to protect investors and the public interest. The rule change will facilitate SOES participants' ability to continue to function in the SOES market under extraordinary market conditions.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

The NASD does not believe that the proposed rule change imposes any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

*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**

The foregoing rule change has become effective pursuant to Section 19(b)(3) of the Act and subparagraph (e) of Rule 19b-4 thereunder. 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 Act.

**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 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 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 Room. Copies of such filing will also be available for inspection and copying at the principal office of the NASD. All submissions should refer to the file number in the caption above and should be submitted by November 21, 1989.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority, 17 CFR 200.30-3(a)(12).

Dated: October 19, 1989.

**Jonathan G. Katz,**

*Secretary.*

[FR Doc. 89-25502 Filed 10-30-89; 8:45 am]

BILLING CODE 8010-01-M

[1] The NASD allowed a grace period of 10 minutes for the day of October 16, 1989. This is an increase from the usual grace period of 5 minutes.

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[Rel. No. 34-27376; [File No. SR-MSTC-89-08]]

**Self-Regulatory Organizations; Filing and Immediate Effectiveness of Proposed Rule Change by Midwest Securities Trust Company Relating to Procedues Regarding the Payment of Cash in Lieu of Bonds in Portions Less Than $1,000 Principal Amount in Bond Issues Paying in Kind**

October 24, 1989.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("the Act"), 15 U.S.C. 78s(b)(1), notice is hereby given that on October 12, 1989, the Midwest Securities Trust Company ("MSTC") 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**

Attached as Exhibit A is the text of a proposed rule change of MSTC which interprets and clarifies MSTC's current procedures regarding the payment of cash-in-lieu of bonds in portions less than $1,000 principal amount in bond issues paying in kind (PIK).

**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 Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

Under current MSTC procedures, MSTC does not process fractional shares (those in denominations of less than one share) or bonds for denominations in principal amount less than $1,000 ("baby bonds"). MSTC also does not process stock dividend allocations in fractional shares and accordingly distributes cash in lieu of fractional shares. The proposed rule change clarifies that, as in the case of payments in cash of fractional shares, MSTC will also distribute cash in lieu of the "baby bond" portion of interest distributions involving PIK issues.

The proposed rule change is consistent with Section 17A of the Act, in that it promotes the prompt and accurate clearance and settlement of PIK bond transactions.

*(B) Self-Regulatory Organization's Statement on Burden on Competition*

MSTC does not believe that any burdens will be placed on competition as a result of the proposed rule change.

*(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. 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 Act and subparagraph (e) of Rule 19b–4 thereunder. 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 Act.

**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 & 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 at the principal office of the above-referenced self-regulatory organization. All submissions should refer to File No. SR–MSTC–89–08 and should be submitted by November 21, 1989.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

**Jonathan G. Katz,**

*Secretary.*

**Exhibit A—MST System**

*Administrative Bulletin*

August 3, 1989

To: All participants.
Attention: Dividend manager/head cashier.
Subject: Cash-in-lieu of baby bonds.

Due to the increase in bond issues paying in kind (PIC), MCC/MSTC will commence to pay cash-in-lieu of the baby bond portions (less than $1,000 principal amount) of this type of distribution. This policy change becomes effective immediately and will maintain interfacing compatibility with other RIO members.

MCC/MSTC will also pay cash-in-lieu of baby bonds on any type of distribution resulting in a baby bond residue. On all claims made by, or against, MCC/MSTC, the baby bond portion will also be paid in the form of cash-in-lieu.

Questions regarding this bulletin may be directed to your Participant Services Representative

**Kathleen M. Staes,**

*Vice president, MCC/MSTC.*

[FR Doc. 89–25497 Filed 10–30–89; 8:45 am]

BILLING CODE 8010–01–M

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**[Rel. No. 34–27377; File No. SR–MCC–89–12]**

## Self-Regulatory Organizations; Filing and Immediate Effectiveness of Proposed Rule Change by Midwest Clearing Corporation Relating to Procedures Regarding the Payment of Case in Lieu of Bonds in Portions Less Than $1,000 Principal Amount in Bond Issues Paying the Kind

October 24, 1989.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("the Act"), 15 U.S.C. 78s(b)(1), notice is hereby given that on October 10, 1989, the Midwest Clearing Corporation ("MCC") 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**

Attached as Exhibit A is the text of a proposed rule change of MCC which interprets and clarifies MCC current procedures regarding the payment of case-in-lieu of bonds in portions less than $1,000 principal amount in bond issues paying in kind (PIK).

**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 Section (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*

Under current MCC procedures, MCC does not process fractional shares (those in denominations of less than one share) or bonds for denominations in principal amount less than $1,000 ("baby bonds"). MCC also does not process stock dividend allocations in fractional shares and accordingly distributes cash in lieu of fractional shares. The proposed rule change clarifies that, as in the case of payments in cash of fractional shares, MCC will also distribute cash in lieu of the "baby bond" portion of interest distributions involving PIK issues.

The proposed rule change is consistent with Section 17A of the Act, in that it promotes the prompt and accurate clearance and settlement of PIK bond transactions.

*(B) Self-Regulatory Organization's Statement on Burden on Competition*

MCC does not believe that any burdens will be placed on competition as a result of the proposed rule change.

*(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. 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 Act and subparagraph (e) of Rule 19B–4 thereunder. 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 Act.

**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 & Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 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 communicaitons 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 at the principal office of the above-referenced self-regulatory organization. All submissions should refer to File No. SR–MCC–89–12 and should be sumitted by November 21, 1989.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Jonathan G. Katz,

*Secretary.*

Exhibit A—MST System

*Administrative Bulletin*

August 3, 1989

To: All participants.
Attention: Dividend manager/head cashier.
Subject: Cash-in-lieu of baby bonds.I21Due to the increase in bond issues paying in kind (PIK), MCC/MSTC will commence to pay cash-in-lieu of the baby bond portions (less than $1000 principal amount) of this type of distribution. This policy change becomes effective immediately and will maintain interfacing compatibility with other RIO members.

MCC/MSTC will also pay cash-in-lieu of baby bonds on any type of distribution resulting in a baby bond residue. On all claims made by, or against, MCC/MSTC, the baby bond portion will also be paid in the form of cash-in-lieu.I21Questions regarding this bulletin may be directed to your Participant Services Representative.

Kathlee M. Staes,

*Vice president, MCC/MSTC.*

[FR Doc. 89–25497 Filed 10–30–89; 8:45 am]

BILLING CODE 8010–01–M

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**[Rel. No. 34–27382; File No. SR–NYSE–89–05]**

## Self-Regulatory Organizations; New York Stock Exchange, Inc.; Order Approving Proposed Rule Changes and Notice of Filing and Order Granting Accelerated Approval to Amendments to Proposed Rule Changes Relating to Basket Trading

**I. Introduction**

On June 2, 1989, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission" or "SEC"), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and rule 19b–4 thereunder,[2] a proposed rule change to trade "Exchange Stock Portfolios" ("ESP's"), standardized baskets of stocks, on the floor of the exchange. The proposed rule change consists of changes to existing Exchange rules, the adoption of a new "800 series" of rules that apply solely to ESP trading, the adoption of guidelines to implement certain provisions of the proposed rules, and an ESP fee schedule. Amendments No. 1, 2, and 3, submitted on September 1 and 13 and October 18, 1989, respectively, proposed additional changes to the Exchange's rules, fees and the statements of purposes governing the proposed rule change.[3]

Notice of the proposed rule change was provided by the issuance of a Commission release (Securities Exchange Act Release No. 26908, June 8, 1989), and by publication in the Federal Register (54 FR 25516, June 15, 1989). Nine comment letters were received regarding the proposed rule change.[4]

[1] 15 U.S.C 78s(b)(1) (1982).

[2] 17 CFR 240.19b–4 (1989).

[3] In Amendment No. 2, The NYSE proposed, among other things, that the Commission initially approve proposed NYSE Rules 805 and 806 for only a 6-month period. In amendments No. 2 and 3, the exchange requested accelerated approval of file No. SR–NYSE–89–05, as amended.

[4] *See* notes 59–71, *infra* and accompanying text.

**II. Description of the Proposal**

*A. ESP Description.*

The ESP service enables the trading of standardized baskets of stocks at an aggregate price in a single execution on the Exchange's stock Floor.[5] An ESP trade will result in a transfer to the buyer of ownership of each of the component stocks. When the transaction is completed, the buyer will be entitled to all rights attending ownership of the basket stocks (including rights to vote and receive dividends), and will be free to sell or hold each stock separately.

That same buyer may later sell the basket stocks he acquired, either individually or through another ESP trade. In order to sell the basket stocks through the ESP service, they must be identical as a group with the standardized ESP basket at the time of sale. If a buyer has sold individual basket stocks and has not separately re-acquired them, or if changes have been made to the index sincethe basket was purchased, the buyer will havew to "rebalance" his position by purchasing or borrowing the additional securities so that he can deliver all the current ESP stocks in their proportionate number of shares.

Initially, ESP trading will be available for executions of a standardized basket of 500 stocks comprising the "Standard & Poor's ("S&P") 500 ("S&P 500") Portfolio Index."[6] At the commencement

[5] NYSE Rule 800(b)(iii) defines the term "basket" as "a group of stocks that the Exchange designates as eligible for execution in a single trade through the ESP service and that consists of stocks whose inclusion and relative representation in the group are determined by the inclusion and relative representation of their current market prices ina widely-disseminated stock index reflecting the stock market as a whole." *See also* the definition contained in proposed Rule 431(a)(8). NYSE Rule 801: (1) Limits ESP trading to baskets that the Exchange has approved; (2) authorizes the Exchange to change the component stocks comprising a basket; and (3) requires that a basket's component stocks have been admitted to dealings for ESP purposes on an "issued", "when issued", or "when distributed" basis. *See also* NYSE Rule 804.

[6] Section 12(a) of the act generally prohibits the trading of a security on a national securities exchange unless the security is requested on the exchange. Upon application by an exchange and Commission approval, however, section 129(f)(1) of the Act and Rule 12f–1 thereunder authorize the Commission to extend unlisted trading privileges ("UTP") to any security registered pursuant to Sections 12(b) or (g) of the Act. The NYSE's S&P 500 Portfolio Index currently is comprised of 39 stocks that are not listed for trading on the NYSE. Pursuant to Section 12(f) of the Act, the Exchange has submitted applications for UTP in 206 stocks for the limited purpose of ESP stock basket trading based upon the S&P 500 Portfolio Index, which the Commission has approved by separate order. Because the composition of the market baskets will change from time to time as the composition of the S&P 500 Index changes, it will be necessary for the

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of ESP trading, each 500-stock ESP will have a value of approximately $5 million.[7]

The S&P 500 Portfolio Index is nearly identical to the S&P 500 Index, containing the same stocks and with virtually the same capitalization weighting. It differs in two respects to accommodate standardized basket trading. First, the S&P 500 Portfolio Index is designed so that fractional share interests that would result from a basket derived directly from the S&P 500 Index are rounded up or down to the nearest whole share. Because of this factor, a basket based on the S&P 500 Portfolio Index will not contain fractional shares.

Second, in order to decrease the occasions when rebalancing is necessary to liquidate a basket position, the Exchange may not adjust the S&P 500 Portfolio Index every time S&P adjusts the S&P 500 Index. At a minimum, the Exchange will adjust the S&P 500 Portfolio Index each calendar quarter. The Exchange will determine when additional adjustments will be made to the S&P 500 Portfolio Index in response to adjustments made to the S&P 500 Index. Generally, such additional adjustments will be made whenever an index stock is substituted or some other corporate event occurs that affects significantly an index stock's relative capitalization in the S&P 500 Index, such as the issuance of stock dividends or special cash distributions. Whenever an adjustment is made to the S&P 500 Portfolio Index, all intervening changes to the S&P 500 Index will be incorporated as well.[8]

The NYSE states that even with these two differences, the S&P 500 Portfolio Index closely tracks the S&P 500 Index. During the latter half of 1988, the "tracking" error between the two indexes never exceeded .02 index points.

Under § 220.18(a) of Regulation T,[9] ESP trades would be subject to the 50% initial margin requirement applicable to exchange-traded equity securities. In addition, basket stocks that are acquired through an ESP transaction would be subject to the 25% maintenance margin requirement set out in NYSE Rule 431(c)(1).

*B. ESP Market Structure.*

1. *Competitive Basket Market Makers.*—The Exchange will not use its standard specialist system to trade ESPs, but instead will employ a market structure consisting of "Competitive Basket Market Makers" ("CBMMs"), Exchange specialists, Floor brokers, and an ESP "Basket Book Broker" ("BBB"). The CBMMs will perform the principal market-making function for ESP trading,[10] and registration as a CBMM will trigger specific market-making obligations. In contrast to the traditional exchange specialist, CBMMs will not be required to maintain a presence on the Floor. They may fulfill their market-making functions through their upstairs ESP terminals, which will provide them with the same basket data available to the crowd on the Floor, plus order-entry capability and identification of their own entered orders. Under proposed NYSE Rule 36.20, CBMMs (or CBMM nominees) on the Floor also will have telephone access to their upstairs desks.

Pursuant to NYSE Rule 807A(a), a NYSE member or member organization may register as a CBMM by satisfying such registration requirements as the Exchange may from time to time specify. Registered CBMMs must meet a minimum $10 million capital requirement over and above any and all other federal and/or Exchange capital requirements.[11] Exchange members or member organizations registered as CBMMs in the ESP market basket would be treated as specialists for margin purposes, and would be entitled to good faith margin treatment for ESP transactions effected in their CBMM accounts.[12]

NYSE Rule 807A(e) authorizes CBMMs to withdraw voluntarily their CBMM registration with proper notice to the Exchange. The NYSE Guidelines for the 800 Series Rules—Basket Trading ("Basket Guidelines") establish a 30 day written notice requirement for withdrawal of a CBMM registration. A CBMM, however, may not give such notice prior to the 60th day after its registration becomes effective, and hence must remain registered as a CBMM until at least the 90th day following the effective date of its registration. A member or member organization so withdrawing its CBMM registration will not be eligible to re-register as a CBMM for 30 days after such withdrawal. Moreover, a CBMM may petition the Exchange's Department of Market Surveillance in writing to suspend its CBMM market-making obligations, but only for cause.

In return for the CBMM franchise, member firms undertake certain affirmative market-making obligations set forth in NYSE Rule 807B. The following specific obligations govern CBMM market-making activities: (1) A CBMM may make a proprietary bid or offer only in a manner consistent with the maintenance of a fair and orderly market; (2) a CBMM must help alleviate temporary disparities between supply and demand; (3) a CBMM must effect proprietary trades in a reasonable and orderly manner in relation to the market in general and to the basket market; and (4) a CBMM must maintain a continuous, two-sided quotation in the basket subject to a specified bid-ask parameter.[13] The rule authorizes a

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NYSE to request UTP in additional securities in the future. Section 12(f)(5) of the Act requires that 10 days' notice be provided to the issuer of a security for which UTP has been requested. This requirement could hamper trading in standardized market baskets, as the NYSE cannot receive 10 days advance notice of changes in the S&P 500 Index.To remedy this, the Commission is considering a new rule [Rule 12a–7] that will exempt from section 12(a), solely for the purpose of market basket trading, securities included in a standardized market basket product approved by the Commission pursuant to section 19(b) of the Act.

[7] The dollar value of a basket bid or offer is determined by multiplying the basket multiplier and the number of index points bid or offered. NYSE Rule 801.10. Pursuant to NYSE Rule 800(b)(v), the term "basket multiplier" is defined as an amount which, when multiplied by the current price of a basket expressed in index points, establishes the dollar value of the basket. Subject to compliance with Rule 19b–4 under the Act, the Exchange shall from time to time specify each basket's multiplier. The Exchange will issue specifications setting forth the number of shares of each of a basket's component stocks that comprise a basket based upon a formula that determines the percentage of the total index that each component stock represents. NYSE Rule 801.10.

[8] The NYSE states that index information will be readily available to investors. The Exchange will use S&P's Index Alert System to disseminate current information about the composition and capitalization weighting of the S&P 500 Portfolio Index. In addition, the Exchange will maintain in files available to the public current data on the composition of the component stocks and their relative representation in the Index and the method of calculating the Index. The Exchange also will make available computer disks containing all current data on the state of the Index as well as a facility for disseminating current data on the component stocks through commercial electronic mail.

[9] 12 CFR 220.18(a) (1989).

[10] In addition to the CBMMs' principal market-making function for ESP trading, specialists and the BBB perform a secondary, passive ESP market-making function. *See* notes 17–32, *infra* and accompanying text.

[11] NYSE Rule 807A(d). *See also*, Rule 15c3–1 under the Act, 17 CFR 240.15c3–1 (1989); NYSE Rule 325.

[12] Under proposed NYSE Rule 431(e)(2)(D), a member organization may clear and carry a CBMM's ESP trades upon such margin as the member and market maker may agree so long as the resulting margin adequately covers the risk attendant to the Market Functions Account (*i.e.*, CBMM account) in which the ESP transactions are carried. Moreover, NYSE Rule 807A(g) authorizes a CBMM to have a bank or a member finance its ESP transactions in a special or joint account on a margin basis that is mutually agreeable with the carrying organization.

[13] In addition, NYSE Rule 803 imposes on CBMMs obligations comparable to those that Rule 11Ac1–1 under the Act, 17 CFR 240.11Ac1–1 (the firm quote rule) and NYSE Rule 60 impose with respect to

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CBMM to comply with its market-making obligations by having a Floor broker represent and execute orders on its behalf.

The Basket Guidelines include a general requirement that a CBMM must maintain a spread of not greater than two index points during normal market conditions as the bid-ask parameter. Nevertheless, whenever the spread in the S&P 500 Index quote [14] exceeds two points, the required bid-ask spread can equal that spread.

Although CBMMs, like Floor brokers and BBBs, can represent customer orders, as a general matter, NYSE Rule 809 establishes that only CBMMs can initiate basket trades for their own accounts on the Floor or from terminals.[15] Thus, only CBMMs can facilitate a customer's ESP transaction.[16] In addition, proposed NYSE Rule 111(g) authorizes a CBMM to initiate proprietary trades to liquidate a position in a component stock that the CBMM established through basket transactions in the same trading session, whether acquired to accommodate customers, to meet his market-making obligations, or otherwise.

2. *Specialists.* NYSE specialists in the individual stocks comprising the ESP basket will, in the aggregate, act as one passive ESP market maker. Whenever all of the basket's component stocks listed on the Exchange are open for trading, NYSE Rule 803(e) requires that the Exchange automatically calculate and disseminate through the ESP system at 15-second intervals the aggregate Tier 1 and Tier 2 quotations in all basket stocks.[17]

A specialists's "Tier 1 component stock" quotation means the price of the best published bid and published offer for a basket's component stock that is listed on the Exchange.[18] An "aggregate Tier 1" quotation will be derived from the weighted summation of the prevailing bids and offers for each of the basket's component stocks as disseminated through the consolidated quotation system, plus the Tier 1 "mini-basket" bid and offer for the non-NYSE component stocks.[19] When a basket order is executed at the aggregate Tier 1 quote, upon receiving the basket execution notice through the ESP service, a specialist must assign, take, or supply the number of shares of the component stock at the execution price needed to complete one basket and must report the size and price as a trade to the consolidated tape.[20]

NYSE Rule 800(b)(xii) defines a "Tier 2 component stock" quotation as a bid or offer for the number of shares of a basket's component stock necessary to comprise three baskets. NYSE Rule 803(e) specifies that the "aggregate Tier 2" quotation derives from the weighted summation of the prevailing bids and offers for each of the component stocks necessary to fill three baskets, plus the Tier 2 "mini-basket" bid and offer for the non-NYSE component stocks.[21] The aggregate Tier 2 quote represents a bid or offer for three baskets, and is designed to operate as a limit off-market, away from the Tier 1 quote. The Basket Guidelines specify that the quotes for the component stocks comprising the Tier 2 aggregate quotation may each be "auto-quoted" at, or ⅛ or ¼ point away from, the Tier 1 individual quote.[22] If a basket order is executed at the aggregate Tier 2 quote, each component stock specialist must assign, take, or supply at the execution price the number of shares of his specialty stock needed to complete three baskets.

When the ESP system sends a basket execution notice to the component stock specialist indicating that a basket order has been executed at the aggregate Tier 1 or Tier 2 quotation, the specialist must assign the execution at the execution price to interest on his book or in the trading crowd in accordance with existing stock rules of priority and precedence,[23] as well as report the price to the consolidated tape.[24] Because the ESP system will calculate and disseminate the aggregate Tier 1 and Tier 2 quotes only once every 15 seconds, and because of the human and system time involved in entering an ESP trade and disseminating the execution notices, the Tier 1 or Tier 2 execution price indicated in a basket execution notice may be superior or inferior to the prevailing market quotation at the time the specialist receives the execution notice. Nevertheless, the execution price indicated in the execution notice always will apply. If the execution price indicated in the notice is inferior to the prevailing market price, the specialist must assign the execution to the bid or offer then having priority at the price indicated in the notice. If the execution price indicated in the notice is superior, the specialist must take or supply the necessary shares. The specialist also is required to take or supply the necessary shares when the size of the interest on the book or in the trading crowd at or better than the execution price is insufficient or, in a non-firm market, when it is impractical for him to assign the execution to the book or trading crowd.[25]

3. *The Basket Book Broker.* Under NYSE Rule 808, the BBB presides over all ESP executions, executes orders entrusted to him, maintains the ESP display unit, arranges the opening of the ESP market, presides over the ESP call market, maintains a market in mini-baskets, reports ESP trades to market data vendors, and otherwise generally supervises the ESP market. Qualified members or member organizations may register as a BBB,[26] and the BBB franchise may be operated on a rotational basis.[27] Each BBB must arrange to have a member qualified to act as a BBB in attendance during all business hours.

The ESP display unit is maintained by the BBB. The display unit on the Floor provides members in the trading crowd ESP market data that is also available off-Floor through vendors (*i.e.*, the ESP last sale price and current best quote, with sizes), as well as the size interest at each minimum tick away from the prevailing bid and offer for the basket. Thus, the display unit allows the trading

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quotations for individual stocks. Basket quotations always will be firm under Rule 803, except when the basket market is in the call mode. *See* NYSE Rule 816.

[14] The S&P 500 Index quotation reflects the mathematical aggregation of all the bid and offer quotations of the component stocks multiplied by their respective percentage weighting.

[15] Pursuant to NYSE Rule 809, a non-CBMM member may initiate proprietary basket trades on the Floor to offset a basket transaction made in error or, subject to NYSE Rule 92, a non-CBMM member on the Floor may accept proprietary basket orders initiated off the Floor.

[16] *See* NYSE Rule 808.

[17] *See* proposed NYSE Rule 104.11A. NYSE Rule 803(e) permits specialist participation in the basket market through aggregate Tier 1 and Tier 2 quotes only when all the NYSE-listed stocks that comprise the S&P 500 Portfolio Index are open. Thus, no component stock specialist participates in the basket market unless all participate.

[18] *See* NYSE Rule 800(b)(xi). The terms "published bid" and "published offer" have the meaning given to them in Rule 11Ac1–1 under the Act, 17 CFR 240.11Ac1–1. *See also* proposed NYSE Rule 104.11A.

[19] *See* NYSE Rule 803(e). *See also* notes 28–32, *infra* and accompanying text for a description of the BBB's obligation to supply the Tier 1 and Tier 2 "mini-basket" quotations.

[20] *See* NYSE Rules 800(b)(iv), 800(b)(xi), and proposed NYSE Rule 104A.11A.

[21] *See* note 30, *infra* and accompanying test, for a definition of "mini-basket" quotations.

[22] The Basket Guidelines provide that the Exchange's Department of Market Surveillance may grant requests for wider settings consistent with applicable Exchange Depth Guidelines.

[23] *See* NYSE Rules 71 and 72.

[24] *See* proposed NYSE Rule 104.11A.

[25] *Id.*

[26] The BBB may be affiliated with a CBMM, but the two units must be separated in accordance with the guidelines of NYSE Rule 98. *See* NYSE Rule 808(h).

[27] A BBB may withdraw its registration by providing the Exchange's Department of Market Surveillance with 30 days' written notice. NYSE Rule 808(g).

crowd to see both the ESP bid-offer spread and the depth of the ESP market.

Only the BBB's terminal has both execution and confirmation capabilities. All basket executions must be entered into the system by the BBB, and only the BBB's data display identifies the entering member firms. The BBB uses a terminal to perform its order entry function. CBMMs also may enter orders through their upstairs terminals. CBMMs and brokers in the crowd also may enter orders in terminals near the trading location. If the CBMM or broker order would result in an execution, then the BBB would enter the execution into the system.

The BBB has responsibility for the ESP limit order "book." NYSE Rule 808(f) requires a BBB to execute promptly any immediately-executable limit orders entrusted to him at the price shown on the display unit, in accordance with price and time priority, against the prevailing contra-side interest until the order is filled, and to place promptly any other limit orders on the basket display unit.

In conjunction with specialist participation for purposes of Tier 1 and Tier 2 basket executions, the BBB acts also as a passive market maker with respect to those stocks that are not NYSE-listed.[28] The BBB makes a market in the "mini-basket" [29] by disseminating "Tier 1 mini-basket" quotations and "Tier 2 mini-basket" quotations, *i.e.*, "bids and offers for the mini-basket that are related to the markets for the stocks included in the mini-basket in accordance with such parameters as the Exchange may from time to time prescribe." [30] The Basket Guidelines provide that the BBB must establish Tier 1 and Tier 2 quotes expressed in ⅛ point increments either as follows or pursuant to such other criteria as the Exchange's Market Surveillance Department may prescribe. In establishing his Tier 1 quote, the BBB must round the weighted sum of the bids (offers) for the mini-basket's component stocks down (up) to the nearest ⅛ point and must set his bid (offer) no more than ⅛ point lower (higher) than that rounded value. The BBB must establish his Tier 2 bid (offer) no more than ¼ point lower (higher) than his Tier 1 bid (offer). When a basket order is executed at the aggregate Tier 1 or Tier 2 quotation, the BBB must take or supply the necessary mini-baskets at the price indicated in the basket execution notice.[31] Upon the execution of a basket transaction, NYSE rule 808.15 requires the BBB to report for dissemination, and submit to the Exchange for comparison, such transaction-related information as the Exchange prescribes.[32]

*C. ESP Trading Rules.*[33]

1. *Acceptable Orders, Limit Orders and the Book.* NYSE Rule 802(d) permits only market and limit orders to be entered on the basket display unit. Additionally, in contrast to traditional block trading procedures,[34] the ESP rules provide no special rules to handle large "one-sided" stock basket orders. Rather, the rules for ESP trading provide that orders may be executed against opposite-side limit orders on the display unit at their displayed prices, in accordance with price and time priority, until the order is filled, thereby allowing a larger buyer or seller of baskets to "walk the book" without having to effect the execution at a single "clean-up" price.[35]

2. *Rules of Priority, Parity and Precedence.* For purposes of ESP trading, NYSE Rule 805 makes no distinction between proprietary and customer basket orders. Accordingly, ESP priority rules, based strictly on time and price, apply equally to agency and principal interest.[36]

ESP baskets will trade in an auction market based on strict time and price priority, and traditional rules of priority or precedence based on size do not apply to ESP trading.[37] The highest bid and the lowest offer will have priority.[38] Aggregate Tier 1 and Tier 2 bids and offers, however, are accorded priority over all other bids and offers at the same price. Otherwise, bids and offers displayed on the basket display unit enjoy priority based on the order of entry into the ESP service.[39] Basket orders will retain time priority once they are entered on the display unit, and intervening trades will not result in a new auction.[40]

3. *Crossing Orders.* Under NYSE Rule 805(d), a member may cross two agency orders without exposing either side, but only at a price that is better than the best bid and offer on the ESP display unit and only if the crossing price is announced to the trading crowd. Thus, a Floor broker or CBMM can cleanly cross customer orders for ESPs anywhere within the prevailing ESP quote, by executing the cross on the Floor, and then giving it to the BBB to enter into the system.[41]

CBMMs also can enter agency crosses through their terminals by sequential entry of each side, although they risk a break-up during the time it takes to enter the second side. In either case, if the crossing price is at or away from the prevailing bid of offer, the broker or CBMM can execute the cross only by clearing the book of all quotes that have priority. Although CBMMs, like Floor brokers and BBBs, can represent customer orders, as a general matter, under NYSE Rule 809 only CBMMs can initiate basket trades for their own accounts on the Floor or from terminals.[42]

Proposed NYSE Rule 806(a) permits CBMMs to facilitate a customer's order at a price that is better than the best bid or offer on the ESP display unit, after communicating the facilitation price to other members in the trading crowd.[43] NYSE Rule 806(b) prohibits another Exchange member from interceding in the facilitation if the proposed facilitation price is only one "minimum variation" (*i.e.*, .01 index points) better than the prevailing quote on the customer's side of the market.[44] When a

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[28] As discussed above, ESP trading initially will be available for executions of a standardized basket of 500 stocks based on the S&P 500 Portfolio Index, which is nearly identical to the S&P 500 Index. Because the S&P 500 Portfolio Index currently is comprised of 39 stocks that are not listed for trading on the NYSE, UTP will be necessary in order to trade these non-NYSE-listed issues as part of an ESP stock basket. *See* discussion at note 6, *supra*.

[29] NYSE Rule 800(b)(ix) defines the term "mini-basket" as "a group of stocks that consist of those of a basket's stocks that are not listed for trading on the Exchange and whose inclusion and relative representation in the group are determined by the inclusion and relative representation of their current market prices in the stock index from which the basket is derived."

[30] NYSE Rule 808.20(a).

[31] NYSE Rule 808.20(b).

[32] *See also* NYSE Rule 817.

[33] *See* File No. SR–NSCC–89–08, Securities Exchange Act Release No. 27021 (July 11, 1989), 54 FR 30125 (July 18, 1989), and Securities Exchange Act Release No. 27207 (September 1, 1989), 54 FR 37859 (September 13, 1989) for a description of the clearance and settlement rules applicable to ESPs. *See also* NYSE rule 817.

[34] *See, e.g.*, NYSE rule 127.

[35] *See* NYSE Rule 808(f).

[36] The Exchange has proposed that the Commission initially approve Rule 805 for only a six-month period. Once the Exchange has experience in the operation of Rule 805 in the basket market, the Exchange will propose permanent approval of Rule 805, either in its current form or modified in light of market experience.

[37] *See, e.g.*, NYSE Rules 71 and 72.

[38] NYSE Rules 805(a) and 805(c).

[39] NYSE Rules 805(b)(i) and 805(c).

[40] NYSE Rules 805(b)(iii) and 805(c).

[41] As stated *supra* note 3, the Exchange has proposed that the Commission approve Rule 805 for only a six-month period.

[42] *See* note 15, *supra* and accompanying text.

[43] The Exchange has proposed that the Commission initially approve NYSE Rule 806 for only a six-month period. Once the Exchange has experience in the operation of Rule 806 in the basket market, the Exchange will propose permanent approval of Rule 806, either in its current form or modified in light of market experience.

[44] *See* NYSE Rule 802(b).

facilitation is more than the minimum variation from the prevailing quote, NYSE Rule 806(b) permits another member to intercede in a CBMM's facilitation trade by taking or supplying all of the baskets that the customer seeks at a price that is better for the customer than the facilitation price.

4. *Split Orders.* NYSE Rule 802.30 allows CBMMs to accommodate a customer's need for a customized basket through "split" orders that enable a CBMM to participate on the same side of the transaction with a customer. In a "vertical split", a customer takes or supplies all shares of specified component stocks of a basket and the CBMM takes or supplies the remainder. A CBMM may not take or supply more than 100 stocks when vertically splitting an order for a customer, whether as part of an agency cross under Rule 805 or as a facilitation under Rule 806.[45] In a "horizontal split", a customer takes or supplies a specified percentage of each component stock's basket shares, rounded to the nearest whole share, and the CBMM takes or supplies the residual percentage of every stock in the basket.

5. *Index-on-Close Orders.* The Exchange's proposed "Index-on-Close" ("IOC") order would enable baskets to trade at 4:00 p.m. at the not-yet-known closing value of the S&P 500 Index. IOC orders may be placed at any time during the day prior to the close of trading, but only as crosses. Because the closing S&P 500 Index value is based on the weighted sum of the closing prices of the 500 component stocks, the IOC trade price will be appended and disseminated after the 4:00 execution of the IOC orders.[46]

6. *Trading Halts and Call Markets.* ESP basket trading would halt under NYSE Rule 816(b) when market activity triggers the Rule 80B "circuit breakers".[47] Moreover, under NYSE Rule 816(b), the Exchange's Senior Officers or Floor Directors can halt ESP trading when the condition of the market so warrants.[48]

In addition, under Rule 816(b) and the Basket Guidelines, a call market is mandatory if more than 30% of the weighted value of the index is not open for trading *and* trading in the related futures contract has reached the daily price limit (or trading in the contract has halted). Under NYSE Rule 816(a) and the Basket Guidelines, the Exchange's Senior Officers or Floor Directors may initiate a call market if market conditions make it unreasonable to conduct basket trading pursuant to regular auction procedures. The Basket Guidelines establish standards that NYSE officials may consider in making such a determination, including an unreasonably wide spread in the S&P 500 Index quote or the triggering of the NYSE Rule 80A "sidecar"provisions.[49] Under NYSE Rule 816(b), the existence of a call market suspends the obligations of specialist, BBBs, CBMMs to establish, maintain, and communicate component stock, mini-basket, and basket quotations.

The BBB must conduct the call market as follows. At the commencement of a call market, the BBB will begin to collect indications of interest in the basket and enter them into the display unit. Within five minutes of entry into the call mode, the BBB must disseminate the initial indications of interest to the Floor and to the CBMM terminals.[50] The BBB must update the indications whenever appropriate, but at least every fifteen minutes, even if only to indicate that there is no new interest.[51] The BBB may execute any matching interest that the indication process elicits at the end of each fifteen-minute cycle. If the match consists of paired market orders, a Floor Governor must determine that the proposed execution price is fair under the circumstances.[52]

The BBB may not reinitiate the continuous market until the later of (1) fifteen minutes after the dissemination of the initial indications or (2) five minutes after the most recent dissemination. Following the approval of the Exchange's Senior Officers or Floor Directors, the BBB may reopen the auction market with a quotation.[53]

7. *Openings and Reopenings.* NYSE Rule 815 permits the basket market to open or reopen only at a single price, and requires that all market orders be executed at that price. All market orders are matched. If there is an order imbalance, then the BBB will attempt to satisfy the imbalance with the limit orders on the book at a single price, unless the imbalance is significant enough to warrant entry into a call market.

D. *Price Allocations.* Member firms have indicated to the Exchange that they will use the Institutional Delivery ("ID") System of the Depository Trust Company ("DTC") to confirm transactions with customers and to effect customer settlement.[54] Because the ID System requires that member firms provide individual prices for each of the basket component stocks, NYSE Rule 817.20 provides a methodology to allocate a basket execution price to each of the basket's 500 component stocks [55] The NYSE believes that the single price allocation methodology should avoid confusion among member firms and institutional users of the ESP product. The methodology would allocate an execution price based on the relative representation of each of the component stocks in the basket, as determined by the closing price of each stock on the day prior to trade date.[56] Where a customer buys or sells a basket that contains fewer than all 500 stocks, the calculation will exclude the omitted component stock(s).

E. *Fees.* The ESP fee schedule proposes fees intended to recover the Exchange's costs in developing and operating the ESP market. The initial fees are $200 per unit (*i.e.*, per basket) per side, $125 per unit per side for crosses, and an access fee of $12,000 per year in advance for each CBMM terminal line.

F. *Purpose and Benefit.* Given the increased institutionalization of the stock market and the growth of index-related trading strategies, the Exchange has proposed the ESP service to address the need for an institutional stock

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[45] NYSE Rule 802.40.

[46] *See* NYSE Rule 802.20.

[47] NYSE Rule 80B, the Exchange's "circuit breaker" rule, provides procedures for one-hour trading halt in the trading of all securities after a 250-point decline in the Dow Jones Industrial Average ("DJIA") and a two-hour trading halt after a 400-point decline. *See* Securities Exchange Act Release No. 26198 (October 19, 1988), 53 FR 41637 (order approving NYSE, American Stock Exchange, Chicago Board Options Exchange, and National Association of Securities Dealers circuit breaker proposals).

[48] The Commission notes in addition that the practical effect of a Commission-ordered suspension of trading in a basket component stock pursuant to section 12(k) of the Act, 15 U.S.C. 781(k), would be a halt in ESP basket trading. Because transactions in such a security would be prohibited while such a trading halt was in effect, basket transactions could not take place until the suspension of trading ended.

[49] NYSE Rule 80A, the "sidecar" rule, imposes certain trading restrictions on orders entered into the NYSE's automated order-routing system, the Super Designated Order Turnaround ("SuperDOT") System, during period of significant market declines. The rule applies when the price of the S&P 500 futures contract traded on the Chicago Mercantile Exchange falls 12 points below the previous trading day's closing value. Once activated, program trading-related market orders entered into SuperDOT are routed into a separate file. *See* Securities Exchange Act Release No. 26198 (October 19, 1988), 53 FR 41637.

[50] NYSE Rule 816(a).

[51] *Id.*

[52] NYSE Rule 816.10.

[53] NYSE Rule 816(a).

[54] *See* notes 88–92, *infra* and accompanying text for a discussion of the Exchange's request for exemption from the trade confirmation requirements of Rule 10b–10 under the Act, 17 CFR 240.10b–10 (1989).

[55] *See also* NYSE circular, dated September 11, 1989.

[56] *See* File No. SR–NSCC–89–08, *supra* note 33, for further explanation of the clearance and settlement rules applicable to basket transactions.

basket trading system with physical delivery of the underlying component stocks. The Exchange contends that the ESP service will address market inefficiencies resulting from the fragmented executions currently accorded program trading strategies.[57] The Exchange believes that the proposed ESP market structure is designed to attract and concentrate the "block positioning"[58] capital necessary to support ESP trading. The Exchange further believes that ESP trading will reduce the transaction and price impact costs associated with current index-related trading strategies through the ESP service's single, aggregated execution function. Finally, the Exchange states that the ESP trading service may reduce the price volatility associated with institutional demands and selling pressures that their index-oriented trading strategies currently transmit to individual component stocks and which may translate into overall market volatility.

III. *Comments Received.* The Commission received nine comment letters in response to its request for comments on the proposed rule change. The Commission received a comment letter from the Commodity Futures Trading Commission ("CFTC")[59] stating that ESP transactions are "spot transactions in securities", and therefore are not "contracts of sale of a commodity for future delivery under section 2(a)(1)(A) of the Commodity Exchange Act."[60]

The Commission also received a comment letter from the Chicago Board of Trade ("CBOT"), a commodities exchange registered with the CFTC as a contract market.[61] The CBOT letter commended the NYSE for developing the ESP service, and asserted that the ESP service will have a positive influence on liquidity in the markets as an efficient execution mechanism for trading a standardized basket of stocks at a single, aggregate price on the Floor of the NYSE.

A third comment letter was received from the Alliance of Floor Brokers ("AFB"),[62] whose membership is comprised predominantly of NYSE Floor brokers. In general, the AFB letter criticizes certain aspects of the ESP market structure as anti-competitive. The AFB also believes that ESP trading may exacerbate structural market risks that already exist because of the unequal regulatory treatment accorded derivative products. The AFB argues that, in comparison to existing equity auction market trading procedures, the alternative trading procedures envisioned by the ESP system ultimately would result in a fragmented securities market structure with increased market volatility. In a report appended to its comment letter, the AFB made the following specific comments.

(1) The AFB criticized the lack of compatibility of the ESP rules package with traditional auction market concepts embodied in NYSE Rule 92 that attempt to eliminate conflicts of interest that may arise in an auction market environment. The AFB argued that a CBMM should be required to hand off all customer orders to an independent agent if the CBMM seeks to continue to trade for its own account.

(2) The AFB contends that parity[63] should be allowed at the basket point-of-sale, because absolute time and price priority will serve to dampen participation by portfolio managers if they must reveal their trading intentions in advance.

(3) The AFB argues that all crosses, whether agency to agency or principal to agency, should be subject to price betterment at the basket point-of-sale and that all brokers, not just CBMMs, should be permitted to effect facilitation crosses.

(4) The AFB argues for more basket order interaction with the "trading crowd," and contends that the BBB should be allowed to stop basket commitments whenever appropriate in the hope of achieving price improvement.

(5) The AFB contends that when a specialist receives a basket execution notice, that execution should receive a better price in the equity pieces whenever available at the equity point-of-sale.

(6) The AFB contends that the ability of a larger buyer or seller to disadvantage the limit orders on the book essentially with prior knowledge that inferior priced prints will take place is counter to existing block trading rules. Specifically, the AFB argues that this type of dealing is predatory when the prior knowledge is shared with a market maker who then takes part of the contra side at a clean up price after intervening public orders have been disadvantaged. Accordingly, the AFB believes some form of block trading protection is necessary for ESP transactions.

(7) The AFB agreed with the Exchange's logic supporting its request for short sale relief when the specialist is required to participate in an execution and the specialist is short the stock. The AFB also supported the Exchange's request for short sale relief when a CBMM supplies stock on a minus or zero-minus tick because the prices of the individual equity prices are priced independently. The AFB, however, criticized the NYSE's request to extend short sale relief to the basket point-of-sale as a potentially disruptive deregulatory initiative. The AFB also claims that such relief would foment a regime of anti-competitive and inequitable short sale regulation in comparison to the regulation of the short selling of individual stocks. Specifically, the AFB posits the example of shorting an industry group (*i.e.*, oil stocks) through ESP short sales in a fashion that is otherwise not available in the retail equity market.

Richard Ney & Associates Asset Management Inc. ("Ney"), an investment management company, criticized the configuration of ESP transaction reporting.[64] The Commission also received letters from Thomas G. and Ruth M. Roberts ("the Roberts") and from Dr. Burton Roger ("Dr. Roger"), individual investors residing in California, who similarly criticized the Exchange's proposed transaction reporting plan as it would apply to the basket's constituent stocks.[65]

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[57] "Program trading" generally is defined as the simultaneous entry, but separate execution, of multiple orders together in a package trade. NYSE Rule 80A defines "program trading" as "either (A) index arbitrage or (B) any trading strategy involving the related purchase or sale of a 'basket' or group of 15 or more stocks having a total value of $1 million or more. Program trading includes the purchases or sales of stocks that are part of a coordinated trading strategy, even if the purchases or sales are neither entered or executed contemporaneously, not part of a trading strategy involving options or futures contracts on an index stock group, or options on any such futures contracts, or otherwise relating to a stock market index."

[58] Section 3(a)(38) of the Act, 15 U.S.C. 78c(a)(38), defines the term "market maker" as "any dealer acting in the capacity of a block positioner." NYSE Rules 97 and 127 generally govern the block positioning operations of Exchange member organizations.

[59] *See* letter from Jean A. Webb, Secretary, CFTC, to Jonathan G. Katz, Secretary, SEC, dated August 17, 1989.

[60] 7 U.S.C. 2(a)(1)(A) (1982).

[61] *See* letter from Thomas R. Donovan, President and Chief Executive Officer, CBOT, to Jonathan G. Katz, Secretary, SEC, dated July 17, 1989.

[62] *See* letter from Michael D. Robbins, President, AFB, to Jonathan G. Katz, Secretary, SEC, dated July 13, 1989.

[63] Namely, customer orders and proprietary orders are accorded equal execution priorities.

[64] *See* letter from Richard Ney, Richard Ney & Associates Asset Management, Inc., to Richard G. Ketchum, Director, Division of Market Regulation, dated July 5, 1989.

[65] *See* letter from Thomas G. and Ruth M. Roberts, to the Hon. Esteban E. Torres, U.S. House of Representatives, dated August 10, 1989, and letter from Burton Roger, M.D., to the Hon. Howard L. Berman, U.S. House of Representatives, dated August 19, 1989.

Specifically, Ney, the Roberts, and Dr. Roger criticized the lack of real time price and volume reporting for the ESP stock components when NYSE specialists do not participate in a basket execution. Tucker Anthony, Inc. ("Tucker Anthony"), an investment management firm,[66] criticizes the ESP system as an institutional and proprietary trading vehicle whose trading will increase market volatility. Tucker Anthony also criticized the NYSE's proposed exemptions from the short sale rule, and expressed concern regarding the operational aspects of basket trading.

The eighth comment letter was from Junius W. Peake, a securities trading systems consultant, and Morris Mendelson, a finance professor ("Peake-Mendelson letter"), who together question the overall need for the ESP trading system, and argue that the ESP service is an inefficient protfolio execution system that would lead to market fragmentation and exacerbated price discontinuities.[67] The Peake-Mendelson letter also requests a more complete vetting of the market structure implications of ESP trading in a public hearing. The ninth comment letter was from the John Hancock Freedom Securities Corp. ("John Hancock Securities letter"),[68] a holding company for three broker-dealer subsidiaries that are NYSE member organizations. The John Hancock Securities letter reiterated several criticisms raised by the AFB,[69] including concern over the proposed strict price and time priorities applicable to ESP trading and the proposed regulatory treatment of ESP short sales.

The Exchange generally addressed these commentator's concerns and other issues raised by Commission staff in a letter to Commission staff ("September 6 letter"), which further explains the rationale underlying ESP trading and its accompanying market structure, as well as clarifies its requests for relief from certain trading practice rules of the Commission.[70] In its September 6 letter, the Exchange notes that ESP trading is structured with the goal of providing institutionial customers and member firms with a trading vehicle suited for an institutional, composite-asset market. The Exchange believes that the rules supporting ESP trading are designed appropriately to accommodate the particular needs of the portfolio market in a fair and competitive market structure.

In response to the specific issues raised in the comment letters, the Exchange made the following comments.

(1) In response to the concern that the proposed ESP market structure would require CBMMs to make markets while allowing them to handle customer orders, the Exchange contends that if CBMMs cannot trade for their own accounts while holding customer orders, they would either have to cease providing two-sided quotations while holding customer orders, or they would have to hand off all of their customer orders. The Exchange concluded that the former alternative would lead to inadequte support for the product, while the latter alternative ignores a fundamental market reality, namely, that the potential ESP market-making firms are the very same firms that are likely to handle customer orders. Accordingly, the Exchange struck a balance between the two competing concerns by proposing a basket market structure that allows a market maker holding customer orders to maintain a two-sided quotation, while executing customer orders against those quotations and otherwise trading in furtherance of its affirmative obligations.

(2) In response to the contention that parity should be allowed at the basket point-of-sale, the Exchange contends that absolute time and price priority is essential to attracting upstairs capital to the ESP basket market. The Exchange states that strict priorities are necessary to assure upstairs market makers that an order will be executed when the market reaches the specified price, thus providing them with an incentive to place and leave orders in the system. The Exchange notes that the minimum ESP tick is 1/100th the size of the tick in the average Exchange-traded stock, and should provide traders ample room to compete by betttering the market.

(3) In response to the suggestion that all crosses should be subject to price betterment at the basket point-of-sale, the Exchange stated that it believes that the limitations on when ESP crosses must be exposed for price improvement are reasonable when viewed in the context of the absolute time and price priorities imposed by the ESP rules. The Exchange contends that no exposure is necessary for agency crosses because both sides of the order will receive prices better than the prevailing quotations in the market. The Exchange further contends that the lack of exposure for principal crosses when the price to the customer is a minimum tick inside the bid or offer is reasonable because the customer receives an immediate execution at the best available price. In addition, it encourages market makers to bring order flow to the Floor because it provides them with certainty in executing crosses, so long as they are prepared to provide the customer the best possible price.

In response to the argument that all brokers should be able to effect facilitation crosses, the Exchange stated its belief that allowing only CBMMs to effect proprietary crosses is an appropriate limitation when viewed in the overall context of the ESP market structure. In particular, because market makers will assume significant obligations and will incur significant costs in helping to maintain a fair and orderly market, the Exchange believes it is reasonable to limit to CBMMs the ability to effect facilitation crosses. The Exchange believes that without this limitation it would be difficult to attract sufficient market-making expertise.

(4) The Exchange notes, in response to the argument for more basket order interaction with the trading crowd, that the ESP rules provide for price improvement at the basket point-of-sale: because orders are "flashed" electronically to all market participants, both upstairs and Floor traders can interact with that order and improve the best bid or offer in the system.

(5) In response to the argument for price improvement at the equity point-of-sale, the Exchange argues that the issue of possible price improvement at the equity point-of-sale in a basket execution that involves Tier 1 or Tier 2 specialist participation arises because the specialist's aggregate quotations are updated only every 15 seconds, and an unavoidable delay occurs between the basket execution and the integration of that execution in the markets for the component stocks. As a result, when a specialist receives a basket execution notice, there could be a quotation in the stock superior to the price specified in the notice. The Exchange contends that it is reasonable to award the benefits of the improved price to the participant in the market for the component stock, who is much more likely to be a retail customer interested in receiving the best

[66] *See* letter from John H. Goldsmith, President and Chief Executive Officer, Tucker Anthony, to Mr. John Phelan, Chairman of the Board, NYSE, dated July 28, 1989.

[67] *See* letter from Junius W. Peake, Chairman, The Peake/Ryerson Consulting Group, Inc., and Morris Mendelson, Professor of Finance, The Wharton School, University of Pennsylvania, to Jonathan G. Katz, Secretary, SEC, dated September 1, 1989.

[68] *See* letter from John H. Goldsmith, Chairman and Chief Executive Officer, John Hancock Freedom Securities Corporation, to Jonathan G. Katz, Secretary, SEC, dated October 12, 1989.

[69] *See supra* note 62.

[70] *See* letter from James E. Buck, Secretary, NYSE, to Mary Revell, Branch Chief, Division of Market Regulation, SEC, dated September 6, 1989.

price for his order. The Exchange further contends that such a resoluton is a reasonable one for a basket customer who may view a speedy execution with price certainty as more important than a relatively insignificant improvement in the price of a $5 million basket.

(6) In response to concerns raised regarding the ability of large buyers or sellers to walk the book, the Exchange notes that the ESP basket market is an institutional market comprised of the equivalent of large block orders competing for execution according to strict price and time priorities. Accordingly, the Exchange believes that ESP trading does not require a regulatory structure modeled on its retail auction market which is designed to integrate both retail and institutional order flow and to protect retail order flow from inferior block executions at "gap" prices.[71]

(7) Finally, in response to concerns raised about the NYSE proposal for relief from the short sale rule, the Exchange notes that ESPs, much like options and futures, will be priced derivatively. Because the Exchange also expects ESP trading to be somewhat discontinuous, with potentially long intervals between trades, the Exchange believes that there is not likely to be much of a price relationship between the last tick in the ESP market and the actual direction of market movements in the ESP market and the actual direction of market movements in the component stocks. The Exchange contends, moreover, that it is impractical to apply the short sale rule at the basket point-of-sale since it will not be easy to determine when a person is "short" a basket that contains 500 component stocks. Thus, the Exchange reasons that it is impractical and competitively disadvantageous to apply short sale restrictions at the basket point-of-sale.

In response to the suggestion that a market participant might use the market basket to short a particular industry group, the Exchange counters that the risk inherent in such a trading strategy is prohibitively expensive, because the trader would be required to cover the unwanted stock short positions at a price no higher than the price at which it sold the stocks. Moreover, the Exchange notes that the general anti-fraud rules of the Exchange and the Commission will apply fully to ESP trading, and that the Exchange's detailed surveillance procedures will operate to capture any such anomalous trading patterns that may evidence a manipulative or otherwise fraudulent trading strategy.

[71] *See* NYSE Rule 127.

## IV. Discussion.

### *A. Introduction*

After careful consideration of the comments received, applicable statutory provisions, and relevant policy considerations, the Commission believes that the NYSE's basket trading proposal is reasonably desinged to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trades, provide for an equitable allocation of fees, and is consistent with the maintenance of fair and orderly markets. For these reasons and for the additional reasons set forth below, the Commission finds that approval of the Exchange's proposed rule change relating to stock basket trading is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange, and, in particular, with the requirements of sections 6(b) (4) and (5).[72]

### *B. Benefits of Market Baskets*

Both the Division of Market Regulation's Report on *The October 1987 Market Break* [73] and an NYSE-commissioned Study entitled *An Overview of Program Trading and Its Impact on Current Market Practices* ("Katzenbach Report") recommend, among other things, the listing and trading of a basket of stocks on an exchange as a means to enhance efficiency and, possibly, the market's ability to absorb institutional portfolio trading.[74] As noted in the Staff Report, the creation of one or more posts for the purpose of trading actual baskets or portfolios of stock could alter the dynamics of program trading, because the availability of such basket trading could, in effect, restore program trades to more traditional block trading techniques.[75] The Staff Report noted further that, while arbitrage ultimately would flow to individual component stocks, many institutional investors and member firms effecting arbitrage transactions could focus their equity transactions at the basket post where the market makers and trading crowd could provide efficiencies associated with effecting transactions in a portfolio of securities as opposed to individual stocks. This could add an additional layer of liquidity and concentrated capital to the market in order to help absorb the volume and velocity of trading associated with index-related trading strategies.[76]

Furthermore, because ESP market basket will be traded on the Exchange Floor at a single location in an "open book" environment, members in the crowd will be able to see both the ESP bid-offer spread and the depth of the ESP market, *i.e.*, the size of the buying and/or selling interest at each minimum tick away from the prevailing bid and offer for the basket. Program trading order flow entered into the system and imbalances resulting therefrom thus will be disclosed, thereby ameliorating curent market information limitations in identifying program trade executions (or overhanging program orders) in the individual stocks.[77] Finally, by creating a trading vehicle for an aggregated basket of standardized portfolios of stocks in a single execution with minimal "execution slippage," [78] the ESP trading system will provide an efficient mechanism to trade, clear and settle stock baskets.

The Commission believes the ESP trading will provide institutional investors with a cost efficient means to make investment decisions based on the direction of standardized measures of stock market segments and the stock market as a whole, and may provide stock market participants several advantages over existing methods of effecting progam trades of stocks and transactions in portfolios of securities. The Commission recognizes that the ESP market will have different trading dynamics than the market for the individual stocks, and that the

[72] 15 U.S.C. 78f(b) (4) and (5) (1982).

[73] SEC, Division of Market Regulation, *The October 1987 Market Break* (February 1988) ("Staff Report").

[74] *See also*, Securities and Exchange Commission Recommendations Regarding the October 1987 Market Break contained in Testimony of David S. Ruder, Chairman, SEC, Before the U.S. Senate Committee on Banking, Housing, and Urban Affairs, on February 3, 1988.

[75] Staff Report at 3–18. For a detailed description of current block trading mechanisms, *see* the *Report of the Presidential Task Force on Market Mechanisms*, at VI–9 to VI–11 (January 1988) ("Brady Report").

[76] *Id.* Similar ideas have been discussed in J. Grundfest, "Would More Regulation Prevent Another black Monday?", Address before the CATO Institute Policy Forum on July 20, 1988, at 13–14 (available at the Commission); H. Stoll and R. Whaley, "Program Trading and The Monday massacre" (November 4, 1987) (available at the Owen Graduate School of Management, Vanderbilt University); and H. Stoll, *Portfolio Trading*, Working Paper No. 87–14 (September 1987) (available at the Owen Graduate School of Management, Vanderbilt University).

[77] The NYSE's concept of an open, fully-disclosed book to support ESP trading is consistent with suggestions offered by various studies of the October 1987 Market Break. *See, e.g.*, the Brady Report, *supra* note 75 at vii. *See also* Wells Fargo Investment Advisors, *Reflections on the Stock Market Crash of October 1987* (January 25, 1987).

[78] "Execution slippage" may be defined as the adverse price impact that currently accompanies the fragmented execution of program trades. *See, e.g.*, the Katzenbach Report at note 29.

regulatory structure for individual stocks may not be best suited for ESP trading. For the reasons discussed below, the Commission finds that the deviations from this structure proposed by the NYSE reasonably are designed to promote just and equitable principles of trade and fair and orderly markets. Furthermore, the Commission believes that ESP trading will not lead unduly toward a more fragmented and volatile market, because the "open book" environment, customer crossing and facilitation rules, and the combination of both "auction" and "dealer" attributes in the trading system for ESPs are consistent with the development of an open and competitive national market system.

*C. Margin*

As discussed above, ESP trades would be subject to the to percent initial margin requirement applicable to exchange-traded equity securities. Market makers who are designated as CBMMs in the ESP market basket would be treated as specialist for margin purposes, and would be entitled to good faith margin treatment for ESP transactions effected in their CBMM account.

Because the purchase of an ESP results in the physical delivery of each stock composing the basket, Regulation T requires a 50 percent initial margin requirement. For the same reasons, the Commission believes that it is appropriate to apply the NYSE equity security maintenance margin requirement of 25 percent to ESPs.

The Commission also finds that, in light of their affirmative market making obligations, the NYSE proposal appropriately treats CBMMs as "specialists" for the purpose of receiving exempt credit treatment under Regulation T and U.[79] In order for CBMMs to qualify for exempt credit, however, the Commission believes that it is necessary for CBMMs to segregate market-making positions from other positions (*e.g.*, proprietary and arbitrage transactions).

*D. Agency Crosses, Proprietary Trading and Customer Facilitations*

Rule 805(d) provides that any member or member organization may cross agency orders. As discussed above, however, under NYSE Rules 806 and 809 only CBMMs can initiate basket trades for their own accounts on the Floor or from terminals, and CBMMs alone will be able to facilitate customer orders through proprietary trading on the Floor.[80] Thus, only CBMMs may effect proprietary cross transactions.

In response to concerns voiced by the commentators that these provisions were anti-competitive, the Exchange contended that such a structural tradeoff was necessary to attract sufficient upstairs market-making participation.[81] In return for this trading "monopoly", the Exchange emphasized that CBMMs will be required to undertake specific affirmative obligations in connection with their ESP market-making operations. For example, Rule 807 establishes affirmative market-making obligations, including the requirement to maintain a fair and orderly ESP market. Moreover, CBMMs must help alleviate temporary disparity between supply and demand through proprietary trading operations. In addition, CBMMs also must maintain a continuous, two-sided firm quotation in the basket.

The Exchange also emphasized that CBMMs will incur the terminal and other systems and personnel costs necessary to support their market-making function. Furthermore, once registered, operation of a CBMM franchise demonstrates a significant capital commitment to the ESP market because a CBMM will not be permitted to withdraw its registration except on 30 days' notice,[82] and if a CBMM does withdraw its registration, it will not be permitted to re-register for 30 additional days.

The Commission believes that the unique capabilities provided to market makers in the ESP market raise difficult questions under the Act. On the one hand, the limitations on direct proprietary facilitations by other NYSE members may discourage their use of ESPs, thus reducing liquidity. On the other hand, the NYSE is attempting to provide, through CBMM participation, a continous basket trading market, something which has heretofore been unavailable. It is difficult to predict whether the market will expand and be characterized by active basket trading, or whether trading will be sporadic. At least in its initial stages, when the latter assumption may be correct, the Commission finds that it is consistent with the Act for the NYSE to build in necessary incentives to ensure active market-making participation. Accordingly, the Commission has determined to approve, on a temporary six-month basis, the NYSE's limitations on proprietary trading contained in NYSE Rule 806. If during the next six months, however, ESPs become actively traded, no artificial market-making incentives should be necessary and the Commission would expect the NYSE to revise its rules to permit basket trading and facilitation by all member firms.

*E. Customer Protection Rules and Rules of Priority, Parity and Precedence*

1. Customer Protection

NYSE Rule 92 protects against conflicts of interest when a member holds a customer order and trades for a proprietary account by imposing specific requirements on how the member must price and handle customer orders in these circumstances. Under NYSE Rule 800(c)(i), however, a member who holds or has knowledge of a customer's unexecuted order for one or more of a basket's component stocks still may initiate proprietary basket transactions, despite the otherwise contrary application of Rule 92. Thus, while holding customer orders, the ESP rules allow a market maker to maintain a two-sided quotation, executing customer orders against those quotations and otherwise trading in furtherance of its affirmative obligations. The Rule 92 restrictions apply when a CBMM seeks to trade for its own account at the then-prevailing bid or offer (if not pursuant to its affirmative obligations), or to break up a facilitation.[83]

The Commission believes that the exceptions proposed for CBMMs are appropriate measures to facilitate liquidity in an institutional market. Because of the size of the ESP's unit of trading and the screen-based trading system employed, ESPs require the participation of large, well-capitalized upstairs firms. Because these firms are integrated, any restriction on their ability to handle customer orders almost certainly would discourage them from registering as CBMMs. While the Commission is concerned over the potential that CBMMs might prefer their own proprietary order over a customer order or "frontrun" that customer order, the Commission recognizes that effectively the same potential for abuse exists today when upstairs firms execute programs through the NYSE's

[79] The BBB also will be entitled to exempt credit, but only with respect to transactions entered into pursuant to its role as passive market maker in the "mini-basket."

[80] A non-CBMM member may initiate proprietary basket trades on the Floor to offset a basket transaction made in error, however, or, subject to NYSE Rule 92, a non-CBMM member on the Floor may accept proprietary basket orders initiated off the Floor.

[81] NYSE September 6 letter, *supra* note 70.

[82] In addition, because the member or member organization may not give such notice prior to the 60th day after its registration becomes effective, a CBMM must continue to function as such for at least 90 days. *See* Basket Guidelines.

[83] *See supra* note 44.

Designated Order Turnaround ("DOT") system. The Commission is satisfied that the NYSE's present surveillance and examination programs are capable of detecting any such improper trading. The Commission also notes that the Rule 92 restrictions still apply when a CBMM seeks to "hit" the then-prevailing bid or offer for a proprietary account (if not pursuant to its affirmative obligations), or to break up a facilitation. Accordingly, in light of the unique market structure of ESPs and the institutional nature of the market, the Commission finds that the NYSE's limitation of Rule 92 is consistent with the Act.

2. *Rules of Priority, Parity and Precedence.* Pursuant to NYSE Rule 805, the ESP basket market will trade under a regime of strict price and time priority. Accordingly, for purposes of determining ESP execution priorities, there is no distinction between proprietary and customer basket order.[84]

The Commission agrees with the Exchange that rules of time and price priority are appropriate in an institutional basket product that will trade in lots of $5 million. Coupled with the "open book" environment of the ESP basket market, rules of time priority should promote a more "transparent" ESP market by providing institutions with an incentive to place and leave orders in the system. This should result in order flow and imbalances being more fully disclosed, thereby ameliorating current market information limitations that may result when program trades are executed in the individual stocks. The alternative of granting institutional customer orders a preference over market maker orders would allow institutions to price broker-dealer CBMMs out of the market without those institutions accepting the affirmative obligations required of market makers. The result might be significant disincentives to market making and less liquidity. Accordingly, because the Commission believes that strict time and price priority provides a fair market regimen for ESPs, the Commission has determined to approved NYSE Rule 805 for a six-month period.

*F. Price Improvement and Price Protection*

As discussed above, the ESP rules provide variations from the usual NYSE market structure in several other instances to accommodate ESP trading. First, the rules for ESP trading allow orders to be executed against opposite-side limit orders on the display unit at their displayed prices, in accordance with price and time priority, until the order is filled, thereby allowing a larger buyer or seller of baskets to "walk the book" without having to effect the execution at a single "clean-up"price.[85]

Second, the proposed ESP rules [86] provide that when a specialist receives a notice indicating the execuion of a Tier 1 or Tier 2 basket trade, he or she must assign that interest at the price specified in the notice to whomever has priority at that time or take or supply the component stock at the execution price.[87]

The Commission believes that the trading rules proposed by the NYSE are consistent with the Act. The "gap pricing" protections set forth in NYSE Rule 127 for block transactions in individual securities are designed to ensure that small public limit orders do not receive block executions inferior to those of the block trade. Application of similar protections in the ESP market would first raise difficult definitional questions as to what was an ESP block. In addition, it is not clear that the sophisticated institutions participating in the ESP market require the identical protections developed for retail public investors in the equity market. In this connection, it is important to note that the absolute time priority provided in the ESP market protects limit orders from being "sized out" by larger orders that would be provided precedence in the market for individual securities. Therefore, the Commission believes that the absence of gap pricing protections for ESP limit orders in light of the institutional nature of the market and the advantage provided limit orders by time priority is appropriate.

Similarly, the Commission believes that the special rules regarding Tier 1 and Tier 2 specialist executions are appropriate because it is reasonable to award the benefit of any improved price to the participant in the market for the component stock, who is much more likely to be a retail customer interested in receiving the best price for his order, and because a basket customer is likely to view a speedy execution with price certainty as more important than a relatively insignificant improvement in the price of a $5 million basket.

*G. Exemption Requests*

The Exchange has requested that the Commission grant exemptions from Rules 10a–1, 10b–6, 10b–7, 10b–8, 10b–10, 10b–13, 15c1–5, and 15c1–6 under the Act [88] to facilitate trading in ESPs.[89]

Rule 10a–1 provides that short sales [90] of exchange-listed securities may not be effected at a price less than the price at which the immediately preceding sale was effected ("minus tick") or at a price equal to the last sale if the last preceding transaction at a different price was at a higher price ("zero-minus tick"). The Exchange has requested relief from Rule 10a–1 in three areas. First, the Exchange seeks an exemption form Rule 10a–1 as it would apply to the individual component stocks traded in an ESP transaction and to transactions in the ESPs themselves. Second, the Exchange requests an exemption analogous to the "block positioner" exemption in paragraph (e)(13) of Rule 10a–1.[91] The requested exemption would permit CBMMs selling stock acquired in an ESP transaction to disregard, when netting positions for purposes of Rule 10a–1, a short position that is the subject of one or more offsetting positions created in the course of bona fide arbitrage, risk arbitrage, or bona fide hedging activities. Third, the Exchange is requesting relief from the operation of the short sale rule as it would apply to a specialist's obligation to trade for its own account when the specialist participates in a Tier 1 or a Tier 2 execution through a "passive sale," *i.e.*, when the specialist is acting

[84] In contrast, Rule 11a1–1(T)(a)(3) under the Act, 17 CFR 240.11a1–1(T)(a)(3), generally provides an exemption from Section 11(a) conditioned on providing customer orders priority over orders of the exchange member handling those orders at the same price. Members whose ESP orders are subject to Section 11(a)'s limitations will have available the exemptions provided in Rule 11a2–2(T) as well as Rule 11a1–1(T) in executing these orders.

[85] *See* NYSE Rule 808(f).

[86] *See* proposed NYSE Rule 104.11A(b).

[87] Moreover, although NYSE Rule 812 requires a CBMM to guarantee the purchase or sale of a basket at the price at which he "stops" a basket, the Exchange is not requiring the BBB to "stop" basket market orders to achieve price improvement. Because of the fact that ESP baskets trade in lots of $5 million, the Commission believes it is reasonable for the Exchange not to require the BBB to stop basket orders in what may prove to be an illusory attempt at achieving price improvement, because the BBB would ultimately bear the risk of any adverse market moves whenever it would stop a basket commitment.

[88] 17 CFR 240.10a–1, 240.10b–6, 240.10b–7, 240.10b–8, 240.10b–10, 240.10b–13, 240.15c1–5 and 240.15c1–6 (1989).

[89] *See* letters from Donald J. Solodar, Senior Vice President, NYSE, to Larry Bergmann, Associate Director, SEC, dated September 25 and October 12, 1989.

[90] A short sale is defined in Rule 3b–3 under the Act, 17 CFR 240.3b–3, as any sale of a security that the seller does not own or any sale that is consummated by the delivery of a security borrowed by, or for the account of, the seller. Rule 3b–3 provides further that a person shall be deemed to own a security only to the exent that that person has a net long position in that security.

[91] *See* Securities Exchange Act Release No. 20715 (March 6, 1984), 49 FR 9414 (March 13, 1984).

as the seller of last resort who is required to fulfill a trading commitment at a given price.

Rule 10b–6 limits the ability of underwriters, issuers, or certain other persons to bid for or purchase a security being distributed, or a related security, during the distribution of that security. Rule 10b–7 regulates stabilizing transactions in connection with an offering of securities. Rule 10b–8 restricts bids and purchases of rights, and offers and sales of the underlying stock, by persons participating in a rights offering. Rule 10b–10 requires broker-dealers to provide customers with a written confirmation that includes the identity, price, and number of shares or units of a security purchased or sold by the customer.[92] Rule 10b–13 prohibits persons making a tender offer for a security from purchasing or arranging to purchase that security otherwise than pursuant to the tender offer. Rule 15c1–5 requires a broker-dealer to disclose that it has a control relationship with an issuer before executing a transaction in that issuer's securities. Rule 15c1–6 requires a broker-dealer to disclose any participation or financial interest in the distribution of a security, at or before the completion of a transaction in such security for the account of a customer.

The Commission believes that transactions in ESPs generally do not involve the same concerns that are applicable to transactions in individual stocks, and that appropriate conditional relief from Rules 10a–1, 10b–6, 10b–7, 10b–8, 10b–10 is necessary if the benefits of ESP trading are to be achieved. With respect to Rules 15c1–5 and 15c1–6, in recognition of the unique nature of ESP transactions, the Division has determined that transactions in ESPs are unlikely to give rise to the abuses the rules were designed to prevent and accordingly, the Division is taking a no-action position under these rules. Accordingly, the Commission's staff today has issued a letter granting certain exemptions and taking certain no-action positions with respect to the treatment of transactions in ESPs under these rules.

*H. NYSE Rules 95, 96, 97, 104, 107, 112 and 312(g)*

A variety of Exchange rules impose transaction restrictions designed to ameliorate conflicts of interest that arise in connection with the intersection of proprietary trading operations and customer operations. Proposed Rule 800(c) would exempt ESP trading from these customer protection rules.

For example, NYSE Rule 95.20 generally prohibits specialists from initiating discretionary orders in specialty stocks. Proposed NYSE Rule 800(c)(ii) would allow a specialist to originate basket orders for discretionary accounts even if the basket contains his specialty stocks, despite the otherwise contrary provisions of NYSE Rule 95.20. Similarly, a member who holds or has granted an option on a basket's component stock may still initiate proprietary basket transactions under Rule 800(c)(iii), despite the otherwise contrary operation of Rule 96.

Exchange Rule 97 generally restricts block positioners from trading in a manipulative manner that would be inconsistent with the informational advantages derived from the intersection of their customer and proprietary trading operations. Proposed Rule 800(c)(iv) exempts a member from the operation of the otherwise applicable tick tests contained in Rule 97 if he or she has acquired a long stock position as a result of a member's basket transactions.

Additionally, a stock specialist may initiate basket transactions under Rule 800(c)(v), even if the basket contains a specialty stock, despite the otherwise contrary provisions of Rule 104. Nevertheless, under Rule 800(c)(vi), a specialist, registered competitive market maker or competitive trader must include in any calculation of his aggregate stock position any stock that he has acquired by means of one or more basket transactions for the purposes of the stock trading limitations imposed by Rules 104, 107 and 112.

Finally, NYSE Rule 312(g) places restrictions on an Exchange member corporation effecting transactions, or making recommendations, in its own securities or in securities issued by any corporation controlling, controlled by, or under common control with the member corporations (collectively, an "affiliated issue"). The rule is designed to protect against potential conflicts of interest and potential misuses of corporate information. Applied literally to basket trading, however, the rule would prohibit a member firm that is affiliated to any of the component companies included in a standardized market basket product approved by the Commission from: (1) Making recommendations or effecting customer transactions in baskets, (2) making a market in baskets, or (3) executing "split" orders for customers in baskets if the customer wanted to exclude the stock of the affiliated issuer, because the member firm would have to buy or sell the stock for its own account to accommodate the customer.

Paragraph (vii) of NYSE Rule 800(c) would apply Rule 312(g) to market baskets [93] as follows: (1) Member corporations of the NYSE would be permitted to recommend and effect customer market basket transactions without restrictions; (2) an Exchange member corporation that is a market maker in stock baskets (*e.g.*, CBMMs on the NYSE or other exchange-designated basket market makers) would be permitted to buy and sell baskets for proprietary accounts without restrictions; (3) if an Exchange member that is a CBMM or other exchange-designated basket market maker liquidates one or more component stock positions with respect to a basket that it holds in its market-making inventory, the CBMM or such other exchange-designated basket market maker will have until the close of the day following such action to liquidate its position in the stock of an affiliated issuer; and (4) if an Exchange member corporation that is neither a CBMM nor a basket market maker designated on another exchange acquires a position in the stock of an affiliated issuer through its execution of a split order, the member corporation would have until the close of business on the day following the transaction to dispose of the position in the stock of the affiliated issuer.

The Exchange contends that the Rule 800(c) provisions appropriately balance customer protection concerns against potential conflicts that could arise while members and member organizations service customers and provide liquidity to the basket market. Consistent with the no-action position taken by the Commission staff with regard to the operation of Rules 15c1–5 and 15c1–6 under the Act,[94] the Commission believes that the amended operation of Exchange Rules 95, 96, 97, 104, 107, 112 and 312(g) as they relate to ESP trading strike an appropriate balance between customer protection concerns and any potential trading abuses by members and member organizations, because investors will make basket trading decisions based on the market as a whole and not on stock-specific criteria, and any proprietary trading undertaken by a member or member organization in this connection does not entail the

[92] *See* notes 54–58, *supra* and accompanying text for a description of the NYSE's proposed methodology for allocating an execution price to each component stock in a basket.

[93] Amendment No. 3 to the Exchange's rule filing clarifies that the operation of NYSE Rule 800(c)(vii) is generic in its application to baskets traded on other national securities exchanges.

[94] *See* note 92 *supra* and accompanying text.

manipulative concerns that these Exchange rules are intended to address in the context of individual stock trading.

**I. Transaction and Quotation Data Reporting**

Pursuant to Rule 11Aa3–1 under the Act,[95] the NYSE is required to collect and disseminate transaction data on securities listed and traded on the Exchange. The NYSE will provide trading facilities through the ESP service for reported securities (as components of baskets) but will not report transactions in the component stocks, as is required by Rule 11Aa3–1.[96]

The Exchange intends to disseminate basket last sale information and quotations to market data vendors, thereby assuring that all ESP market participants will have ready access to the ESP transaction reports and quotations. Tier 1 and Tier 2 executions in the NYSE-listed component stocks will be disseminated to market data vendors in the same manner as individual executions in the component stocks. In addition, proposed Rule 803 will impose on members obligations consistent with those imposed by Rule 11Ac1–1 under the Act [97] and Exchange Rule 60 with respect to the quotations for individual stocks. Basket quotations always will be firm under Rule 803, except when the market is in a call mode. However, outside of the existing markets in the individual component stocks trading on the Exchange in compliance with Rules 11Aa3–1 and 11Ac1–1, no quotes or last sale reporting will be available for the individual constituent stocks that comprise a stock basket when it trades under the ESP market structure, unless an order is executed against a Tier 1 or Tier 2 aggregate quotation.

For the frist six months of ESP trading, the NYSE will not disseminate on a consolidated basis the total trading volume for each of the component stocks represented by ESP transactions either during or after the trading day. The NYSE believes that its proposal to exclude end-of-day transaction volume in the ESP component stocks from the consolidated transaction volume figures is appropriate to provide the Commission and the Exchange with an opportunity to assess whether the absence of individual basket component stocks in the end-of-day consolidated volume figures merits modification in light of actual trading experience.[98] The NYSE has, however, committed at the end of the first six months of basket trading to submit to the Commission a proposed rule change that will provide for the inclusion of end-of-day transaction volume in the ESP component stocks in the consolidated transaction volume figures.[99]

Ney, the Roberts, and Dr. Roger criticized the proposed configuration of ESP transaction reporting, which would not include price and volume breakdowns in the component stocks of a basket trade. Because ESP trades are executed at aggregated prices, the Exchange contends that a last sale reporting requirement for the price and volume of a basket's individual component stocks does not translate well into the ESP context.

The Commission agrees with the Exchange that, with the exception of specialist Tier 1 and Tier 2 executions, real-time last sale and volume reporting for the individual component stocks underlying a basket trade would not be appropriate in the ESP context. Pricing of the baskets is based on the aggregate value of the underlying securities and thus any assignment of a "price" to any of the component stocks in the basket would be arbitrary. For these reasons, the Commission believes that the proposed reporting requirements, even though they deviate to a certain extent from the requirements of Rule 11Aa3–1, are, nevertheless, consistent with the Act. In addition, the Commission believes that a six-month delay in implementing consolidated reporting of end-of-day transaction volume in the basket component stocks is reasonable in order to determine whether such consolidation would provide useful information to market participants.

The Commission believes that conditional relief from Rule 11Aa3–1 for ESP transactions is necessary and appropriate. Accordingly, the Commission has issued an order exempting the NYSE from certain requirements in that rule with respect to transactions in ESPs.[100]

*J. Surveillance Procedures*

The proposed ESP market structure raises various surveillance concerns. The Commission believes that the Exchange's enhanced ESP surveillance procedures should capture any potentially abusive trading practices of market participants attempting to profit unfairly from the information advantages that their fiduciary and market positions entail. In this connection, the Commission expects the Exchange to exercise its Rule 814 authority to surveil ESP training through routine post-trade monitoring, program trading reports, revamped Form 81s, intermarket surveillance, its surveillance agreement with the Chicago Mercantile Exchange and the Exchange's own frontrunning circular. The Exchange should be able to monitor and police derivative activity relating to ESP trading and program trading, as well as questionable transactions that may relate to customer conflicts of interest. Finally, the Commission believes that the Exchange should use its existing procedures to discipline members and member organizations that abuse their fiduciary positions and informational advantages to the detriment of customers and the public interest.

**V. Conclusion.**

The Commission believes that the ESP market structure balances appropriately the competing concerns of various Exchange constituencies in a manner consistent with just and equitable principles of trade. Given the institutional character of stock portfolio trading that ESP trading is designed to capture, the Commission agrees that the Exchange's chosen market structure, which accords institutions strict price-time priority, is a fair and competitive market structure. Finally, the Commission's section 19 authority and the Rule 19b–4 process allow the Commission and the Exchange sufficient flexibility to modify ESP trading in light of actual trading experience and any future developments that materially affect the ESP market structure.[101]

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[95] Rule 11Aa3–1, the transaction reporting rule, generally requires that exchanges file transaction reporting plans governing the collection, processing and dissemination of last sale data on securities traded on the exchanges. 17 CFR 240.11Aa3–1 (1989).

[96] By separate order, The Commission has granted the NYSE an exemption from this requirement. *See* Securities Exchange Act Release No. 27390 (October 26, 1989).

[97] 17 CFR 240.11Ac1–1 (1989). Rule 11Ac1–1 imposes quote collection obligations on exchanges and associations and requires broker-dealer quotations, subject to specific exceptions, to be firm at the price and size publicly disseminated. The Commission notes that Rule 11Ac1–1 applies to quotations for ESP baskets.

[98] *See* letter from Richard A. Grasso, President and CEO, NYSE, to Brandon C. Becker, Associate Director, Division of Market Regulation, SEC, dated October 4, 1989.

[99] *Id.* The Exchange has reserved the right to provide views and information that would express its continued opposition to the addition of end-of-day transaction volume in the ESP component stocks in the consolidated transaction volume figures.

[100] *See supra* note 96.

[101] The Commission believes that the 30 day comment period that accompanied publication of the Exchange's proposal and the Commission's continued willingness to entertain all comments that precede its action as providing an adequate public forum to vet all the issues and concerns that may have accompanied the ESP proposal. Accordingly, it is unnecessary to hold public hearings on the NYSE proposal.

Accordingly, based upon the aforementioned factors, the Commission finds that the Exchange's proposed rule change relating to the trading of ESP stock baskets is properly within its jurisdiction and consistent with the requirements of sections 6(b)(4) and (5) and the rules and regulations thereunder.[102]

The Commission finds good cause for approving those portions of the NYSE's proposal that were amended by Amendments 1, 2, and 3 prior to the thirtieth day after the date of publication of the amendments in the Federal Register. The original filing was the subject of a 35-day notice period that generated several comment letters. The amendments made only minimal changes to the proposal as noticed. In addition, accelerated approval is necessary because ESP trading is scheduled to begin on October 26, 1989. Because of the Commission view of the benefits that may result from the trading of a basket of stocks on a national securities exchange, the Commission believes a good cause finding is justified.

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC. Copies of such filing also will be available for inspection and copying at the principal office of the above-referenced self-regulatory organization. All submissions should refer to the file number in the caption above and should be submitted by November 21, 1989.

[102] The Commission notes that approval of the proposed rule change is based upon a determination that the terms of ESP basket trading are consistent with the requirements of the Act. If the terms of the ESP basket market structure, including the index multiplier, are changed in any material way, however, it would be necessary for the NYSE to submit a proposed rule change to the Commission in order to afford the public an opportunity to review the proposed modification and for the Commission to review its prior determination.

It is therefore ordered, pursuant to section 19(b)(2) of the Act,[103] that proposed Rules 805 and 806 are approved for a six-month period ending on April 30, 1990 and that the remaining proposed rule changes be, and hereby are, approved.

By the Commission.

Dated: October 26, 1989.

**Jonathan G. Katz,**

*Secretary.*

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**[Rel. No. 34-27383; File No. SR-CBOE-88-20]**

## Self-Regulatory Organizations; Chicago Board Options Exchange, Inc.; Order Approving Proposed Rule Change and Filing and Order granting Accelerated Approval of Amendments to Proposed Rule Change Relating to Market Basket Trading

### I. Introduction

On may 12, 1989, the Chicago Board Options Exchange, Inc. ("CBOE" or "Exchange") filed with the Securities and exchange Commission ("Commission" or "SEC"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b-4 thereunder,[2] a proposed rule change that establishes Exchange rules to govern the trading of "market basket contracts" on the floor of the Exchange.

The proposed rule change was published for comment in Securities Exchange Act Release No. 26882 (June 1, 1989), 54 FR 24442 (June 7, 1989).[3] The Exchange subsequently submitted amendments to its proposed rule change.[4] No direct comment letters were received regarding the proposed rule change, although commentators did discuss the CBOE proposal in responding to proposals by other exchanges to trade baskets of stock.[5]

[103] 15 U.S.C. 78s(b)(2) (1982).

[1] 15 U.S.C. 78s(b)(1) (1982).

[2] 17 CFR 240.19b-4 (1989).

[3] The proposed rule change published for comment was Amendment No. 2 to SR-CBOE-88-20 and was filed with the Commission on May 12, 1989. The CBOE originally filed SR-CBOE-88-20 with the Commission on November 1, 1988, and filed Amendment No. 1 to the filing with the Commission on January 13, 1989.

[4] The Commission received Amendments No. 3, 4, and 5 to the CBOE proposal on September 21, 1989, September 26, 1989 and October 6, 1989, respectively. The Exchange requested accelerated approval of File No. SR-CBOE-88-20, as amended. The notable changes made in these amendments are described in this order.

[5] The New York Stock Exchange, Inc. ("NYSE") filed with the Commission a proposal that sets forth a framework for trading "Exchange Stock Portfolios" ("ESPs"), standardized baskets of stocks, on the floor of the NYSE. *See* Securities Exchange Act Release No. 26906 (June 8, 1989), 54 FR 25516 (June 15, 1989). Additionally, the Midwest Stock Exchange, Inc. ("MSE") filed with the Commission a proposal to establish a secondary trading session for the execution of transactions in portfolios of securities. *See* Securities Exchange Act Release No. 26887 (June 1, 1989), 54 FR 24779 (June 9, 1989). For a discussion of the comments applicable to the CBOE proposal, see *infra* notes 34-39 and accompanying text.

### II. Background and Description of Market Baskets

#### *A. Description and Terms of Market Basket Contracts*

A CBOE market basket contract enables the trading of standardized baskets of stocks at an aggregate price in a single execution on the Exchange's floor.[6] A market basket trade will result in a transfer to the buyer of ownership of each of the component stocks. When the transactions is completed, the buyer will be entitled to all rights attending ownership of the basket stocks (including rights to vote and receive dividends), and will be free to sell or hold each stock separately.

That same buyer may later sell the basket stocks he acquired, either individually or through another market basket trade. In order to sell the basket stocks through market basket contracts, they must be identical as a group with the standardized basket at the time of sale.[7] If a buyer has sold individual basket stocks and has not separately reacquired them, or if changes have been made to the index since the basket was purchased, the buyer who then decides to sell a basket will have to "rebalance" his position so that he can deliver all the current market basket stocks in their proportionate number of shares.[8]

[6] The number of shares of individual stock shall be determined by dividing the outstanding float of the particular security by the divisor of the index and multiplying this value by the index multiplier, subject to the requirement that any fractional amount is to be rounded to the nearest whole share. For example, if XYZ Corp. has 130.257 million shares outstanding and the divisor for the S&P 500 (expressed to four decimal places) is 3022.4168 million, the weighted number of shares for XYZ Corp. would be 0.0431 (130.257 million ÷ 3022.4168 million). The purchaser of the S&P 500 market basket would receive 216 shares (.0431 × 5,000, the index multiplier for the basket contract) of XYZ stock, together with the stock of the other companies whose shares comprise the index in amounts corresponding to their respective weighting in the index.

[7] The process will be simpler for offsetting transactions that occur during a single trading day. Specifically, the Exchange proposes that if a customer has purchased and sold the same market basket contract on the same date, then the customer will receive a confirmation statement reflecting the terms of such purchase and sale, including the amount of any credit or debit to the customer's account.

[8] If a change occurs in the composition of either the S&P 100 or S&P 500, the composition of the

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The CBOE proposes to trade market basket contracts based on the Standard & Poor's 100 Stock Price Index ("S&P 100") and the Standard & Poor's 500 Stock Price Index ("S&P 500").[9] The Exchange proposal provides that determinations as to the composition of the index, the index divisor, and the number of shares outstanding of each of the component stocks shall be determined by the Exchange after the close of business on the date preceding the trade date.[10] The index multiplier for both the S&P 100 basket ("OBE") and S&P 500 basket ("MBX") contract is 5,000, and, accordingly, the value of a single OBE and MBX contract is approximately $1,610,000 and $1,730,000, respectively.[11]

*B. Market Structure for the Trading of Market Basket Contracts*

1. DPM and Market Makers

The Exchange proposes to trade market basket contracts under its Designated Primary Market Maker ("DPM") program. In acting as a market maker, the DPM will fulfill all the obligations of a market maker along with the other market basket market makers that are at the market basket post. Additionally, the DPM will fulfill the responsibilities of the Order Book Official by, among other things, maintaining the limit order book and displaying bids and offers in the book.[12]

The Exchange also proposes to appoint market makers to trade the market basket contracts. These market basket market makers will supplement the DPM in making markets and thereby provide additional liquidity to the market basket post. Under the proposal, market makers in market basket contracts will be obligated to perform a similar function to market makers in classes of options. In general, a market maker will be expected to engage in a course of dealings reasonably calculated to contribute to the maintenance of a fair and orderly market. Specifically, market basket market makers, when present in the trading crowd, will be expected to compete with other market makers to improve the markets of market basket contracts. Moreover, when present in the trading crowd, the market basket market makers are expected to update market quotations in response to changed market conditions. In addition, the market basket market makers will be expected to make markets and, at the request of another member or the DPM, provide bid and/or offer quotations that are subject to immediate acceptance for one contract. The Exchange believes this one-contract requirement is appropriate based on the size of each market basket contract.[13] Moreover, if a bid and/or offer quotation larger than one contract is displayed, then the trading crowd (including the DPM) will be required to sell or buy such greater number of contracts.

2. Financial Requirements for DPM and Market Makers

In addition to the requirement of a Clearing Member Guarantee,[14] the Exchange proposes to establish financial requirements for the market basket DPM and market makers. Specifically, the CBOE proposes to require the market basket DPMs to have $10,000,000 in excess net capital.[15]

The Exchange also proposes to require a market maker to have $450,000 of net liquidating equity in order to be eligible to trade market basket contracts.[16] In addition to this initial capital requirement, the CBOE proposal contains a maintenance requirement for market makers of $225,000 net liquidating equity. The net equity requirement can be met from either an individual account, joint account, [17] or group account.[18] According to the CBOE, this net liquidating equity standard does not require that specific funds be dedicated to market basket trading; rather, the standard is designed to ensure that only market makers with a substantial equity position are allowed to trade market basket products.

The Exchange believes these financial requirements will ensure that participating market makers have sufficient capital to withstand day-to-day price movements in the securities comprising the market baskets.[19]

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stocks that comprise the applicable market basket will change the following trade day. Accordingly, changes in the composition of the market baskets will complicate liquidating transactions by market participants and investors.

[9] Section 12(a) of the Act generally prohibits the trading of a security on a national securities exchange unless the security is registered on the exchange. Upon application by an exchange and Commission approval, however Section 12(f)(1) of the Act and Rule 12f-1 thereunder authorize the Commission to extend unlisted trading privileges ("UTP") to any security registered pursuant to Section 12 (b) or (g) of the Act. The CBOE has requested UTP in the companies comprising the S&P 100 and S&P 500 Index.

[10] The CBOE states that index information will be readily available to investors. For Example, S&P's Index Alert System provides current information about the composition and capitalization weighting of the S&P 100 and 500 Indexes. The Exchange will maintain in files available to the public current data on the composition of the component stocks and their relative representation in the indexes.

[11] Based on S&P 100 and S&P 500 Index values on September 8, 1989.

[12] In addition, the DPM will be required continuously to display the highest bid and the lowest offer voiced in the trading crowd, execute customer orders left on his book, and disclose, upon request, information regarding the depth of the market.

[13] Interpretation .05 to CBOE Rule 8.7. establishes a similar bidding/offering five-contract requirement for options market makers. The monetary value of five OEX contracts, however, is approximately $20,000, in comparison to a value of $1,600,000 for one MBX basket.

[14] CBOE Rule 8.5 provides that no market maker shall make any transaction on the floor of the Exchange unless a Letter of Guarantee has been issued for such member by a clearing member, approved by the Options Clearing Corporation ("OCC"), and filed with the Exchange. With respect to market basket contracts, a market maker Letter of Guarantee must acknowledge that the market maker is approved to trade market basket contracts. Additionally, special notations will be placed on the badges of market makers that are qualified to trade market baskets.

[15] The Exchange reserves the right to waive this requirement in unusual circumstances, such as permitting a DPM, whose capital drops below the capital requirement, to continue its function where the markets are volatile or disruptive, and no other Exchange member reasonably can be expected to fulfill the DPM function. *See* letter from Mary L. Bender, First Vice President, Division of Regulatory Services, CBOE, to Howard Kramer, Assistant Director, Division of Market Regulation, SEC, dated September 27, 1989. For the purpose of this requirement, net capital shall be computed in accordance with the requirements of Rule 15c3-1 under the Act. Excess net capital shall mean the amount of net capital in excess of the amount required under Rule 15c3-1.

[16] By contrast, a member acting as a floor broker will be required to have $225,000 of net liquidating equity in order to qualify to trade market basket contracts. Net liquidating equity is defined as the sum of the net value of a market maker's long and short positions adjusted for any credit or debit balance. *See* Rule 15c3-1(c)(2)(x)(B)(2).

[17] *See* letter from Margaret E. Wiermanski, Director, Credit Policies and Special Projects, Department of Financial Compliance, CBOE, to Mark McNair, Staff Attorney, Division of Market Regulation, SEC, dated September 1, 1989. A joint market maker account is an account in which more than one market maker participates. The Exchange approves all joint accounts and, for surveillance purposes, each joint account is assigned an acronym that begins with the letter "Q." If a joint account trades market basket contracts, then only one individual market maker can trade market basket contracts for the benefit of the joint account at any time unless the Exchange grants an exception.

[18] A group account involves several traders trading for the same market maker account, where the equity in each trader's account is aggregated to determine the equity position of the group account. For example, broker-dealer *ABC* is a market maker firm that has employed four individuals to trade on its behalf ("nominees") at the Exchange. Each nominee has an acronym and an account, but the accounts identify *ABC* as the ultimate beneficiary. For purposes of the minimum capital requirements, the nominee accounts are combined to determine how many, if any, nominees would be permitted to trade market basket contracts for the group account For example, if the combined net liquidating equity for *ABC* is $1,000,000, then the market maker firm could have no more than two nominees trading market basket contracts at the same time.

[19] Specifically, the Exchange examined the daily close-to-close price moves for the Indexes for the last three years. The Exchange, consistent with its methodology for assessing risk in other areas such as margin requirements, sought to develop financial requirements that would meet the close-to-close

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Moreover, the Exchange notes that there are a significant number of OEX and SPX Options market makers [20] who currently meet the proposed financial requirements that would be eligible to trade market baskets.[21] The Exchange proposed an initial entry requirement higher than the maintenance level to ensure that day-to-day price changes in equities do not prevent market makers from committing equity to trading market basket contracts.[22]

3. Location of the Market Basket Posts

The Exchange proposes to trade market baskets adjacent to the posts where index options are traded. The Exchange believes that this arrangement will enhance the efficiency of both markets by minimizing price disparities between market baskets and index options. Additionally, the Exchange believes this arrangement will facilitate hedging and other trading strategies involving both types of index contracts. Moreover, the Exchange believes that this arrangement will not present any of the potential abuses generally associated with side-by-side trading because both the market basket and index options contracts are priced derivatively in relation to the prices of the underlying stocks in the principal markets where such stocks are traded.

*C. Application of Exchange Rules to Market Basket Contracts*

The Exchange proposes to apply most of its rules for options to the trading of market baskets. The Exchange believes that these rules are suitable to the trading of market baskets and will assist in the maintenance of a fair and orderly market for the market basket contracts. Because a market basket contract is a stock product and not an options contract, however, there are areas where the Exchange proposes to modify the applicable Exchange rules.

1. Net Capital Requirements

Broker-dealers, at the end of the trading day, will be long or short the component stocks as a result of the market basket transactions. Accordingly, the Exchange notes that the normal "haircuts" for stocks set out in the Commission's net capital rule will apply to transactions in market basket contracts. Additionally, the CBOE notes that positions in the component stocks resulting from the trading of market baskets will be subject to lesser haircuts when these positions are offset by broad-based index options or futures contracts.[23]

2. Customer Protection Rules

The Exchange proposes to apply substantially all of its customer protection rules to market basket trading.[24] In considering the applicability of its customer protection rules, the Exchange notes that the dollar value of the unit of trading for market baskets most likely will limit the interest in these contracts only to the largest and most sophisticated institutional investors. Accordingly, the Exchange believes that these institutional investors may not require the same protections as do retail investors. Nevertheless, the Exchange proposes that market basket transactions will be subject to Exchange rules covering supervision, suitability, restrictions on acting for persons affiliated with exchanges or other members, assuming losses, communications with customers, and complaints.[25] With respect to the confirmation of customer transactions, member organizations must provide details, not only as to the market basket transaction itself, but also information as to the identity, price and number of shares of each of the component stocks that comprise the basket.[26] The CBOE proposal provides that members who participate in the Institutional Delivery System ("IDS") of the Depository Trust Company may use the confirmations generated by IDS to satisfy customer confirmation requirements.[27]

3. Position and Exercise Limits

The Exchange believes that the position limits and exercise limits applicable to options contracts should not be applicable to market basket contracts because there will be no open interest in, and no exercise of, market basket contracts. Instead, all transactions in market baskets will be settled by the delivery of the component stocks. Thus, the Exchange believes that exercise limits have no application to market baskets. Additionally, the Exchange believes that because there are no numerical restrictions on the ownership of individual common stock, the position limits that apply to transactions in options should not apply to market basket transactions.

4. Margin

Because the purchase of a market basket contract results in the physical delivery of each stock composing the basket, Regulation T requires a 50% margin requirement. Moreover, the applicable Exchange rules provide for maintenance margin requirements of 25% and 30% for long and short positions, respectively. In this regard, the CBOE received a staff opinion from the Federal Reserve System that the

price moves for 95% of trading days. Moreover, the CBOE, in calculating market maker exposure, assumed the market maker would have an unhedged position of ten market basket contracts on the same side of the market and such an exposed position would be unusual for a market maker. Accordingly, the Exchange believes the proposed $450,000 financial requirement for market makers, which would cover 95% of one day price moves based on closing prices for 10 MBX baskets, is sufficient and appropriate. *See* letter from Mary Bender, First Vice President, Division of Regulatory Services, CBOE, to Brandon Becker, Associate Director, Division of Market Regulation, dated August 21, 1989.

[20] "OEX" and "SPX" are options contracts traded on the Exchange and based on the S&P 100 Index and S&P 500 Index, respectively.

[21] The Exchange represents that as of July 1989, with respect to OEX and SPX traders with monthly trading volume in excess of 10,000 contracts, approximately 70 traders maintain net liquidating equity of $225,000 or more, of which 50 traders maintain net liquidating equity greater than $450,000. *See* CBOE letter, *supra* note 19.

[22] A trader falling below the maintenance level will be permitted only to effect liquidating market basket transactions as a market maker. As long as his account maintains positive equity, however, he would not be precluded from trading option contracts on the Exchange.

[23] *See* letter from Mary L. Bender, First Vice President, Division of Regulatory Services, CBOE, to Michael Macchiaroli, Assistant Director, Division of Market Regulation, dated January 27, 1989.

[24] Because the buyer is acquiring a basket of securities rather than an option, delivery of an options disclosure document is not required.

[25] The original CBOE proposal included a requirement that a member organization provide a customer, before or contemporaneous with the first written confirmation of a market basket transaction, a written description, substantially in the form provided by the Exchange, of the mechanics and risks of trading in market basket contracts. The Exchange has amended its proposal to delete this requirement. The Exchange believes that this requirement is not necessary because only sophisticated institutional investors will trade the product. Additionally, because market basket contracts are not options, the CBOE further amended its proposal to make the rules for market basket contracts relating to dealing with the public more closely comparable to the rules of other self-regulatory organizations that regulate the trading of stocks. Specifically, many CBOE rules were adopted in recognition that the unique attributes of options required special safeguards and procedures that are not required for a customer's non-options accounts and transactions. For example, the CBOE proposal provides that certain rules relating to the opening of customer options accounts, such as registration of options principals and delivery of the options disclosure document, will not be applicable to market baskets.

[26] Such information is required by the provisions of Rule 10b-10 of the Act. The Exchange's proposed Rule 26.10 provides that each confirmation shall show the class of a market basket contract, contract price, number of market basket contracts purchased or sold, number of individual component underlying stocks, commissions, date of transaction and settlement date, whether the transaction is a purchase or sale, and whether it is a principal or agency transaction.

[27] The CBOE proposal also provides that the derived prices of component stocks of a market basket contract shall be based upon the market basket transaction price and calculated in accordance with an algorithm provided by the CBOE.

margin requirements applicable to exchange-traded equity securities would be appropriate for market basket contracts.[28]

The Exchange also proposes to clarify the margin rules applicable to market makers in market basket contracts. Specifically, the Exchange believes that market basket market makers should be entitled to "good faith margin" treatment for all transactions in market basket contracts, as would any other specialist who makes a market in a particular security.[29] Movever, the Exchange believes that Regulation T affords good faith margin treatment for positions in broad-based index options taken by market basket makers, provided that the market maker is using the options to hedge stock positions acquired through market basket trading and he is a market maker in both the market basket and the index option. Accordingly, index options market makers who are not market makers in market baskets would not receive good faith margin treatment for market basket transactions that hedge their index options positions.[30]

*D. Clearing and Settlement of Proposed Contracts*

The CBOE proposed that OCC will perform the clearing and settlement functions for the Exchange's market basket products.[31] OCC has submitted a proposal to the Commission to amend its rules to enable it to perform such functions for the trading of baskets of stock.[32]

Specifically, the Exchange proposes that the buyer of the market basket contract will be obligated to purchase and the seller will be obligated to sell a quantity of shares of each component stock of the designated index. The settlement of the purchase and sale of the underlying component stocks will take place on the fifth business day after trade date in accordance with the rules of OCC and OCC's correspondent stock clearing corporations.[33]

**III. Comments Received**

The Commission did not receive any comment letters in response to its request for comments on the proposed rule. The Commission, however, did receive responses to a similar proposal by the NYSE to trade baskets of stock.[34] Specifically, the Commission received a comment letter from the Commodity Futures Trading Commission ("CFTC") that stated that the NYSE market basket proposal was not a futures contract under the Commodity Exchange Act, and a Chicago Board of Trade ("CBT") letter that commended the NYSE proposal to trade baskets of stock.[35]

The Commission also received comment letters from the Alliance of Floor Brokers ("AFB"), whose membership is predominately comprised of NYSE floor brokers, on both the NYSE proposal [36] and the MSE proposal.[37] The AFB letters raised objections to each exchange's respective proposal and stated that their reservations extended to the CBOE "ersatz stock" proposal. In general, the AFB claimed not to be unequivocally and arbitrarily opposed to portfolio products, but believed that the regulations and trading practices applicable to individual stock transactions generally should apply to stock basket transactions.

In response to the comment letters, the CBOE argues that although the AFB comment letters argue that both the NYSE and MSE proposals have very specific defects,[38] neither AFB letter specifically discussed any shortcomings in the CBOE proposal.[39] Additionally, the CBOE letter notes that many of the market structure issues identified in the AFB comment letters are specifically addressed in the CBOE proposal. Specifically, the CBOE notes that because of its concern with order exposure and competition, the CBOE proposal utilizes a competitive market maker and DPM trading system to trade market baskets. The CBOE also notes that all the present safeguards to ensure public priority in options trading will apply to basket trading. In particular, for example, there will be a public limit order book in place and basket orders will be routed via the CBOE's computerized "Order Routing System."

The CBOE also responded to AFB criticisms regarding possible exemptive relief from the short sale rule for market basket products. Specifically, the CBOE believes that sales of market baskets should be exempted from the "tick test" of Rule 10a–1 under the Act because the underlying rationale for the Rule is not applicable to market basket trading. Moreover, the Exchange notes that application of the tick test to market baskets could effectively preclude market basket trading during a declining market, when the "shock absorbing" benefits of market basket trading would be most useful.

**IV. Discussion**

*A. Introduction*

After careful consideration of the comments received, applicable statutory provisions, and relevant policy considerations, the Commission believes that the CBOE's market basket proposal is reasonably designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, provide for an equitable allocation of fees, and, in general, protect investors and the public interest. For these reasons and for the additional reasons set forth below, the Commission finds that approval of the Exchange's proposed rule change relating to the trading of market basket contracts is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange, in general, and the requirements of sections 6(b) (4) and (5) and the rules and regulations thereunder, in particular.[40]

*B. Benefits of Market Baskets*

The Division of Market Regulation's Report on *The October 1987 Market*

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[28] *See* letter from Mary L. Bender, First Vice President, Division of Regulatory Services, CBOE, to Laura Homer, Securities Credit Officer, Board of Governors of the Federal Reserve System, dated May 17, 1989, and letter from Laura Homer, Securities Credit Officer, Board of Governors of the Federal Reserve System, to Mary L. Bender, First Vice President, Division of Regulatory Services, CBOE, dated June 8, 1989.

[29] *See* Regulation T, 12 CFR § 220.12(b)(3)(i).

[30] In this regard, the CBOE received a Federal Reserve Board staff opinion that agreed with the CBOE's application of good faith margin to market basket market makers. *See* Homer Letter, *supra* note 28, at 2.

[31] Presently, OCC provides such functions for the Exchange's options contracts.

[32] *See* Securities Act Release No. 27157 (August 21, 1989), 54 FR 35743 (August 29, 1989). OCC filed amendments to the proposal with the Commission on September 21, 1989 and October 13, 1989.

[33] *See* Securities Exchange Act Release No. 27389 (October 26, 1989).

[34] *See supra* note 5.

[35] *See* letterr from Jean A. Webb, Secretary, CFTC, to Jonathan G. Katz, Secretary, SEC, dated August 17, 1989 and letter from Thomas R. Donovan, President and Chief Executive Officer, CBT, to Jonathan G. Katz, Secretary, SEC, dated July 17, 1989.

[36] *See* letter from Michael D. Robbins, President, AFB, to Jonathan G. Katz, Secretary, SEC, dated July 13, 1989.

[37] *See* letter from Michael D. Robbins, President, AFB, to Jonathan G. Katz, Secretary, SEC, dated August 18, 1989.

[38] The AFB comments regarding the NYSE proposal are discussed in Securities Exchange Act Release No. 27382 ("NYSE ESP Order") (October 26, 1989) at notes 62–63, 68–69 and accompanying text. The AFB comments regarding the MSE proposal are discussed in Securities Exchange Act Release No. 27384 ("MSE Order") (October 26, 1989) at notes 2124 and accompanying text.

[39] *See* letter from Robert P. Ackermann, Vice President, Legal Services, CBOE, to Jonathan C.Katz, Secretary, SEC, dated September 27, 1989.

[40] 15 U.S.C. 78f(b) (4) and (5) (1982).

*Break* ("Staff Report"),[41] and an NYSE-commissioned study entitled *An Overview of Program Trading and Its Impact on Current Market Practices* ("Katzenbach Report"), recommend, among other things, the listing and trading of a basket of stocks on an exchange as a means to enhance market efficiency and, possibly, the market's ability to absorb institutional portfolio trading.[42] As noted in the Staff Report, the creation of one or more posts for the purpose of trading actual baskets or portfolios of stock could alter the dynamics of program trading because the availability of such a basket trading mechanism could, in effect, restore the execution of program trades to more traditional block trading techniques.[43] The Staff Report noted further that, while arbitrage ultimately would flow to indivdiual component stocks, many institutional investors and member firms effecting arbitrage transactions could focus their equity transaction at the basket post where the market makers and trading crowd could provide efficiencies associated with effecting transactions in a portfolio of securities as opposed to individual stocks. This could add an additional layer of liquidity and concentrated capital to the market in order to help absorb the volume and velocity of trading associated with certain index-related trading strategies.[44]

Furthermore, because market baskets will be traded on the Exchange Floor at a single location in an "open book" environment, members in the crowd will be able to see the bid offer spread and inquire as to the depth of the market (*i.e.*, the size of the buying and/or selling interest at each minimum tick away from the prevailing bid and offer for the basket). Program trading order flow entered into the system and imbalances resulting therefrom thus will be disclosed, thereby ameliorating current market information limitations in identifying program trade executions (or overhanging program orders) in the individual stocks.[45] Finally, by creating a trading vehicle for an aggregated basket of standardized protfolios of stocks in a single execution with minimal "execution slippage",[46] the trading of market baskets will provide an efficient mechanism to trade, clear and settle stock baskets.

The Commission believes that the CBOE market baskets will provide institutional investors with a cost efficient means to make investment decisions based on the direction of standardized measures of stock market segments and the stock market as a whole, and may provide stock market participants several advantages over existing methods of effecting program trades of stocks and transactions in portfolios of securities. For the reasons discussed below, the Commission finds that the market structure proposed by the CBOE reasonably is designed to promote just and equitable principles of trade and fair and orderly markets. Furthermore, the Commission believes that market basket trading will not lead unduly toward a more fragmented and volatile market, and that the CBOE proposal to trade market baskets is consistent with the development of an open and competitive national market system.

### *C. Price Dissemination and Reporting*

The CBOE proposes to disseminate basket last sale information and quotations through the Options Price Reporting Authority ("OPRA"), thereby ensuring that all market participants will have ready access to market basket transaction reports and quotations.[47] Rule 11Aa3–1 under the Act requires, however, an exchange to file a transaction reporting plan that would govern transaction reporting of certain securities traded on that exchange. Because CBOE will be trading securities subject to transaction reporting requirements and has not filed a transaction reporting plan, it has requested an exemption from that requirement. The Commission has granted the exemption in Securities Exchange Act Release No. 27391 (October 26, 1989) ("Exemption Order").

CBOE Rule 26.11(e) imposes on Exchange members an obligation to make firm quotes for market basket contracts, which is consistent with the requirement in Commission Rule 11Ac1–1 that quotations be firm.[48] However, no quotes or last sale reports will be generated or disseminated for the individual constituent stocks comprising a market basket during the trading day.

For the first six months of basket trading, the CBOE will not disseminate on a consolidated basis the total trading volume represented by basket trades. While the Commission is aware of the limited usefulness of price information on the underlying securities in the baskets, it believes that dissemination of the share volume in the underlying securities is important information and should be included in the daily consolidated volume for each of the underlying securities. Because this presents a number of technological difficulties for CBOE, CBOE has represented that it will evaluate trading in the baskets over a six-month period and, at the end of that period in consultation with the Commission, CBOE will reconsider whether its volume dissemination prodocures should be modified.[49]

### *D Market Structure*

The Commission believes that the trading structure for market basket contracts is adequate to provide fair and orderly markets. The DPM system has been employed by the CBOE for other new products, and will help to ensure continuous quotations for the basket products. Moreover, supplemental market making support for this relatively "expensive" product will be provided by potentially dozens of market basket market makers. These market makers will be obligated to make markets, and, specifically, provide bid and/or offer quotations which will be subject to immediate acceptance.

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[41] Division of Market Regulation, *The October 1987 Market Break* (February 1988).

[42] *See also* Securities and Exchange Commission Recommendations Regarding the October 1987 Market Break contained in Testimony of David S. Ruder, Chairman, SEC, Before the U.S. Senate Committee on Banking, Housing, and Urban Affairs, on February 3, 1988.

[43] Staff Report at 3–18. For a detailed description of current block trading mechanisms, *see* the *Report of the Presidential Task Force on Market Mechanisms*, at VI–9 to VI–11 (January 1988) ("Brady Report").

[44] *Id.* Similar ideas have been discussed in J. Grundfest, "Would More Regulation Prevent Another Black Monday?", Address before the CATO Institute Policy Forum on July 20, 1988, at 13–14 (copies available at the Commission); H. Stoll and R. Whaley, "Program Trading and The Monday Massacre" (November 4, 1987) (copies available at the Owen Graduate School of Management, Vanderbilt University); and H. Stoll, *Portfolio Trading*, Working Paper No. 87–14 (September 1987) (copies available at the Owen Graduate School of Management, Vanderbilt University).

[45] The CBOE's concept of an open, fully-disclosed book to support market basket trading is consistent with suggestions offered by various studies of the October 1987 Market Break. *See also* Wells Fargo Investment Advisors, *Reflections on the Stock Market Crash of October 1987* (January 25, 1988).

[46] "Execution slippage" is defined as the adverse price impact that currently accompanies the fragmented execution of program trades. *See, e.g.*, the Katzenbach Report at note 29.

[47] OPRA is responsible for collecting from the options exchanges last sale and quotation information for all standardized options and disseminating that information to private vendors.

[48] 17 CFR § 240.11Ac1–1 (1989). The Commission notes that Rule 11Ac1–1 requires that disseminated quotations include the size associated with the quote. OPRA, the facility through which CBOE basket quotes will be reported cannot, however, disseminate size. Thus, CBOE requested an exemption from this requirement, which the Commission granted in the Exemption Order.

[49] *See* letter from Nancy R. Crossman, First Vice President and General Counsel, CBOE, to Howard L. Kramer, Assistant Director, Division of Market Regulation, SEC, dated October 11 , 1989. *See* Exemption Order for further discussion.

The Commission believes the proposed financial requirements for the DPM and market makers to trade market basket contracts are appropriate. Specifically, the financial requirement for the DPM will ensure that the DPM has sufficient resources to perform effectively its market obligations. Additionally, the Commission believes the initial and maintenance financial requirements for market makers are sufficient to ensure that only those persons or firms with adequate equity to trade contracts worth over $1,000,000 will receive market maker status. At the same time, these financial standards are not so high as to result in an inadequate number of market basket market makers. The Commission believes that the Exchange has balanced concerns regarding liquidity and required capital, and, accordingly, designed standards to ensure sufficient market making resources at the market basket trading post.

In regard to the physical location of the market basket pit, the Commission does not believe that the location of the market basket trading post adjacent to the post or posts where traditional index options are traded raises side-by-side trading concerns. Specifically, both the market basket contracts and index options contracts are based on the prices of a group of stocks, none of which by itself accounts for a significant weighting of the applicable index.[50] In addition, the underlying stocks for the baskets are not traded on the CBOE. Accordingly, Exchange market makers will not have a market informational advantage of the nature and dimension that specialists in individual stocks traded on the primary market would have. Therefore, the Commission does not believe that permitting CBOE members to be market makers for index options and market baskets will create an undue advantage that would undermine the maintenance of fair and orderly markets. Additionally, the Commission believes that the close proximity of the index options and market basket posts will allow CBOE market makers to hedge both their index options and stock basket positions more efficiently. The Commission believes that this opportunity to hedge may enhance the depth and liquidity of the index options and market basket markets, thereby improving the quality of these markets.

[50] As of August 31, 1989, the five largest companies in the S&P 50 (IBM, Exxon, GE, AT&T, and GM) comprised 10.97 percent of the Index. The five largest companies in the S&P 100 (IBM, Exxon, GE, AT&T, and Philip Morris) comprised 26.49 percent of the Index.

*E. Application of Current Rules to Market Basket Contracts*

The Commission believes that the application of the existing Exchange options trading rules to market basket transactions will assist in the maintenance of a fair and orderly market for the new market basket contracts. Moreover, the Commission believes that the application of the current trading rules will promote just and equitable principles of trade at the market basket trading post and protect investors and the general public.

In addition, the Commission recognizes that because transactions in market basket contracts result in the transfer of the underlying stocks, certain Exchange rules designed for options contracts are not appropriate for the trading of market basket contracts. Specifically, position and exercise limits are not appropriate for market basket contracts, because the transactions are not leveraged and the underlying securities are actually acquired. Additionally, for the same reasons, the Commission believes that the applicable margin rules for both customers and market basket market makers should be based on the rules applicable to the underlying stock involved in a market basket transaction.

The Commission also believes that the proposed rules regarding customer protection are appropriate for market basket contracts. The Commission recognizes that because of the size of a market basket contract only institutional or sophisticated investors will invest in them. The Commission agrees with the Exchange that such investors do not require a special disclosure document that describes the risks of trading baskets of stocks. The Commission notes, however, that the Exchange will apply substantially all of its customer protection rules, including suitability requirements, to market basket transactions.[51]

*F. Exemption Requests*

The Exchange has requested that the Commission grant exemptions from Rules 10a–1, 10b–6, 10b–8, 10b–10, 10b–13, 15c1–5, and 15c1–6 under the Act[52] to facilitate trading in market basket contracts.[53]

[51] To the extent relevant, the Commission incorporates in this order its response to the comments on the NYSE's ESP proposal.

[52] 17 C.F.R. §§ 240.10a–1, 240.10b–6, 240.10b–7, 240.10b–8, 240.10b–10, 24010b–13, 240.15c1–5, and 240.15c1–6 (1989).

[53] *See* letters from Nancy Crossman, General Counsel, CBOE to Larry E. Bergmann, Associate Director, Division of Market Regulation, SEC, dated September 8, 1989, September 18, 1989, and October 10, 1989.

Rule 10a–1 provides that short sales[54] of exchange-listed securities may not be effected at a price less than the price at which the immediately preceding sale was effected ("minus tick") or at a price equal to the last sale if the last preceding transaction at a different price was at a higher price ("zero-minus tick"). The Exchange has requested relief from Rule 10a–1 in two respects. First, the Exchange seeks an exemption from Rule 10a–1 as it would apply to the individual component stocks in the S&P 100 and S&P 500 market basket contracts and to transactions in the market basket contract itself. Second, the Exchange requests an exemption analogous to the "block positioner" exemption in paragraph (e)(13) of Rule 10a–1.[55] The requested exemption would permit DPMs and market basket market makers, selling stock acquired in a market basket transaction, to disregard, when netting positions for purposes of Rule 10a–1, a short position that is the subject of one or more offsetting positions created in the course of bona fide arbitrage, risk arbitrage, or bona fide hedging activities.

Rule 10b–6 limits the ability of underwriters, issuers, or certain other persons to bid for or purchase a security being distributed, or a related security, during the distribution of that security. Rule 10b–7 regulates stabilizing transactions in connection with an offering of securities. Rule 10b–8 restricts bids and purchases of rights, and offers and sales of the underlying stock, by persons participating in a rights offering. Rule 10b–10 requires broker-dealers to provide customers with a written confirmation that includes, among other things, the identity, price and number of shares or units of a security purchased or sold by the customers.[56] Rule 10b–13 prohibits persons making a tender offer for a security from purchasing or arranging to purchase that security otherwise than pursuant to the tender offer. Rule 15c1–5 requires a broker-dealer to disclose that it has a control relationship with an issuer before executing a transaction in that issuer's securities. Rule 15c1–6 requires a broker-dealer to disclose its participation or financial interest in the

[54] A short sale is defined in Rule 3b–3 under the Act, 17 CFR § 2403b–3, as any sale of a security that the seller does not own or any sale that is consummated by the delivery of a security borrowed by, or for the account of, the seller. Rule 3b–3 provides further that a person shall be deemed to own a security only to the extent that such person has a new long position in the security.

[55] *See* Securities Exchange Act Release No. 20715 (March 6, 1984), 49 FR 9414 (March 13, 1984).

[56] See *supra*, note 25.

distribution of a security at or before the completion of a transaction in such security for the account of a customer of that broker-dealer.

The Commission believes that transactions involving standardized baskets of stocks generally involve the same regulatory concerns that are applicable to transactions in individual stocks, and that appropriate conditional relief from Rules 10a–1, 10b–6, 10b–7, 10b–8, 10b–10, and 10b–13 is necessary and appropriate if the benefits of trading in market basket contracts are to be achieved. With respect to Rules 15c1–5 and 15c1–6, in recognition of the unique nature of market basket contract transactions, the Division has determined that transactions in market baskets are unlikely to give rise to the abuses the rules were designed to prevent and accordingly, the Division is taking a no-action position under those rules. Accordingly, the Commission's staff today has provided exemptions or other appropriate relief with respect to the treatment of transactions in market basket contracts under these rules.

## V. Conclusion

The Commission believes that the market structure for trading market baskets is consistent with just and equitable principles of trade. Moreover, given the institutional character of stock portfolio trading that market basket trading is designed to capture, the Commission believes that the Exchange's chosen market structure is a fair and competitive market structure. Finally, the Commission's Section 19 authority and the Rule 19b–4 process allow the Commission and the Exchange sufficient flexibility to modify market basket trading in light of actual trading experience and any future developments.[57]

Accordingly, based upon the aforementioned factors, the Commission finds that the Exchange's proposed rule change relating to the trading of market baskets is properly within its jurisdiction and consistent with the requirements of Sections 6(b)(4) and (5) of the Act and the rules and regulations thereunder.[58]

The Commission finds good cause for approving those portions of the proposal that were amended by Amendments No. 3, 4, and 5 prior to the thirtieth day after the date of publication of the amendments in the Federal Register. The original filing was the subject of a 30-day notice period and the amendments made only minimal changes to the proposal as noticed. In addition, accelerated approval is necessary because market basket trading is scheduled to begin on October 26, 1989. Because of the Commission view of the benefits that may result from the trading of market baskets on a national securities exchange, the Commission believes a good cause finding is justified.

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 Room. Copies of such filings also will be available for inspection and copying at the principal office of the CBOE. All submission should refer to file number SR–CBOE–88–20, and should be submitted by November 23, 1989.

It is therefore ordered, pursuant to section 19(b)(2) of the act,[59] that the proposed rule change (SR–CBOE–88–20) be, and hereby is, approved.

By the Commission.

Dated: October 26, 1989.

**Jonathan G. Katz,**

*Secretary.*

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[57] The Commission believes that the 30 day comment period that accompanied publication of the Exchange's proposal, and the Commission's continued willingness to entertain all comments that preceded this action, provided an adequate public forum in which to examine all the issues and concerns regarding the Exchange's market basket proposal. Accordingly, it is unnecessary to hold public hearings on the CBOE proposal.

The Commission notes that approval of the proposed rule change is based upon a determination that the terms of market basket trading are consistent with the requirements of the Act. If the terms of the market basket contract, including the index multiplier, or market structure are changed in any material way, however, it would be necessary for the CBOE to submit a proposed rule change in order to afford the public an opportunity to review and comment on the proposed modification and for the Commission to review its prior determination.

[59] 15 U.S.C. 78s(b)(2) (1982).

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[Rel. No. 34-27384; File No. SR-MSE-89-02]

## Self-Regulatory Organizations; Midwest Stock Exchange, Inc.; Order Approving Proposed Rule Change to Establish a Secondary Trading Session for the Execution of Transactions in Portfolios of Securities

### I. Introduction

On April 28, 1989, the Midwest Stock Exchange, Inc. ("Midwest" or "Exchange") submitted to the Securities and Exchange Commission ("Commission" or "SEC"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act") [1] and Rule 19b–4 thereunder,[2] a proposed rule change [3] designed to establish a Secondary Trading Session for the execution of transaction in portfolios of securities through its new automated Portfolio Trading System ("PTS" or "System").[4] Concurrent with its April 28, 1989 filing, Midwest filed with the Commission's Division of Market Regulation ("Division") a proposed transaction reporting plan pursuant to Commission Rules 11Aa3–1 and 11Aa3–2 under the Act.[5]

[1] 15 U.S.C. 78s(b)(1) (1982).

[2] 17 CFR 240.19b–4 (1989).

[3] Additionally, Midwest stated that it intends to submit an application to the Commission's Division of Market Regulation for unlisted trading privileges ("UTP") pursuant to Section 12(f) of the Act, 15 U.S.C. § 781(f). *See* letter from J. Craig Long, Vice President and General Counsel, to Richard G. Ketchum, Director, Division of Market Regulation, SEC, dated April 27, 1989 ("April 27 letter"). Specifically, Midwest will apply for UTP in those securities which comprise a part of the Standard and Poor's ("S&P") 500 Index and which Midwest does not trade currently pursuant to UTP.

[4] Amendment No. 1, submitted by the Midwest on May 31, 1989, deletes changes to Article XX, Rule 12 and Article XXI, Rules 2, 3, 4, 8, 9, 12 and 13 as proposed in the Exchange's original filing submitted on April 28, 1989. Amendment No. 1 also adds an Interpretation and Policy, to be set forth in Article VIII, Rule 9 of the Midwest's Rules, that clarifies the application of the Exchange's off-board trading restrictions to member transactions in securities traded on the Exchange. In particular, the Interpretation and Policy clarifies that implementation of the Midwest's proposed Secondary Trading Session will not prohibit members from effecting transactions in securities listed or admitted to unlisted trading privileges on the Exchange, where the member acts as principal or agent, on any organized exchange, or over-the-counter market in any foreign country, outside of the trading hours of the Exchange's Primary Trading Session.

[5] 17 CFR §§ 240.11Aa3–1 and 240.11Aa3–2 (1989). The Midwest also has requested an exemption from the requirements of paragraph (b)(2)(viii) of Rule 11Aa3–1 for transactions effected through the System. *See* letter from J. Craig Long, Midwest, to Mary Revell, Branch Chief, SEC, dated September 12, 1989.

Notice of the proposed rule change was provided by the issuance of a Commission release (Securities Exchange Act Release No. 26887, June 2, 1989), and by publication in the **Federal Register** (54 FR 24779, June 9, 1989). The Commission received one comment on the proposed rule change.[6]

**II. Description of the Proposal**

*A. PTS Product Description and Market Structure*

Proposed Midwest Rule 10(b), Article IX would establish a Secondary Trading Session to be conducted from 3:30 p.m. to 5:00 p.m. Central Time (4:30 p.m. to 6:00 p.m. Eastern Standard Time) for the limited purpose of permitting the execution of transactions in qualified portfolios of equity securities through the PTS.[7] The rules governing the Secondary Trading Session are to be set forth in a new Article XXXV of the Midwest's Bylaws.[8]

The Midwest's Floor will not be open during the Secondary Trading Session. Rather, all qualified portfolio transactions will be executed through the PTS, an automated, screen-based trading system maintained by Midwest. Exchange members will be permitted access to the PTS through dial-up modems, but Exchange specialists, odd-lot dealers and registered market makers may not participate as such during the Secondary Trading Session.

The Midwest's Secondary Trading Session is limited to transactions in portfolios of "Eligible Securities." These are defined in proposed Rule 2(d), Article XXXV as all securities that are listed for trading on the Exchange or to which UTP have been granted. The Midwest's Secondary Trading Session will allow portfolio transactions in both "standardized portfolios" and "non-standardized portfolios". Proposed Rule 2(a), Article XXXV defines the term "standardized portfolios" as any group of Eligible Securities that are the subject of an option contract traded on a national securities exchange or a futures contract traded on a contract market designated by the Commodity Futures Trading Commission. Rule 2(b) defines a "non-standardized portfolio" as any group of Eligible Securities consisting of at least 20 securities, where the value of any one security does not exceed 20 percent of the contract price of the shares in the portfolio as executed.

Proposed Midwest Rule 9, Article XXXV establishes objective and subjective pricing parameters for stock portfolio transactions executed through the PTS. Using the last reported price after the New York Stock Exchange ("NYSE") close for each of the securities comprising a portfolio as reported on the Consolidated Transaction Reporting System or the NASDAQ Transaction Reporting System on the day the portfolio transaction is to be executed, the price at which the portfolio transaction is executed may not be less than 95% or greater than 105% of the aggregate value of the securities comprising the portfolio. Additionally, proposed Rule 9, Article XXXV specifies that the price of each security comprising a portfolio may not be less than 90% or greater than 110% of the last reported price for that security. Furthermore, the price at which a portfolio transaction is executed, both in the aggregate and on a security-by-security basis, must be fair, taking into consideration all relevant circumstances, including market conditions with respect to such security or securities at the time of the transaction, the expense involved, and the fact that the member or member organization is entitled to a profit. Upon application by a member or member organization, Rule 9 permits an officer of the Exchange to exempt transactions on a case-by-case basis from the operation of the objective portfolio pricing parameters.

Under proposed Rule 5, Article XXXV, bids or offers in portfolios entered into the PTS must be made in minimum increments of $.01. Bids or offers in Eligible Securities comprising a portfolio must be made in increments of 1/10,000 of a dollar per share.[9]

*B. PTS Order Entry and Trading Rules*

1. Acceptable Orders

All qualified protfolios traded in the PTS are deemed to consist of a single unit of trading, which is comprised of the number of shares of each security in the portfolio as specified in the bid and offer. All bids and offers entered into the PTS are deemed to be firm quotations to buy or sell the portfolio at the stated price as if made available for an individual security in accordance with Rule 11Ac1-1 under the Act.[10]

Only orders for portfolios may be executed during the Secondary Trading Session. No other orders for the purchase or sale of securities will be accepted for execution. Any orders for the purchase or sale of securities entered in Midwest's Primary Trading Session that remain unfilled at the close will be held over for execution during the next Primary Trading Session and will not be executed during the Secondary Trading Session. Thus, there will be no interaction between orders in individual securities left open at the end of the Primary Trading Session and portfolio executions that take place during the Secondary Trading Session.

A personal computer ("PC") may be used for order entry into the PTS. A member or member organization may make a bid or offer to purchase or sell a portfolio by entering into the System the total value of the portfolio, the symbol and quantity of all eligible securities comprising a non-standardized portfolio, and the settlement terms of other than "regular way" transactions. In the event that an Exchange member or member organization attempts to trade a portfolio that contains a non-eligible security, a PTS systems check would disallow the input, and generate a rejection. Similarly, if a portfolio did not meet the standards for concentration and issue composition, the PTS would generate a rejection.

2. Price Protections and Order Execution

Members may enter crossed orders or unmatched bids and offers into the system. When crosses are entered, the System will first search all unmatched orders to determine whether there is an order in the System for the same portfolio at the same or a better price. If there is no better quotation, the cross will be executed, provided the transaction price is within the applicable pricing parameters.[11] If there is a better quotation, the cross will not be permitted and a message to that effect will be sent to the member attempting to effect the transaction.

If an unmatched bid or offer is entered, and the member or member organization wished to sell a specific portfolio at a price equal to or lower than a published bid, or it wishes to buy a specific portfolio at a price equal to or higher than a published offer, then Rule

[6] *See* notes 21–24, *infra* and accompanying text.

[7] The Primary Trading Session currently is conducted on the Floor of the Exchange from 8:30 a.m. to 3:00 p.m. Central Time.

[8] The Article XXXV Rules apply to Exchange contracts made on the Exchange during the Secondary Trading Session. Except to the extent that specific Article XXXV Rules govern, or unless the context otherwise requires, the provisions of Midwest's Constitution and all other rules and policies of the Board of Governors are applicable to the execution of portfolio transactions through the PTS.

[9] The Midwest has stated that the relatively small portfolio valuation increments were chosen to reflect current business practice: customers price a portfolio to the nearest cent, and then allocate the portfolio's dollar value to each stock in the portfolio. In allocating the portfolio's value to the stocks, customers may need to use a fraction of a cent to value each stock.

[10] Midwest Rule 6(a), Article XXXV.

[11] *See* April 27 letter, *supra* note 3.

6(b), Article XXXV requires the member or member organization to "satisfy" such a pre-existing quotation prior to executing any order at that price. The member could then contact the other side and personally negotiate a price at which the transaction an take place, because PTS does not operate as an order interaction system. One of the two members would then enter a matched bid and offer into the system for execution.

An Exchange member or member organization that has accepted for execution an order to purchase or sell a portfolio of securities on behalf of a customer through the PTS cannot fill the order by selling or purchasing such portfolio for its own account if it is holding an unexecuted order on behalf of another customer to sell or purchase a portfolio at the same or a better price.[12] Similarly, no Exchange member or member organization that has accepted an order to purchase or sell a portfolio of securities on behalf of a customer through the PTS may fill such an order by selling or purchasing such portfolio for its own account or the account of a customer, if another member or member organization has entered a quotation into the System to sell or purchase such a portfolio at the same or a better price.[13]

When a bid or offer is accepted over the phone by another member or member organization, the portfolio transaction must be executed in accordance with Rule 7, Article XXXV. In order to execute an order, a member or member organization must enter into the System a matched bid and offer for a portfolio.[14] An Exchange member or member organization must then enter specified information describing the executed portfolio transaction into the System.[15] If a bid or offer is not accepted in any given Secondary Trading Session, then the bid or offer will be retained for the next Secondary Trading Session, unless it is a day order.[16]

*C. Transaction Reporting Plan*

The Midwest has filed a transaction reporting plan ("Plan") that is limited specifically to portfolio transactions executed during the Exchange's Secondary Trading Session.[17] Pursuant to the Plan, when a portfolio is executed through the PTS, Midwest will disseminate real-time transaction reports for the portfolios, but not for the individual securities that comprise the portfolios, from 3:30 p.m. to 5:00 p.m., Central Time (the hours of the Secondary Trading Session), on all trading days.[18] The Exchange will make available to vendors and subscribers: (1) the aggregate price of the portfolio; and (2) the symbol and quantity for each security comprising the portfolio.[19] At the end of each Secondary Trading Session, Midwest will provide to news vendors and subscribers a report on the aggregate number of shares of each of the securities purchased and sold during that session, as well as aggregate System volume.

The Plan submitted by the Midwest does not provide for the consolidation of transaction reports from other markets trading the same securities. The Commission has decided to gant Midwest a temporary exemption, for six months, from the requirement in Rule 11Aa3–1 that the Plan provide a mechanism for the consolidation of last sale data on these securities with last sale data from other markets trading the same securities. While the Commission is aware of the limited usefulness of price information on the underlying securities in a portfolio transaction executed during Midwest's Secondary Trading Session, it believes that dissemination of the share volume in the underlying securities is important information that should be included in the daily consolidated volume for each of the underlying securities. This presents a number of technological difficulties for Midwest, however, and the Commission has therefore decided to grant a temporary exemption from this requirement to allow Midwest adequate time to make the necessary arrangements to have this volume data included in the end-of-day consolidated volume.[20]

*D. Fees*

For portfolio transactions executed through the PTS, proposed Rule 13, Aticle XXXV imposes transaction fees equal to the greater of $100 per portfolio transaction or $.025 per $1,000 valuation. Midwest members and member organizations that elect to participate in PTS are required to pay a monthly fee of $2,500, payable quarterly in advance. The monthly access fee will be reduced by an amount equal to the amount of transaction fees such member or member organization pays.

*E. Purpose and Benefits*

Midwest has proposed its Secondary Trading Session to permit the efficient execution of transactions in portfolios of securities subject to the regulatory oversight of the Midwest. The Exchange contends that the Secondary Trading Session is designed to address some of the effects of NYSE Rule 390, which generally prohibits a NYSE member, or any broker or dealer affiliated with a NYSE member, from effecting any transaction in most NYSE-listed securities as a principal in the over-the-counter market or from acting as agent of both parties in an over-the-counter transaction. Because these prohibitions are not applicable to transactions effected in any foreign country outside of NYSE trading hours, many brokers for large institutional investors in portfolios of securities that desire to execute transactions based on the closing prices of securities on the NYSE effect such transactions off-shore, usually in London.

The Exchange contends that these overseas execution procedures are unsatisfactory from several viewpoints. First, these transactions take place without the benefit of exchange oversight and without the regulatory protection afforded participants in U.S. security markets. In addition, such transactions are not reported to the public. Thus, issuers, the investing

[12] Midwest Rule 8(a), Article XXXV. This rule is designed to address concerns raised by the conflict of interest that may arise because of the intersection of a member firm's customer and proprietary trading operations.

[13] Midwest Rule 8(b), Article XXXV.

[14] Portfolio transactions between Exchange member or member organization or between members and their customers must be entered into the System by only one member or member organization. Midwest Rule 7(a), Article XXXV.

[15] An executed portfolio transaction must be accompanied by the following items of information: (1) the name of the executing member or member organization and its Exchange symbol; (2) the name of the clearing member or members, if not the entering member; (3) the symbol, quantity and price, in decimals, for each security in the portfolio; (4) the total value of the portfolio; and (5) the settlement terms, if other than "regular way." Midwest Rule 7(b), Article XXXV. Upon entry of this information, an Exchange contract will be made for each security comprising the portfolio; (4) the total value of the portfolio; and (5) the settlement terms, if other than "regular way." Midwest Rule 7(b), Article XXXV. Upon entry of this information, an Exchange contract will be made for each security comprising the portfolio.

[16] Midwest Rule 4(a), Article XXXV.

[17] *See* Securities Exchange Act Release No. 27385 (October 26, 1989) (Commission order approving Midwest Plan and exemptions from certain requirements of Rule 11Aa3–1 under the Act).

[18] However, Rule 11Aa3–1 under the Act requires that transactions in the individual securities be reported. Thus, by separate order the Commission has granted Midwest an exemption from this requirement. *See supra* note 17.

[19] The Plan also provides the terms of access for vendors who wish to retransmit the data. The Plan provides for no vendor fees for access to the information but would require subscribers to pay "appropriate" fees for receipt of the data. The Commission notes that any fees established by the Midwest that would be charged to PTS subscribers must be filed with the Commission.

[20] *See* Midwest Plan approval order, *supra* note 17.

public and the regulatory agencies responsible for the oversight of the markets are deprived of important information regarding trading activity in various securities.

The Midwest believes that the Secondary Trading Session will permit broker-dealers to execute transactions in portfolios rapidly through the PTS automated trading system maintained by Midwest, and will provide disclosure to the public of trade information concerning such transactions. In addition, the Midwest notes that it will maintain a complete audit trail of all transactions effected in the Secondary Trading Session, permitting the Commission and the Midwest to monitor better the after-hours institutional market.

As discussed above, there will be no interaction between orders in individual securities left open on Midwest during the Primary Trading Session and portfolio executions during the Secondary Trading Session. The Exchange claims that this aspect of the System is a necessary consequence of the limited trading environment being supported during the Secondary Trading Session. The PTS is not designed or intended to be an after-hours automated execution system for individual securities and small groups of securities. Midwest states that at the present time it is not prepared to advocate an off-floor, electronic trading mechanism for these types of orders, which can benefit from open outcry or widespread dissemination of firm quotations reflecting buying and selling interest.

Integration of orders from the Primary Trading Session into the Secondary Trading Session also would require fundamental changes in the way limit orders are handled. Brokers that do not want their customers' orders to be executed after hours would have to mark those orders or withdraw them prior to the close of the Primary Trading Session. Customers would be faced with the decision whether to obtain an after-hours execution or wait until the opening of the Primary Trading Session the following day when there could be an even greater price movement.

Finally, the Exchange contends that its proposed price allocation process makes the entire notion of order interaction somewhat specious. Under its proposed rules package, individual stock prices have the potential to be set derivatively so long as they are within the applicable pricing parameters set forth in Rule 9, Article XXXV. Therefore, the Exchange believes that it would be inappropriate to initiate order executions based on that price. Similarly, if individual stock orders could interact with portfolios, brokers would have the incentive to change their individual stock price allocation in order to avoid this result.

In order to accommodate trading in the System, Midwest has requested exemptive relief from the operation of Commission Rules 10a–1 and 11Aa3–1 as they would otherwise apply to portfolio trading through the PTS during the Secondary Trading Session. The Exchange believes that these rules would impede the operation of the alternative trading procedures that govern trading through the PTS during its Secondary Trading Session without providing any regulatory benefits.

### III. Comments Received

The Commission received one comment on the proposed rule change from the Alliance of Floor Brokers ("AFB"),[21] whose membership is comprised predominantly of NYSE floor brokers. In general, the AFB comment letter argues that in comparison to existing equity market trading procedures, the unequal regulatory treatment envisioned by the Secondary Trading Session and the supporting System would result ultimately in a fragmented securities market structure with increased market volatility. The AFB questions the Midwest's rationale supporting its proposed rule change, as well as the overall need for the Secondary Trading Session.

The AFB also levels more specific criticisms at the Exchange's proposal. For example, the AFB contends that the pricing mechanisms that govern stock portfolio trading during Midwest's Secondary Trading Session do not provide for sufficient price transparency, order interaction and ultimate price betterment. Furthermore, the AFB comments that the Secondary Trading Session's proposed crossing rules do not consider adequately the "price conditionality" [22] of some proposed cross transactions, nor do the portfolio pricing parameters account adequately for the possibility of severe price variances from closing prices that may result from the proposed price parameters that would govern Midwest's Secondary Trading Session. The AFB also criticized the Midwest's proposed Plan for reporting trades executed during the Secondary Trading Session.

The AFB believes that Midwest's Secondary Trading Session may exacerbate existing structural market risks because of the unequal regulatory treatment accorded transactions in PTS portfolios and regular way transactions in individual securities. The AFB particularly criticizes the exemption to the short selling rule that would apply during the Secondary Trading Session. The AFB argues that in comparison to existing equity procedures, short selling during the Secondary Trading Session would result ultimately in a fragmented securities market structure with increased market volatility.

The Exchange responded to the AFB's concerns and other issues raised by Commission staff in a letter to Commission staff.[23] The letter addressed the market structure and regulatory concerns raised by the proposal and explained further the rationale for implementing a Secondary Trading Session for executing portfolio transactions.

In its letter the Exchange notes that its Secondary Trading Session is structured with the goal of providing institutional customers and member firms with a trading vehicle that allows a largely institutional composite-asset market to rebalance stock portfolios after the NYSE close to reflect the last reported sale on the consolidated transaction reporting system. The Exchange believes that the rules supporting its Secondary Trading Session are designed appropriately to accommodate the particular needs of its market niche in a fair and competitive market structure. Finally, Midwest believes that it proposal will result in improvements in the areas cited by the AFB by bringing a share of the after-hours institutional market in portfolio transactions under the auspices of the Commission and Exchange oversight and by requiring transactions to be reported.

The Exchange also answers the AFB's specific criticisms. In response to the concern raised by the AFB that the proposed price parameters afford too much leeway in pricing portfolio transactions, the Exchange stated that it believes that the flexibility in its proposed price parameters are necessary to accommodate institutional trading in a composite-asset market where stock transactions with otherwise separate executions are executed in aggregated portfolios at a single price, and will therefore allow parties to a portfolio transaction to price portfolios

[21] *See* letter from Michael D. Robbins, President, AFB, to Jonathan G. Katz, Secretary, SEC, dated August 18, 1989.

[22] A proposed cross transaction may be "price conditional" to the extent that one or both sides of the trade would delay executing the cross at the market in the hope that a better execution price may be found in other buying or selling interest.

[23] *See* letter from J. Craig Long, General Counsel, Midwest, to Jonathan G. Katz, Secretary, SEC, dated September 11, 1989.

in response to the buying and selling interest of their customers, as well as respond to changed market conditions after the close of regular trading. The Exchange contends that the price limits assure that the execution prices of a portfolio and its component securities will be fair and consistent with prevailing market conditions and fundamental corporate valuations.

In response to the AFB's criticism of the proposed crossing procedures for the Secondary Trading Session, Midwest notes that its Secondary Trading Session will permit matched orders to be crossed only if there is not an unmatched order in the PTS at the same or a better price. Citing the Cincinnati Stock Exchange's ("CSE") National Securities Trading System ("NSTS") as an example,[24] the Exchange claims that its PTS provides the same level of order interaction and price competition approved by the Commission in other electronic trading systems.

Midwest responded to the AFB's critique of the proposed transaction reporting plan for trades executed during the Secondary Trading Session by emphasizing that its Secondary Trading Session represents a marked improvement over current market practices, where overseas portfolio transactions are not reported either to the Commission or the public. Under Midwest's proposed transaction reporting plan for its Secondary Trading Session, real time portfolio transaction reports will be disseminated to vendors and subscribers along with aggregate shares traded. Thus, the Exchange notes that the investing public will no longer be deprived of important information regarding portfolio trading activity in various securities.

Finally, the AFB suggested that the Secondary Trading Session is susceptible to manipulation of individual securities and insider trading abuses. In response, the Exchange emphasizes that the lack of a price effect for the individual stocks that comprise a portfolio and the Exchange's detailed surveillance procedures will deter and capture any trading abuses.

## IV. Discussion

### *A. Introduction*

After careful consideration of the comments received, applicable statutory provisions, and relevant policy considerations, the Commission concludes that Midwest's proposed Secondary Trading Session is designed appropriately to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, provide for an equitable allocation of fees, and is consistent with the maintenace of fair and orderly markets, an open and competitive national market system, and the ability of a national securities exchange to enforce compliance with its rules. For these reasons and for the additional reasons set forth below, the Commission finds that approval of the Exchange's proposed rule change relating to a Secondary Trading Session is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange, and, in particular, with the requirements of section 6(b).[25]

Over the past several years the use of composite-asset trading techniques and strategies by institutional investors has increased substantially. Both the stock exchanges and private information vendors have developed products to facilitate the trading of portfolios of securities.[26] In addition, broker-dealers have used exchanges-for-physicals ("EFPs")[27] to satisfy their customers' needs in this area. The Midwest system is another attempt to provide a program trading service for institutional investors. The Commission agrees with Midwest that the Secondary Trading Session may provide a useful means for executing portfolio trades in U.S. securities that currently are being executed overseas. Moreover, the System may be helpful in soliciting contra-side interest for portfolios orders.

As described below, the Commission also believes that the market structure Midwest has designed to support its Secondary Trading Session balances appropriately the competing concerns of various Exchange constituencies and its institutional clientele in a manner consistent with just and equitable principles of trade. Given the institutional character of stock portfolio trading that the Secondary Trading Session is designed to capture, the Commission agrees that the Exchange's chosen market structure, which accords price protections and trade reporting, as well as the benefits of Commission and Exchange oversight pursuant to the Act, is a fair and competitive market structure. Furthermore, the Commission believes that Midwest's Secondary Trading Session will not, as the AFB contends, lead unduly toward a more fragmented and volatile market. The Secondary Trading Session responds to existing demand for a means to effect portfolio trades at an aggregate price reflective of the market closing prices of the component securities. By definition, these transactions will not occur during regular equity trading hours. The Secondary Trading Session offers the very real benefits of trade reporting, consolidated surveillance, and pricing protections which ensure that matched bids and offers do not "trade through" an unmatched quotation.[28]

### *B. Portfolio Pricing Parameters*

As discussed above, each individual security in a portfolio traded in the System must be priced within a range of plus or minus 10% of the last reported price for that security on the day the portfolio transaction is executed, provided that the portfolio itself is priced within a range that is plus or minus 5% of the aggregate closing prices of the securities comprising the portfolio. Further, no one security shall consist of more than 20% of the contract

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[24] The CSE's NSTS is a system of users linked electronically, which executes orders automatically. For a general discussion of CSE's NSTS, *see generally* SEC, Division of Market Regulation, *The October 1987 Market Break* at 7–40 (February 1988).

[25] 15 U.S.C. §§ 78f(b) (1982).

[26] *See, e.g.*, Securities Exchange Act Release No. 27383 (October 26, 1989) (Commission order approving File No. SR–NYSE–89–05, a proposed rule change submitted by the NYSE designed to enable the trading of standardized baskets of stocks at an aggregate price in a single execution on the NYSE floor); Securities Exchange Act Release No. 27383 (October 26, 1989) (Commission order approving File No. SR–CBOE–88–20, a proposed rule change submitted by the Chicago Board Options Exchange ("CBOE") also designed to enable the trading of standardized baskets of stocks at an aggregate price in a single execution on the CBOE floor); and letter from Brandon Becker, Associate Director, Division of Market Regulations, SEC, to Lloyd H. Feller, Esq., Morgan Lewis and Bockius, dated July 28, 1987 (Commission no-action letter issued under Sections 5 and 6 of the Act on behalf of request by Jeffries and Co., Inc. to implement a computerized order entry mechanism to allow for trading customized portfolios of stocks at a single price).

[27] An EFP generally may be defined as the exchange of a long (short) futures position for an equivalently valued long (short) stock position. This normally takes place after the NYSE close and is completed in accordance with Commodity Futures Trading Commission ("CFTC") regulations. In the CFTC Division of Trading and Markets *Report on Exchanges of Futures for Physicals*, dated October 1, 1987 ("CFTC Report"), an EFP was defined as "a transaction in which one party buys the physical commodity and simultaneously sells (or gives up a long) futures contract. The price of the exchanged futures position, the quantity of the futures and cash commodity, and other terms are privately negotiated by the parties rather than being competitively executed in the pit." CFTC Report at 2. The CFTC has interpreted Section 4c(a) of the Commodity Exchange Act, 7 U.S.C. § 6c(a), and CFTC Regulation 1.38, 17 C.F.R. § 1.38, to permit individual contract markets, such as the Chicago Mercantile Exchange, to establish rules permitting and governing EFP transactions.

[28] The Commission's approval order issued today for the NYSE's basket proposal, *supra* note 26, addresses comments received by the AFB on that product. The Commission incorporates its responses to the AFB's comments on the NYSE proposal to the AFB's comments on the PTS to the extent that the comments are the same for both proposals.

price of the shares in a "non-standardized portfolio" as executed.

The Commission agrees with Midwest that the price parameters afford institutions the flexibility to price portfolio transactions executed during the Exchange's Secondary Trading Session in response to changed market conditions, such as currency movements after the close of regular equity trading hours, or because of differing estimates of equities' values. It would be unnecessarily rigid to require that prices on the system reflect precisely the closing prices for the constituent securities in the Primary Trading Session.

With respect to the AFB's concerns regarding the transparency of the PTS price mechanism and the flexibility of the price parameters that govern portfolio trading during the Secondary Trading Session, the Commission recognizes that although the individual prices allocated among the stocks that comprise a protfolio are somewhat derivative, the plus or minus 10% price limit on an individual stock will operate as a reasonable limit on the actual price variance that a particular stock may experience. Moreover, the additional plus or minus 5% price limit on the portfolio as a whole also operates, on average,[29] as a further restriction on the discretion of pricing an individual component stock. The Commission notes furthermore that proposed Rule 9, Article XXXV requires all portfolio transactions executed during the Secondary Trading Session both in the aggregate and on a security-by-security basis to be fair, taking into consideration all the relevant circumstances attendant to the transaction. The Commission believes Midwest's Secondary Session pricing parameters strike an appropriate balance between allowing institutions and Exchange members the flexibility to price transactions according to economic fundamentals while restricting the ability of market participants to effect trades at prices that do not benefit from open outcry or the widespread dissemenation of firm quotations during regular equity trading hours.

*C. Order Interaction and Price Protections*

The Commission believes that Midwest's Secondary Trading Session's order interaction and price protecton rules are consistent with fair and orderly markets. First, Midwest's decision to deny order interaction between its Primary and Secondary Trading Sessions is reasonable to ensure that limit orders are not triggered by potentially unrepresentative prices of constituent securities executed after the close of the primary markets for those securities. The composite-asset nature of the portfolios traded over the System, combined with the fact that the Secondary Trading Session will operate in a discontinuous manner, makes the prices of the individual securities less indicative of the prices obtained during the Primary Trading Session, and therefore not useful triggers for limit orders. Second, because the PTS will permit matched orders to be crossed only if there is not an unmatched order in the System at the same or a better price, the Secondary Trading Session's proposed crossing rules provide an opportunity for price betterment and preserve time and price priority for portfolios.

*D. Transaction Reporting*

As described above, the Midwest has filed with the Commission a proposed Plan for reporting transactions executed during the Secondary Trading Session. The Midwest also has requested exemptions from certain requirements of Rule 11Aa3-1 under the Act for transactions executed through the System. Because the Commission agrees with Midwest that the proposed configuration for transaction reporting during the Secondary Trading Session is appropriate, the Commission has issued a separate order approving the Plan and the exemptions.[30]

*E. Short Sale Exemption*

The Exchange has requested that the Commission grant an exemption from Rule 10a-1 under the Act [31] to facilitate transactions in the Secondary Trading Session.[32] Rule 10a-1 provides that short sales [33] of exchange-listed securities may not be effected at a price less than the price at which the immediately preceding sale was effected ("minus tick") or at a price equal to the last sale if the last preceding transaction at a different price was at a higher price ("zero-minus tick").

The Commission believes it is appropriate, particularly in view of the absence of price reporting in the individual stocks comprising portfolios, to exempt transactions during Midwest's Secondary Trading Session from the operation of the short sale rule. Accordingly, the Commission's staff will issue a letter granting appropriate relief from Rule 10a-1 with respect to such transactions.

**V. Conclusion**

Midwest's Secondary Trading System should improve the portfolio trading process by providing a means to disseminate buying and selling interest for portfolio orders. To the extent that Midwest's Secondary Trading Session does not integrate all segments of the securities markets, the Commission agrees with Midwest that these departures are reasonably necessary to accommodate the unique aspects of the PTS without deviating from the concept of fair and orderly markets. Finally, the Commission's Section 19 authority and the Rule 19b-4 process allow the Commission and the Exchange sufficient flexibility to modify the rules governing portfolio trading on Midwest during its Secondary Trading Session in light of actual trading experience and any future developments that materially affect the Secondary Trading Session's market structure.[34]

Based upon the aforementioned factors, the Commission finds that the Exchange's proposed rule change relating to the after-hours trading of stock baskets is consistent with the requirements of Sections 6(b) (4) and (5) of the Act and the rules and regulations thereunder.

It is therefore ordered, pursuant to section 19(b)(2) of the Act,[35] that the proposed rule change be, and hereby is, approved.

By the Commission.

Dated: October 26, 1989.

**Jonathan G. Katz,**

*Secretary.*

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[29] The Commission notes that the combination of the price limits and the different weighing of stocks in a portfolio accounts for the sliding scale price mechanism as applied to individual stocks.

[30] *See* Midwest Plan approval order, *supra* note 17.

[31] 17 CFR 240.10a-1 (1989).

[32] *See* letter from J. Craig Long, Vice President and General Counsel, Midwest, to Richard G. Ketchum, Director, Division of Market Regulation, SEC, dated April 27, 1989.

[33] A short sale is defined in Rule 3b-3 under the Act, 17 CFR § 240.3b-3, as any sale of a security that the seller does not own or any sale that is consummated by the delivery of a security borrowed by, or for the account of, the seller.

[34] The Commission notes that approval of the proposed rule change is based upon a determination that the terms of Midwest's Secondary Trading Session and the PTS are consistent with the requirements of the Act. If the terms of Midwest's Secondary Trading Session's market structure are changed in any material way, however, it would be necessary for the Midwest to submit a proposed rule change in order to afford the public an opportunity to review and comment on the proposed modification and for the Commission to review its prior determination.

[35] 15 U.S.C. 78s(b)(2) (1982).

[Release No. 34-27385; File No. SR-MSE-89-02]

## Self-Regulatory Organizations; Midwest Stock Exchange, Inc.; Order Approving Proposed Transaction Reporting Plan

On April 28, 1989, the Midwest Stock Exchange, Inc. ("Midwest" or "Exchange") submitted to the Securities and Exchange Commission ("Commission" or "SEC"), pursuant to Rules 11Aa3-1 and 11Aa3-2 under the Securities Exchange Act of 1934 ("Act"),[1] a proposed transaction reporting plan ("Plan") governing the collection, consolidation and dissemination of information on transactions in reported securities that are executed during the Midwest Secondary Trading Session.[2] As part of the proposal, the Exchange requested certain exemptions under Rule 11Aa3-1.[3] The Plan was noticed in Securities Exchange Act Release No. 26887, June 2, 1989, 54 FR 24779. The Commission received one comment on the proposed rule.

### Description of the Plan

The transaction reporting plan filed by Midwest is specifically limited in application to trading during the Exchange's Secondary Trading Session. All qualified portfolio transactions can be executed during Midwest's Secondary Trading Session through the PTS, an automated, screen-based trading system maintained by Midwest. The Midwest's Secondary Trading Session is limited to transactions in portfolios of "Eligible Securities."[4] Pursuant to the Plan, Midwest will disseminate last sale transaction reports for each portfolio, but not the individual securities composing the portfolio. Midwest will make available to vendors and subscribers: (1) the aggregate price of the portfolio; and (2) the symbol and quantity for each security in the portfolio.[5] The Plan further provides that Midwest will make transaction reports available to information vendors from 3:30 p.m. to 5:00 p.m., Central Time, on all trading days [6] and that at the end of each Secondary Trading Session, Midwest will make available to vendors the aggregate number of shares of each of the securities that were purchased and sold during that session.

The Plan also contains provisions for ensuring the accuracy and validity of transaction reports. The Plan provides that all trades in portfolio transactions will be reported immediately upon execution to Midwest through the PTS pursuant to the requirements in Article XXXV of Midwest's rules. In addition, the Plan provides a description of how Midwest will verify the accuracy of the reports and how Midwest will review portfolio transaction reports for compliance with the pricing parameters for portfolios contained in Rule 9, Article XXXV. Finally, the Plan provides that all contracts with vendors and subscribers explicitly provide that the information provided them must be used consistently with all applicable statutes and regulations and must not be used in a fraudulent or manipulative manner.

### Comments

The Commission received one comment on the proposed Plan from the Alliance of Floor Brokers ("AFB").[7] In general, the AFB argues that in comparison to existing equity market trading procedures, the different regulatory treatment envisioned by the Secondary Trading Session would result in a fragmented securities market structure. More specifically, the AFB contends that the pricing mechanisms that govern stock portfolio trading during the Secondary Trading Session do not provide for sufficient price transparency, order interaction and ultimate price improvement. The AFB argues that Midwest has not properly addressed the lack of pricing transparency, and is concerned that some individual securities prices may be somewhat arbitrary and unreflective of their actual price movements.

Midwest responded to the AFB's critique by emphasizing that its Secondary Trading Session represents a marked improvement over current market practices, where overseas portfolio transactions are not reported, either to the Commission or to the public.[8] Under the Plan, real-time portfolio transaction reports will be disseminated to vendors and subscribers along with aggregated shares traded. Thus, the Exchange noted that the investing public will no longer be deprived of important information regarding portfolio trading activity in various securities.

In addition, Midwest believes that the pricing of portfolio tranactions between institutional buyers and sellers is actually based on the aggregate portfolio price, not on the prices of individual securities. As a result, although Midwest's rules require reporting of individual security prices for audit trail and clearing purposes, and require that these prices be within a 10% range of the close, Exchange members and their customers are free to allocate the portfolio's price among the individual securities at their own discretion. Individual security prices therefore may be somewhat derivative and not reflective of the price movements in any particular security. Thus, Midwest is concerned that disseminating these arbitrarily determined prices to the general public may be misleading and potentially harmful to the market.

### Discussion

*A. Standards of Review*

In reviewing the Plan, the Commission must determine that it meets the standards set forth in Section 11A of the Act and Rules 11Aa3–1 and 11Aa3–2 thereunder. The Commission believes that the Plan, as described above, substantially meets these standards.

Rule 11Aa3–1(b)(2) provides that any National Market System ("NMS") plan shall specify, at a minimum: (1) the listed equity and NASDAQ securities or classes of such securities for which transaction reports are required by the plan; (2) the reporting requirements for

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[1] 17 CFR 240.11Aa3-1 and 240.11Aa3-2 (1989).

[2] Proposed Midwest Rule 10(b), Article IX will establish a Secondary Trading Session to be conducted from 3:30 p.m. to 5:00 p.m. Central Time for the limited purpose of permitting the execution of transactions in qualified portfolios of equity securities through the new automated Portfolio Trading System ("PTS" or "System"). Brokers for institutional investors in portfolios of securities that desire to execute transactions based on closing prices of securities on the NYSE often effect such transactions offshore, usually in London. These transactions take place without exchange oversight and without regulatory protection for participants in U.S. securities markets. Further, such transactions are not reported to the public. Midwest developed the Secondary Trading Session to provide a facility for broker-dealers to execute transactions in portfolios in the United States. The Commission approved the proposed rule change submitted by Midwest to establish the Secondary Trading Session in a separate order issued today. *See* Securities Exchange Act Release No.

[3] *See* letter from J. Craig Long, Vice President, General Counsel and Secretary, Midwest, SEC, to Mary Revell, Branch Chief, Division of Market Regulation, SEC, dated September 12, 1989, and letter from J. Craig Long to Kathryn Natale, Assistant Director, Division of Market Regulation, SEC, dated October 18, 1989.

[4] Eligible securities are defined in proposed Rule 2(d), Article XXXV as all securities that are listed for trading on the Exchange or to which unlisted trading privileges ("UTP") have been granted.

[5] The Plan also provides the terms of access for vendors who wish to retransmit the data. The Plan provides for no vendor fees for access to the information but would require subscribers to pay "appropriate" fees for receipt of the data.

[6] This corresponds to the hours of the Secondary Trading Session.

[7] *See* Letter from Michael D. Robbins, President, AFB, to Jonathan G. Katz, Secretary, SEC, dated August 18, 1989.

[8] *See* letter from J. Craig Long, Vice President and General Counsel, Midwest, to Richard G. Ketchum, Director, Division of Market Regulation, SEC, dated April 27, 1989 ("April 27 letter").

transactions in listed equity securities or NASDAQ/NMS securities for any broker or dealer subject to the plan; (3) the manner of collecting, processing, sequencing, making available and disseminating transaction reports and the last sale data reported pursuant to such plan; (4) the manner such transaction reports reported pursuant to the plan are to be consolidated with transaction reports from exchanges and associations reported pursuant to any other effective transaction reporting plan; (5) the applicable standards and methods that will be used to ensure promptness of reporting and the accuracy and completeness of transaction reports; (6) any rules or procedures that may be adopted to ensure that transaction reports or last sale data will not be disseminated in a fraudulent or manipulative manner; (7) specific terms of access to transaction reports made available or disseminated pursuant to the plan; and (8) that transaction reports or last sale data made available to any vendor for display on an interrogation device identify the marketplace where each transaction was executed.[9]

*B. Exemptions From Rule 11Aa3–1*

Because of the limited purposes of the Plan and limited nature of the Plan itself, Midwest requested that the Commission grant three exemptions from the requirements of Rule 11Aa3–1.[10] Specifically, Midwest requests exemptions from the Rule's requirements to: (1) report transactions in reported securities; (2) specify in the Plan the method of consolidation with transaction reports from exchanges and associations reported pursuant to any other effective transaction reporting plan; and (3) provide market identifiers for last sale transaction reports disseminated pursuant to the Plan.[11]

Paragraphs (c) (1) and (2) of Rule 11Aa3–1 require Midwest to disseminate last sale transaction reports for individual reported securities traded on the Exchange.[12] The Plan provides for the dissemination of transaction reports for each portfolio. but not the individual securities composing the portfolio.[13] As noted above, however, Midwest will make transaction reports on the portfolios available during the Secondary Trading Session and at the end of each Session it will provide the aggregate number of shares of each of the securities traded that day. The Commission agrees with the Exchange that real-time last sale transaction reporting for the individual stocks underlying a portfolio transaction is not necessary in the Secondary Trading Session context. The Commission concurs that dissemination of prices of the individual securities composing the portfolio may be of limited value. For the reasons discussed above, the Commission believes that dissemination of transaction reports only for the portfolios, rather than for the underlying securities, is consistent with the goal of publicly disseminating accurate and useful transaction information. Thus, the Commission believes that it is appropriate to grant an exemption from this requirement of Rule 11Aa3–1.

Rule 11Aa3–1(b)(2)(iv) requires that provision be made in the plan for the consolidation of transaction reports from other markets trading the same securities. The Commission has decided to grant Midwest a temporary exemption, for six months from the date of this order, from the requirement that the Plan provide a mechanism for the consolidation of last sale data on these securities with last sale data from other markets trading the same securities.[14] While the Commission is aware of the limited usefulness of price information on the underlying securities in the portfolio, it believes that dissemination of the share volume in the underlying securities is important information and should be included in the daily consolidated volume for each of the underlying securities. This presents a number of technological difficulties for Midwest, however, and thus the Commission has decided to grant a temporary exemption from this requirement to allow Midwest adequate time to make the necessary arrangements to have this volume data included in the end-of-day consolidated volume.

Finally, Midwest requested an exemption from the requirement of Rule 11Aa3–1(b)(2)(viii) that it provide market identifiers on the disseminated portfolio transaction reports. It requires, however, that NMS plans provide market identifiers. Therefore, Midwest requested an exemption from this specific provision. Because Midwest will be the only marketplace reporting transactions to vendors pursuant to the Plan, all trades will be known by vendors as Midwest Trades. Midwest believes, therefore, that there is no benefit to be gained by requiring that transaction reports contain marketplace identifiers. The Commission agrees that unless and until any other market becomes a party to the Plan and transactions in that market are reported pursuant to the Plan, it is not necessary that the Plan provide market identifiers for transaction reports. Thus, the Commission believes it is appropriate to grant Midwest an exemption from the requirements of Rule 11Aa3–1(b)(2)(viii).

**Conclusion**

For the reasons discussed above, the Commission finds that the Midwest transaction reporting plan and the exemptions under Rule 11Aa3–1 are consistent with the requirements of the Act and the rules and regulations thereunder and, in particular, Section 11A(a)(1) and Rules 11Aa3–1 and 11Aa3–2.

It is therefore ordered, pursuant to section 11A of the Act and Rules 11Aa3–1 and 11Aa3–2 thereunder, that the proposed transaction reporting plan be, and hereby is, approved. Further, the Commission hereby orders that Midwest be granted the following exemptions from Rule 11Aa3–1: (1) the requirement under paragraphs (c) (1) and (2) that Midwest disseminate transaction reports for individual reported securities traded on the Exchange; (2) the requirement under paragraph (b)(2)(viii) that transaction reports include market identifiers; and (3) a temporary exemption for a six-month period commencing on the date of this order from the requirement under paragraph (b)(2)(iv) that the Plan provide for the consolidation of transaction reports from other markets trading the same security.

By the Commission.

Dated: October 26, 1989.

**Jonathan G. Katz,**

*Secretary.*

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[9] Additionally, Rule 11Aa3–2, to the extent that it is applicable, requires that a NMS plan describe the terms and conditions under which brokers, dealers, and/or self-regulatory organizations will be granted or denied access.

[10] The Commission has authority under paragraph (g) of Rule 11Aa3–1 to grant exemptions from the provisions of the Rule.

[11] *See* note 3.

[12] "Reported securities" are securities for which there is in effect a transaction reporting plan.

[13] As noted above, Midwest will disseminate the volume of the stocks comprising baskets but will not disseminate the price of those component stocks.

[14] The Commission anticipated that the portfolios traded in the Secondary Trading Session will consist mostly, if not entirely, of securities already subject to transaction reporting requirements pursuant to the Consolidated Transaction Reporting Plan (the plan governing transaction reporting of New York and American Stock Exchange stocks) or the National Association of Securities Dealers' transaction reporting plan. Among other things, these plans provide for real-time reporting of the price and volume on trades in securities subject to the plans.

[Rel. No. 34-27386; File No. 7-5309 and 7-5356]

## Self-Regulatory Organizations; Findings and Order Granting Applications for Unlisted Trading Privileges; New York Stock Exchange, Incorporated

October 26, 1989.

The New York Stock Exchange, Inc. ("NYSE") has filed application with the Securities and Exchange Commission ("Commission") pursuant to section 12(f)(1)(B) and (C) of the Securities Exchange Act of 1934 ("Act") [1] and Rule 12f-1 [2] thereunder for unlisted trading privileges ("UTP") in the 205 securities listed in the attached *Exhibit A* [3] for the purpose of trading Exchange Stock Portfolio ("ESPs") which are based on the Standard & Poor's 500 Portfolio Index ("Index").[4]

As indicated by *Exhibit A*, the NYSE is applying for UTP on 98 stocks registered on the American Stock Exchange ("Amex") and 107 over-the-counter securities ("OTC") that are quoted on the National Association of Securities Dealers Automated Quotation System ("NASDAQ") but that are not listed and registered on any national securities exchange. Last sale information relating to the exchange-listed stocks is reported in the consolidated transaction reporting system. Last sale information on the ITC stocks is reported through NASDAQ facilities.

Two comment letters were submitted on the NYSE's UTP application.[5] The Amex stated that, although the NYSE's UTP application caused some confusion for the Amex-listed companies that were included in the application, the Amex believed that any such confusion would be eliminated if the Commission limited the grant of UTP to the sole purpose of trading these securities as part of the ESP and then only to the extent that the securities are actually included in the ESP, as indicated by the NYSE in its application.

The NASD letter expressed concern that the application of exchange off-board trading restrictions [6] to the proposed market baskets of both the NYSE and CBOE would prohobit the NASD from trading exchange listed stocks as part of a similar market basket product. In their view, the approval of the UTP applications only would be appropriate if the Commission conditioned such approval on "reciprocal unlisted trading privileges [7] to all NYSE securities included in future basket products that may be traded in the NASDAQ market, free of any off-board trading restrictions applicable to such basket products." The NASD stated that, without such a condition, the Commission could not find that the grant of UTP would have no anti-competitive effect as required under section 12(f)(2) of the Act.

Under section 12(f) of the Act the Commission may approve UTP applications if it finds, after notice and opportunity for hearing, that the extensions of UTP pursuant to such application is consistent with the maintenance of fair and orderly markets and the protection of investors. Further, in considering the NYSE's application for extension of UTP in the 107 NASDAQ stocks, section 12(f)(2) of the Act requires the Commission to consider, among other matters, the public trading activity in such securities, the character of such trading, the impact of such extension on the existing markets for such securities, and the desirability of removing impediments to and the progress that has been made toward the development of a national market system. The Commission may not grant such application if any rule of the national securities exchange making an application under section 12(f)(1)(C) of the Act would unreasonably restrict competition among dealers in such securities or between such dealers acting in the capacity of market makers who are specialists and such dealers who are not specialists.

After careful review, the Commission has determined that granting the NYSE's UTP application for the limited purpose of accommodating trading on the NYSE's ESPs is consistent with the maintenance of fair and orderly markets and the protection of investors. As noted above, the NYSE's UTP application is *not* intended to (nor does it) permit them to make individual markets in the stocks on which UTP has been requested, but rather to permit the NYSE to trade its market basket product, ESPs. The Commission today approved the NYSE's proposal to trade a basket of stocks at a single trading location on the exchange.[8] The Commission's approval order concludes that the NYSE proposal could offer a means to enhance the efficient execution of portfolio trades and, possibly increase the market's ability to absorb institutional portfolio trading. In particular, the order notes that liquidity increases resulting from trading in basket products could help absorb the volume and velocity of trading associated with index-related trading strategies, thereby reducing volatility. Based on the above, the Commission believes that the granting of UTP on the requested stocks for the sole purpose of accommodating trading on NYSE's market basket product is consistent with the maintenance of fair and orderly markets and the protection of investors.

The Commission also believes that approval of the NYSE's request for UTP on the 107 OTC stocks is appropriate and meets the requirements under section 12(f)(2) of the Act. First, because the grant of UTP on the OTC securities is limited to effecting transactions in ESPs, the Commission does not believe the concerns that have been previously raised relating to the extension of UTP on OTC stocks to a national securities exchange are directly applicable.[9] For

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[1] 15 U.S.C. 781(F)(1) (1982).

[2] 17 CFR 240.12f-1 (1989).

[3] *See* Securities Exchange Act Release Nos. 27248, September 15, 1989 and 27328, October 2, 1989. Notice of the application was given by publication in the *Federal Register* (54 FR 38778). We note that this order does not grant UTP on Jerrico, Inc., as originally requested by the NYSE, because that stock has since been deleted from the Index. As discussed below, the Commission received two comment letters regarding this application.

[4] *See* File No. SR-NYSE-89-05. The NYSE application includes the 39 stocks currently comprising the INDEX that are not listed and registered on the NYSE (The remaining 461 stocks comprising the Index are currently registered and traded on the NYSE). The NYSE believes that the remaining 166 stocks on which they have applied for UTP are likely candidates for substitution in the Index. The NYSE has indicated that UTP on the stocks in its application will be used for the limited purpose of trading these securities as part of the NYSE's ESPs and then only to the extent these securities are actually included in the ESP. The Chicago Board Options Exchange, Inc. ("CBOE") also has requested UTP on the 500 stocks comprising the S&P 500 Index for the purpose of trading these securities as part of a market basket. *See* Securities Exchange Act Release Nos. 27237, September 11, 1989 and 27327, October 2, 1989 and 54 FR 38475.

[5] *See* letters from Kenneth R. Leibler, President, American Stock Exchange, Inc. to Jonathan G. Katz, Secretary, SEC, dated September 22, 1989 and from Joseph R. Hardiman, President, National Association of Securities Dealers, Inc. ("NASD") to Richard G. Ketchum, Director, Division of Market Regulation, SEC, dated October 9, 1989.

[6] *See* NYSE Rule 390 which prohibits members from effecting any transaction in any listed security off the exchange floor. Rule 19c-3 under the Act, however, prevents exchange rules from prohibiting members from effecting transactions off an exchange floor in securities that have been listed or traded pursuant to UTP on or after April 26, 1979.

[7] We note that unlike the registration requirements for exchanges under section 12(a) of the Act, there is no Section of the Act that actually would prohibit the NASD from trading exchange listed stocks as part of a market basket approved by the Commission. We recognize, however, that the application on exchange off-board trading restrictions that prohibit exchange members from trading certain securities off an exchange floor could have a severe impact on the trading market for an OTC market basket comprised of stocks subject to these restrictions.

[8] *See* Securities Exchange Act Release No. 27382, October 26, 1989.

[9] *See* Securities Exchange Act Release No. 22417 (September 16, 1985), 50 FR 38640 which announced

Continued

example, among other things, the Commission has been concerned with procedures for assuring coordinated market information if OTC issues were traded on an exchange.[10] Because the OTC issues on which the NYSE has requested UTP only will trade as part of a market basket and not individually, however, these concerns are not raised. Further, because the grant of UTP does *not* permit market making in the individual securities by the NYSE, the other factors which section 12(f)(2) directs the Commission to consider do not raise concerns. For example, the trading of the OTC securities as part of a basket should not have any negative impact on the public trading activity in such securities or their existing market and should not have any potential to change the existing primary market for the individual stocks.[11] In this regard, we note that the 31 OTC issues that currently comprise the ESP make up a small component of the composite index value, thus assuring that any impact on the underlying NASDAQ market will be minimal.

Finally, the Commission is cognizant of the competitive implications raised by the NASD about approving UTP on the OTC issues without limiting the application of exchange off-board trading restrictions to market baskets. In this context, the Commission would be concerned about any exchange restrictions that would limit the ability of any market to quote and trade a market basket product similar to the market baskets approved for trading on the NYSE and CBOE.

*Accordingly, it is ordered,* pursuant to section 12(f) of the Act, that the NYSE's application for unlisted trading privileges in the securities listed in the attached *Exhibit A* for the limited purpose of trading such securities as part of the NYSE's ESPs and only to the extent that the securities actually are included in the Index on which the ESPs will be based is hereby approved.

By the Commission.

**Jonathan G. Katz,**

*Secretary.*

## Exhibit A

### I. Amex-Listed Stocks

| Symbol | Issuer | Class |
|---|---|---|
| AMEX: | | |
| AMH | Amdahl Corp | |
| API.A | American Petrofina Co | A |
| ATC | Atari Corp | |
| ATX.A | Cross Co | A |
| AZA | Alza Corp | |
| BBC.A | Bergen Brunswig Corp | A |
| BF.A | Brown-Forman Corp | A |
| BF.B | Brown-Forman Corp | B |
| BHA | Biscayne Holdings Inc | |
| BIC | Bic Corp | |
| BID | Sotheby's Holdings, Inc | A |
| BL | Blair Corp | |
| BLR | Bolar Pharmaceutical Co., Inc | |
| BNE | Bowne & Co., Inc | |
| CCL | Carnival Cruise Lines Inc | A |
| CDV.A | Chambers Development Co., Inc. | A |
| CDV.B | Chambers Development Co., Inc. | A |
| CFB | Citizens First Bancorp | |
| CJN | Caesars New Jersey, Inc | |
| CTY | Century Communications Corp | A |
| CVC | Cablevision Systems Corp | A |
| DIA | Diasonics, Inc | |
| DPC | Dataproducts Corp | |
| EXC | Excel Industrial, Inc | |
| FCE.A | Forest City Enterprises, Inc | A |
| FCE.B | Forest City Enterprises, Inc | B |
| FES | First Empire State Corp | |
| FRK | Florida Rock Industries, Inc | |
| FRX | Forest Laboratories, Inc | A |
| FTL | Fruit of the Loom, Inc | A |
| GAN | Garan Inc | |
| GB | Guardian Bancorp | |
| GDS.B | Glenmore Distilleries Co | B |
| GFS.A | Giant Food, Inc | A |
| GLT | Glatfelter Co | |
| GO | Collins Industries, Inc | |
| HA | Hal, Inc | |
| HAI | Hampton Industries, Inc | |
| HAS | Hasbro, Inc | |
| HBW | Howard B Wolf, Inc | |
| HCO | Hubco, Inc | |
| HEI | Heico Corp | |
| HGC | Hudson General Corp | |
| HOC | Holly Corp | |
| HOV | Hovnanian Enterprises, Inc | |
| HRL | Hormel & Co | |
| HSN | Home Shopping Network, Inc | |
| HUB.A | Hubbell, Inc | A |
| HUB.B | Hubbell, Inc | B |
| ICH | ICH Corp | |
| JBM | Jan Bell Marketing, Inc | |
| LFA | Littlefield Adams & Co | |
| LII | Larizza Industries, Inc | |
| LJC | La Jolla Bancorp | |
| MEG.A | Media General, Inc | A |
| MMZ.A | Metro Mobile CTS, Inc | A |
| MMZ.B | Metro Mobile CTS, Inc | B |
| MND | Mitchell Energy & Development Corp. | |
| MXM | Maxxam, Inc | |
| NAN | Nantucket Industries, Inc | |
| NYT.A | New York Times Co | A |
| OEA | OEA, Inc | |
| ONA | Oneita Industries | |
| OSL | O'Sullivan Corp | |
| PAR | Precision Aerotech, Inc | |
| PGU | Pegasus Gold, Inc | |
| PLL | Pall Corp | |
| PRY | Pittway Corp | |
| RAV | Raven Industries, Inc | |
| RDK | Ruddick Corp | |
| SA | Stage II Apparel Corp | |
| SBA | Sbarro, Inc | |
| SEB | Seaboard Corp | |
| SER | Sierracin Corp | |
| SGC | Superior Surgical Manufacturing Co., Inc. | |
| SMC.A | Smith A.O. Corp | A |
| SMK | Sanmark Stardust, Inc | |
| SP | Spelling Entertainment, Inc | A |
| SUP | Superior Industries International Inc. | |
| SWD | Standard Shares, Inc | |
| TBS.A | Turner Broadcasting System, Inc. | A |
| TBS.B | Turner Broadcasting System, Inc. | B |
| TDS | Telephone and Data Systems, Inc. | |
| TFX | Teleflex, Inc | |
| THI | Thermo Instrument Systems, Inc. | |
| TMD | Thermedics, Inc | |
| TRC | Tejon Ranch Co | |
| USM | United States Cellular Corp | |
| VAC.A | Vermont American Corp | A |
| VAL | Valspar Corp | |
| VIA | Viacom, Inc | |
| VOT | Voplex Corp | |
| WAB | Westamerica, Bancorp | |
| WAH | Westair Holding, Inc | |
| WAN.B | Wang Laboratories, Inc | B |
| WDC | Western Digital Corp | |
| WPO.B | Washington Post Co | B |
| WSC | Wesco Financial Corp | |

*All stocks in this list are common stock.

### II. OTC-Traded Stocks

| Symbol | Issuer | Class |
|---|---|---|
| AAPL | Apple Computer Inc | |
| ACAD | Autodesk, Inc | |
| ACCOB | Adolph Coors Co | B |
| AGREA | American Greetings Corp | A |
| ALEX | Alexander and Baldwin Co | |
| AMGN | Amgen, Inc | |
| AMTR | Ameritrust Corp | |
| ANAT | American National Insurance Co | |
| ANDW | Andrew Corp | |
| ATCMA | American Television and Communications. | A |
| BETZ | Betz Laboratories, Inc | |
| BNHI | Bancorp Hawaii, Inc | |
| BOAT | Boatmens Bancshares, Inc | |
| BRNO | Brunos, Inc | |
| BSET | Bassett Furniture Industries, Inc | |
| CCLR | Commerce Clearing House, Inc | |
| CCXLA | Contel Cellular, Inc | A |
| CHRS | Charming Shoppes, Inc | |
| CINF | Cincinnati Financial Corp | |
| CITUB | Citizens Utilities Co | B |
| CMCA | Comerica, Inc | |
| CMCSA | Comcast Corp | A |
| CNCAA | Centel Cable Television Co | A |
| COMM | Cellular Communication, Inc | |
| CPER | Consolidated Papers, Inc | |
| CRBN | Calgon Carbon Corp | |
| CRFC | Crestar Financial Corp | |
| CSFN | Corestates Financial Corp | |
| CTCO | Cross and Trecker Corp | |
| CTYN | City National Corp | |
| DIGI | DSC Communications Corp | |
| DMBK | Dominion Bankshares Corp | |
| EWSC | E.W. Scripps Co | A |
| FDLNB | Food Lion, Inc | B |
| FEXC | First Executive Corp | |
| FITB | Fifth Third Bancorp | |
| GOSHA | Oshkosh B Gosh, Inc | A |

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the Commission's willingness to grant UTP on OTC securities if certain conditions were met.

[10] *See* Securities Exchange Act Release No. 22407 (April 24, 1987), 52 FR 17349 which approved a Midwest Stock Exchange application for UTP on 25 OTC issues subject to the development of a joint transaction reporting plan to accommodate such trading.

[11] Rather, as noted above, one positive result of such trading could be increased liquidity in the subject securities and reduced volatility.

| Symbol | Issuer | Class |
|---|---|---|
| HAML | Hamilton Oil Corp | |
| HBAN | Huntington Bancshares, Inc | |
| HBOL | Hartford Steam Boiler Inspection and Insurance. | |
| HECHA | Hechinger, Co | A |
| HENG | Henley Group, Inc | A |
| INGR | Intergraph Corp | |
| INTC | Intel Corp | |
| ITGR | Integra Financial Corp | |
| JJSC | Jefferson Smurfit Corp | |
| KELYA | Kelly Services, Inc | A |
| LINB | Lin Broadcasting Corp | |
| LIZC | Liz Claiborne, Inc | |
| LMED | Lyphomed, Inc | |
| LNCE | Lance Inc | |
| LOTS | Lotus Development Corp | |
| MASX | Masco Industries, Inc | |
| MCAWA | McCaw Cellular Communications, Inc. | A |
| MCCRK | McCormick and Company, Inc | |
| MCCS | Medco Containment Services, Inc. | |
| MCIC | MCI Communications Corp | |
| MIDL | Midlantic Corp | |
| MMEDC | Multimedia, Inc | |
| MNCO | Michigan National Corp | |
| MNTL | Manufacturers National Corp | |
| MOLX | Molex, Inc | |
| MRDN | Meridian Bancorp, Inc | |
| MRIS | Marshall and Ilsley Corp | |
| MSFT | Microsoft Corp | |
| NHLI | National Health Laboratories, Inc. | |
| NIKE | Nike, Inc | B |
| NGNA | Neutrogena Corp | |
| NOBE | Nordstrom, Inc | |
| NOVL | Novell, Inc | |
| NOXLB | Noxell Corp | B |
| NTRS | Northern Trust Corp | |
| OCAS | Ohio Casualty Corp | |
| ORCL | Oracle Systems Corp | |
| PACCB | Provident Life and Accident Insurance of America. | B |
| PCAR | Paccar, Inc | |
| PCLB | Price Co | |
| PHYB | Pioneer Hi Bred International, Inc. | |
| PTCM | Pacific Telecom, Inc | |
| ROAD | Roadway Services, Inc | |
| ROUS | Rouse Co | |
| SAFC | Safeco Corp | |
| SCRP | Scripps Howard Broadcasting Co. | |
| SGAT | Seagate Technology, Inc | |
| SIAL | Sigma Aldrich Corp | |
| SMED | Shared Medical Systems Corp | |
| SOCI | Society Corp | |
| SONO | Sonoco Products Co | |
| SPGLA | Spiegel, Inc | A |
| STBK | State Street Boston Corp | |
| STJM | St. Jude Medical, Inc | |
| STPL | St. Paul Companies, Inc | |
| SUNW | Sun Microsystems, Inc | A |
| TCOMA | Tele Communication, Inc | A |
| TECU | Tecumseh Products Co | |
| TYSNA | Tyson Foods, Inc | A |
| UBNK | Union Bank | |
| USBC | U.S. Bancorp of Oregon | |
| USWNA | U.S. West New Vector Group Inc. | A |
| VCELA | Vanguard Cellular Systems Inc | A |
| WETT | Wetterau, Inc | |
| WILM | Wilmington Trust Co | |
| WMOR | Westmoreland Coal Co | |
| WMTT | Willamette Industries, Inc | |
| WTHG | Worthington Industries, Inc | |
| YELL | Yellow Freight System, Inc. of Delaware. | |
| RYAN | Ryan's Family Steak Houses, Inc. | |

*All stocks in this list are common stock.

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**[Rel. No. 34-27387; File No. 7-5301 and 7-5357]**

## Self-Regulatory Organizations; Findings and Order Granting Applications for Unlisted Trading Privileges; Chicago Board Options Exchange, Inc.

October 26, 1989.

The Chicago Board Options Exchange, Inc. ("CBOE") has filed application with the Securities and Exchange Commission ("Commission") pursuant to sections 12(f)(1)(B) and (C) of the Securities Exchange Act of 1934 ("Act") [1] and Rule 12f-1 [2] thereunder for unlisted trading privileges ("UTP") in 500 securities [3] for the purpose of trading market baskets on the Standard & Poor's ("S&P") 500 and 100 Stock Price Indexes ("Index").[4]

The CBOE originally applied for UTP on 462 stocks registered on the New York Stock Exchange ("NYSE"), 7 registered on the American Stock Exchange, Inc. ("Amex") and 31 over-the-counter securities ("OTC") that are quoted on the National Association of Securities Dealers Automated Quotation System ("NASDAQ") but that are not listed and registered on any national securities exchange.[5] Last sale information relating to the exchange-listed stocks is reported in the consolidated transaction reporting system. Last sale information on the OTC stocks is reported through NASDAQ facilities.

One comment lette was submitted on the CBOE's UTP application.[6] The NASD letter expressed concern that the application of exchange off-board trading restrictions [7] to the proposed market baskets of both the New York Stock Exchange ("NYSE") [8] and CBOE would prohibit the NASD from trading exchange-listed stocks as part of a similar market basket product. In their view, the approval of the UTP applications only would be appropriate if the Commission conditioned such approval on "reciprocal unlisted trading privileges [9] to all NYSE securities included in future basket products that may be traded in the NASDAQ market, free of any off-board trading restrictions applicable to such basket products." The NASD stated that, without such a condition, the Commission could not find that the grant of UTP would have no anti-competitive effect as required under section 12(f)(2) of the Act.

Under section 12(f) of the Act the Commission may approve UTP applications if it finds, after notice and opportunity for hearing, that the extensions of UTP pursuant to such application is consistent with the maintenance of fair and orderly markets and the protection of investors. Further, in considering the CBOE's application

[1] 15 U.S.C. 781(f)(1) (1982).

[2] 17 CFR 240.12f-1 (1989).

[3] *See* Securities Exchange Act Release No. 27237 September 11, 1989. Notice of the application was given by publication in the **Federal Register** (54 FR 38475). As discussed below, the Commission received two comment letters regarding this application. The Commission also received applications for UTP in four additional securities. *See* Securities Exchange Act Release Nos. 27327 (October 2, 1989) 54 FR 41357.

[4] *See* File No. SR-CBOE-88-20. The CBOE requested UTP in the 500 stocks comprising the S&P 500 Index at the time of their initial application. Subsequent to the submission of CBOE's UTP application, S&P replaced four stocks in the Index. The replacement stocks were not part of CBOE's original UTP request. Although the Commission has noticed for comment the UTP request for the four replacement securities, the 10 day notice period required by Section 12(f)(5) of the Act has not expired on two of the replacement securities. Accordingly, the Commission is only considering a grant of UTP in the 498 stocks listed on the attached *Exhibit A* that are currently included in the Index and for which the 10 day notice requirement has been fulfilled., *But see* letter from Richard G. Ketchum, Director, Division of Market Regulation, SEC to Nancy R. Crossman, General Counsel, CBOE, dated October 26, 1989 granting no-action relief from compliance with Section 12(f) of the Act to the CBOE under certain conditions for replacement securities.

[5] For the reasons discussed in note 4 *supra*, the Commission is only considering CBOE's request for UTP in the 498 stocks listed in *Exhibit A*. This list includes 460 NYSE registered stocks rather than 462. The list continues to include 7 Amex registered stocks and 31 OTC securities.

[6] *See* letter form Joseph R. Hardiman, President, National Association of Securities Dealers, Inc. ("NASD") to Richard G. Ketchum, Director, Division of Market Regulation, SEC, dated October 9, 1989.

[7] *See* NYSE Rule 390 which prohibits members from effecting any transaction in any listed security off the exchange floor. Rule 19c-3 under the Act, however, prevents exchange rules from prohibiting members form effecting transactions off an exchange floor in securities that have been listed or traded pursuant to UTP on or after April 26, 1979.

[8] The NYSE also has requested UTP in 205 stocks for the purpose of trading these securities as part of Exchange Stock Portfolios ("ESPs"). *See* Securities Exchange Act Release Nos. 27248, September 15, 1989 and 27328, October 2, 1989 and 54 FR 38778. In a separate order the Commission is approving the NYSE's UTP request. *See* Securities Exchange Act Release No. 27386.

[9] We note that unlike the registration requirements for exchanges under section 12(a) of the Act, there is no Section of the Act that actually would prohibit the NASD from trading exchange-listed stocks as part of a market basket approved by the Commission. We recognize, however, that the application of exchange off-board trading restrictions that prohibit exchange members from trading certain securities off an exchange floor could have a severe impact on the trading market for an OTC market basket comprised of stocks subject to these restrictions.

for extension of UTP in the 31 NASDAQ stocks, section 12(f)(2) of the Act required the Commission to consider, among other matters, the public trading activity in such securities, the character of such trading, the impact of such extension on the existing markets for such securities, and the desirability of removing impediments to and the progress that has been made toward the development of a national market system. The commission may not grant such application if any rule of the national securities exchange making an application under section 12(f)(1)(C) of the Act would unreasonably restrict competition among dealers in such securities or between such dealers acting in the capacity of market makers who are specialists and such dealers who are not specialists.

After careful review, the Commission has determined that granting the CBOE's UTP application for the limited purpose of accommodating trading on the CBOE's market basket contracts is consistent with the maintenance of fair and orderly markets and the protection of investors. As noted above, the CBOE's UTP application is not intended to (nor does it) permit them to make individual markets in the stocks on which UTP has been requested, but rather to permit the CBOE to trade its market basket product. The Commission today approved the CBOE's proposal to trade a basket of stocks at a single trading location on the exchange.[10] The Commission's approval order concludes that the CBOE proposal could offer a means to enhance the efficient execution of portfolio trades and, possibly, the market's ability to absorb institutional portfolio trading. In particular, the order notes that liquidity increases resulting from trading in basket products could help absorb the volume and velocity of trading associated with index/related trading strategies thereby reducing volatility. Based on the above, the Commission believes that the granting of UTP on the requested stocks for the sole purpose of accommodating trading on CBOE's proposed market basket product is consistent with the maintenance of fair and orderly markets and the protection of investors.

The Commission also believes that approval of the CBOE's request for UTP on the 31 OTC stocks is appropriate and meets the requirements under section 12(f)(2) of the Act. First, because the grant of UTP on the OTC securities is limited to effecting transactions in market baskets, the Commission does not believe the concerns that have been previously raised relating to the extension of UTP on OTC stocks to a national securities exchange are directly applicable.[11] For example, among other things, the Commission has been concerned with preocedures for assuring coordinated market information if OTC issues were traded on an exchange.[12] Because the OTC issues on which the CBOE has requested UTP only will trade as part of a market basket and not individually, however, these concerns are not raised. Further, because the grant of UTP does *not* permit market making in the individual securities by the NYSE, the other factors which section 12(f)(2) directs the Commission to consider do not raise concerns. For example, the trading of the OTC securities as part of a basket should not have any negative impact on the public trading activity in such securities or their existing market and should not have any potential to change the existing primary market for the individual stocks.[13] In this regard, we note that the 31 OTC issues that currently comprise the CBOE's market basket product make up a small component of the composite index value, thus assuring that any impact on the underlying NASDAQ market will be minimal. Finally, the Commission is cognizant of the competitive implications raised by the NASD about approving UTP on the OTC issues without limiting the application of exchange off-board trading restrictions to market baskets. In this context, the commission would be concerned about any exchange restrictions that would limit the ability of any market to quote and trade a market basket product similar to the market baskets approved for trading on the NYSE and CBOE.

Accordingly, it is ordered, pursuant to section 12(f) of the Act, tha the CBOE's application for unlisted trading privileges in the securities listed in the attached *Exhibit A* for the limited purpose of trading such securities as part of the CBOE's market basket contracts and only to the extent that the securities actually are included in the Index on which the market baskets will be based is hereby approved.

By the Commission.

**Jonathan G. Katz,**

*Secretary.*

EXHIBIT A

| Traded | Ticker | Company | Security | Par value |
|---|---|---|---|---|
| NYSE | AMP | AMP Incorporated | Common Stock | None. |
| NYSE | AMR | AMR Corporaton | Common Stock | $1.00 |
| NYSE | AR | ASARCO Incorporated | Common Stock | None. |
| NYSE | ABT | Abbott Laboratories | Common Stock | None. |
| NYSE | AMT | Acme-Cleveland Corporation | Common Stock | $1.00 |
| NYSE | AMD | Advanced Micro Devices, Inc. | Common Stock | $0.01 |
| NYSE | AET | Aetna Life & Casualty Company | Common Stock | None. |
| NYSE | AHM | Ahmanson (H.F.) & Company | Common Stock | None. |
| NYSE | APD | Air Productis & Chemicals, Inc. | Common Stock | $1.00 |
| NYSE | ACV | Alberto-Culver Company | Common Stock | None. |
| | | | Class A Common Stock | $0.22 |
| | | | Class B Common Stock | $0.22 |
| NYSE | ABS | Albertson's, Incorporated | Common Stock | $1.00 |
| NYSE | AL | Alcan Aluminum Limited | Common Stock | None. |
| NYSE | ASN | Alco Standard Corporation | Common Stock | None. |
| NYSE | AAL | Alexander & Alexander Services Inc. | Common Stock | $1.00 |
| NYSE | ALD | Allied-Signal Inc. | Common Stock | $1.00 |
| NYSE | AA | Aluminum Company of America (Alcoa) | Common Stock | $1.00 |

[10] *See* Securities Exchange Act Release No. 27383, (October 26, 1989).

[11] *See* Securities Exchange Act Release No. 22417 (September 16, 1985), 50 FR 38640 which announced the Commission's willingness to grant UTP on OTC securities if certain conditions were met.

[12] *See* Securities Exchange Act Release No. 24407 (April 24, 1987), 52 FR 17349 which approved a Midwest Stock Exchange application for UTP on 25 OTC issues subject to the development of a joint transaction reporting plan to accommodate such trading.

[13] Rather, as noted, above, one positive result of such trading could be increased liquidity in the subject securities and reduced volatility.

EXHIBIT A—Continued

| Traded | Ticker | Company | Security | Par value |
|---|---|---|---|---|
| NYSE | AMX | AMAX Inc. | Common Stock | $1.00 |
| AMEX | AMH | Amdahl Corporation | Common Stock | $0.05 |
| NYSE | AHC | Amerada Hess Corporation | Common Stock | $1.00 |
| NYSE | AMB | American Brands, Inc. | Common Stock | $1.56 |
| NYSE | ACY | American Cyanamid Company | Common Stock | $5.00 |
| NYSE | AEP | American Electric Power Company, Inc. | Common Stock | $6.50 |
| NYSE | AXP | American Express Company | Common Stock | $0.60 |
| NYSE | AGC | American General Corporation | Common Stock | $0.50 |
| NYSE | AHP | American Home Products Corporation | Common Stock | 0.33⅓ |
| NYSE | AIG | American International Group, Inc. | Common Stock | $2.50 |
| NYSE | ASC | American Stores Company | Common Stock | $1.00 |
| NYSE | T | American Telephone and Telegraph Company | Common Stock | $1.00 |
| NYSE | AIT | American Information Technologies Corporation | Common Stock | $1.00 |
| NYSE | AN | Amoco Corporation | Common Stock | None. |
| NASDAQ | ANDW | Andrew Corporation | Common Stock | $0.01 |
| NYSE | BUD | Anheuser-Busch Companies, Inc. | Common Stock | $1.00 |
| NASDAQ | AAPL | Apple Computer, Inc. | Common Stock | None. |
| NYSE | ADM | Archer-Daniels-Midland Company | Common Stock | None. |
| NYSE | ALG | Arkla, Inc. | Common Stock | $0.625 |
| NYSE | AS | Armco Inc. | Common Stock | $1.00 |
| NYSE | ACK | Armstrong World Industries, Inc. | Common Stock | $1.00 |
| NYSE | ASH | Ashland Oil, Inc. | Common Stock | $1.00 |
| NYSE | ARC | Atlantic Richfield Company | Common Stock | $2.50 |
| NYSE | AUD | Automatic Data Processing, Inc. | Common Stock | $0.10 |
| NYSE | AVY | Avery International Corporation | Common Stock | $1.00 |
| NYSE | AVP | Avon Products, Inc. | Common Stock | $0.50 |
| NYSE | BHI | Baker Hughes Incorporated | Common Stock | $1.00 |
| NYSE | BLL | Ball Corporation | Common Stock | None. |
| NYSE | BLY | Bally Manufacturing Corporation | Common Stock | $0.66⅔ |
| NYSE | BGE | Baltimore Gas and Electric Company | Common Stock | None. |
| NYSE | ONE | Banc One Corporation | Common Stock | None. |
| NYSE | BKB | Bank of Boston Corporation | Common Stock | $2.25 |
| NYSE | BAC | BankAmerica Corporation | Common Stock | $1.5625 |
| NYSE | BT | Bankers Trust New York Corporation | Common Stock | $10.00 |
| NYSE | BCR | Bard (C.R.), Inc. | Common Stock | $0.25 |
| NYSE | BBI | Barnett Banks, Inc. | Common Stock | $2.00 |
| NASDAQ | BSET | Bassett Furniture Industries, Incorporated | Common Stock | $5.00 |
| NYSE | BOL | Bausch & Lomb Incorporated | Common Stock | $0.40 |
| NYSE | BAX | Baxter International Inc. | Common Stock | $1.00 |
| NYSE | BDX | Becton, Dickinson and Company | Common Stock | $1.00 |
| NYSE | BEL | Bell Atlantic Corporation | Common Stock | $1.00 |
| NYSE | BLS | BellSouth Corporation | Common Stock | $1.00 |
| NYSE | BMS | Bemis Company, Inc. | Common Stock | $0.10 |
| NYSE | BNL | Beneficial Corporation | Common Stock | $1.00 |
| NYSE | BS | Bethlehem Steel Corporation | Common Stock | $1.00 |
| NYSE | BEV | Beverly Enterprises | Common Stock | $0.10 |
| NYSE | BDK | Black & Decker Corporation (The) | Common Stock | $0.50 |
| NYSE | HRB | Block (H & R), Inc. | Common Stock | None. |
| NYSE | BA | Boeing Company (The) | Common Stock | $5.00 |
| NYSE | BCC | Boise Cascade Corporation | Common Stock | $2.50 |
| NYSE | BN | Borden, Inc. | Common Stock | $1.25 |
| NYSE | BGG | Briggs & Stratton Corporation | Common Stock | $3.00 |
| NYSE | BMY | Bristol-Myers Company | Common Stock | $0.10 |
| NYSE | BNS | Brown & Sharpe Manufacturing Company | Common Stock | $1.00 |
| | | | Class A Common Stock | $1.00 |
| | | | Class B Common Stock | $1.00 |
| NYSE | BG | Brown Group, Inc. | Common Stock | $3.75 |
| NYSE | BFB | Brown-Forman, Inc. | Class B Common Stock | $0.15 |
| AMEX | BFI | Browning-Ferris Industries, Inc. | Common Stock | $.016⅔ |
| NYSE | BC | Brunswick Corporation | Common Stock | None. |
| NYSE | BNI | Burlington Northern Inc. | Common Stock | None. |
| NYSE | CBS | CBS Inc. | Common Stock | $2.50 |
| NYSE | CI | CIGNA Corporation | Common Stock | $1.00 |
| NYSE | CNA | CNA Financial Corporation | Common Stock | $2.50 |
| NYSE | CPC | CPC International Inc. | Common Stock | $0.25 |
| NYSE | CSX | CSX Corporation | Common Stock | $1.00 |
| NYSE | CPB | Campbell Soup Company | Common Stock | $0.30 |
| NYSE | CCB | Capital Cities/ABC, Inc. | Common Stock | $1.00 |
| NYSE | CPH | Capital Holding Corporation | Common Stock | $1.00 |
| NYSE | CPL | Carolina Power & Light Company | Common Stock | None. |
| NYSE | CHH | Carter Hawley Hale Stores, Inc. | Common Stock | $0.01 |
| NYSE | CAT | Caterpillar Inc. | Common Stock | None. |
| NYSE | CTX | Centex Corporation | Common Stock | $0.25 |
| NYSE | CSR | Central & South West Corporation | Common Stock | $3.50 |
| NYSE | CHA | Champion International Corporation | Common Stock | $0.50 |
| NASDAQ | CHRS | Charming Shoppes Inc. | Common Stock | $0.10 |
| NYSE | CMB | Chase Manhattan Corporation | Common Stock | $12.50 |
| NYSE | CHL | Chemical Banking Corporation | Common Stock | $12.00 |
| NYSE | CHV | Chevron Corporation | Common Stock | $3.00 |
| NYSE | C | Chrysler Corporation | Common Stock | $1.00 |

EXHIBIT A—Continued

| Traded | Ticker | Company | Security | Par value |
|---|---|---|---|---|
| NYSE | CB | Chubb Corporation (The) | Common Stock | $1.00 |
| NYSE | CMZ | Cincinnati Milacron Inc. | Common Stock | $1.00 |
| NYSE | CC | Circuit City Stores, Inc. | Common Stock | $1.00 |
| NYSE | CCI | Citicorp | Common Stock | $1.00 |
| NYSE | CKL | Clark Equipment Company | Common Stock | $7.50 |
| NYSE | CLX | Clorox Company (The) | Common Stock | $1.00 |
| NYSE | CGP | Coastal Corporation (The) | Common Stock | $0.33⅓ |
| NYSE | KO | Coca-Cola Company (The) | Common Stock | $1.00 |
| NYSE | CL | Colgate-Palmolive Company | Common Stock | $1.00 |
| NYSE | CG | Columbia Gas System, Inc. (The) | Common Stock | $10.00 |
| NYSE | CSP | Combustion Engineering, Inc. | Common Stock | $1.00 |
| NYSE | CMCSA | Comcast Corporation | Class A Common Stock | $1.00 |
| NYSE | CWE | Commonwealth Edison Company | Common Stock | $12.50 |
| NYSE | CMY | Community Psychiatric Centers | Common Stock | $1.00 |
| NYSE | CPQ | COMPAQ Computer Corporation | Common Stock | $0.01 |
| NYSE | CA | Computer Associates International, Inc. | Common Stock | $0.10 |
| NYSE | CSC | Computer Sciences Corporation | Common Stock | $1.00 |
| NYSE | CAG | ConAgra, Inc. | Common Stock | $5.00 |
| NYSE | ED | Consolidated Edison Company of New York, Inc. | Common Stock | $2.50 |
| NYSE | CNF | Consolidated Freightways, Inc. | Common Stock | $0.625 |
| NYSE | CNG | Consolidated Natural Gas Company | Common Stock | $2.75 |
| NYSE | CRR | Consolidated Rail Corporation | Common Stock | $1.00 |
| NYSE | CIC | Continental Corporation (The) | Common Stock | $1.00 |
| NYSE | CDA | Control Data Corporation | Common Stock | $0.50 |
| NYSE | CBE | Cooper Industries, Inc. | Common Stock | $5.00 |
| NASDQ | ACCOB | Coors (Adolph) Company | Class B Common Stock | None. |
| NYSE | GLW | Corning Glass Works | Common Stock | $5.00 |
| NYSE | CBL | Corroon & Black Corporation | Common Stock | $0.12½ |
| NYSE | CR | Crane Co. | Common Stock | $1.00 |
| NYSE | CYR | Cray Research, Inc. | Common Stock | $1.00 |
| NYSE | CTCO | Cross & Trecker Corporation | Common Stock | $1.00 |
| NYSE | CCK | Crown Cork & Seal Company, Inc. | Common Stock | $5.00 |
| NYSE | CUM | Cummins Engine Company, Inc. | Common Stock | $2.50 |
| NYSE | CYM | Cyprus Minerals Company | Common Stock | None. |
| NASDAQ | DIGI | DSC Communications Corporation | Common Stock | $0.01 |
| NYSE | DCN | Dana Corporation | Common Stock | $1.00 |
| NYSE | DGN | Data General Corporation | Common Stock | $0.01 |
| NYSE | DPT | Datapoint Corporation | Common Stock | $0.25 |
| NYSE | DH | Dayton Hudson Corporation | Common Stock | $1.00 |
| NYSE | DE | Deere & Company | Common Stock | $1.00 |
| NYSE | DAL | Delta Air Lines, Inc. | Common Stock | $3.00 |
| NYSE | DLX | Deluxe Corporation | Common Stock | $1.00 |
| NYSE | DTE | Detroit Edison Company (The) | Common Stock | $10.00 |
| NYSE | DEC | Digital Equipment Corporation | Common Stock | $1.00 |
| NYSE | DDS | Dillard Department Stores Inc | Class A Common Stock | None. |
| NYSE | D | Dominion Resources, Inc | Common Stock | None. |
| NYSE | DNY | Donnelley (R.R.) & Sons Company | Common Stock | $1,25 |
| NYSE | DOV | Dover Corporation | Common Stock | $1.00 |
| NYSE | DOW | Dow Chemical Company (The) | Common Stock | $2.50 |
| NYSE | DJ | Dow Jones & Company, Inc | Common Stock | $1.00 |
| NYSE | DI | Dresser Industries, Inc. | Common Stock | $0.25 |
| NYSE | DO | du Pont (E.I.) de Nemours and Company | Common Stock | $1.66⅔ |
| NYSE | DUK | Duke Power Company | Common Stock | None. |
| NYSE | DNB | Dun & Bradstreet Corporation | Common Stock | $1.00 |
| NYSE | EGG | EG&G, Inc | Common Stock | $1.00 |
| NYSE | ESY | E-System, Inc | Common Stock | $1.00 |
| NYSE | ENS | ENSERCH Corporation | Common Stock | $4.45 |
| NYSE | EFU | Eastern Enterprises | Common Stock | $1.00 |
| NYSE | EK | Eastman Kodak Company | Common Stock | $2.50 |
| NYSE | ETN | Eaton Corporation | Common Stock | $0.50 |
| NYSE | ECH | Echlin Inc | Common Stock | $1.00 |
| NYSE | ECL | Ecolab Inc | Common Stock | $1.00 |
| NYSE | EMR | Emerson Electric Co | Common Stock | $1.00 |
| NYSE | EC | Englehard Corporation | Common Stock | $1.00 |
| NYSE | ENE | Enron Corp | Common Stock | $10.00 |
| NYSE | ETR | Entergy Corporation | Common Stock | $5.00 |
| NYSE | EY | Ethyl Corporation | Common Stock | $1.00 |
| NYSE | XON | Exxon Corporation | Capital Stock | None. |
| NYSE | FMC | FMC Corporation | Common Stock | $0.10 |
| NYSE | FPL | FPL Group, Inc | Common Stock | $.01 |
| NYSE | FJQ | Fedders Corporation | Common Stock | $1.00 |
| NYSE | FDX | Federal Express Corporation | Common Stock | $0.10 |
| NYSE | FNM | Federal National Mortgage Association | Common Stock | None. |
| NYSE | FBO | Federal Paper Board Company, Inc | Common Stock | $5.00 |
| NYSE | FNB | First Chicago Corporation | Common Stock | $5.00 |
| NYSE | FFB | First Fidelity Bancorporation | Common Stock | $1.00 |
| NYSE | I | First Interstate Bancorp | Common Stock | $2.00 |
| NYSE | FRM | First Mississippi Corporation | Common Stock | $1.00 |
| NYSE | FTU | First Union Corporation | Common Stock | $3.33⅓ |
| NYSE | FNG | Fleet/Norstar Financial Group, Inc | Common Stock | $1.00 |

EXHIBIT A—Continued

| Traded | Ticker | Company | Security | Par value |
|---|---|---|---|---|
| NYSE | FLE | Fleetwood Enterprises, Inc | Common Stock | $1.00 |
| NYSE | FLM | Fleming Companies, Inc | Common Stock | $2.50 |
| NYSE | FLR | Flour Corporation | Common Stock | $0.62½ |
| NYSE | F | Ford Motor Company | Common Stock | $1.00 |
| NYSE | FWC | Foster Wheeler Corporation | Common Stock | $1.00 |
| NYSE | GTE | GTE Corporation | Common Stock | $0.10 |
| NYSE | GCI | Gannett Co., Inc | Common Stock | $1.00 |
| NYSE | GPS | Gap. Inc. (The) | Common Stock | $0.05 |
| NYSE | GNE | Genentch, Inc | Common Stock | $0.02 |
| NYSE | GCN | General Cinema Corporation | Common Stock | $1.00 |
| NYSE | GD | General Dynamics Corporation | Common Stock | $1.00 |
| NYSE | GE | General Electric Company | Common Stock | $0.63 |
| NYSE | GRL | General Instrument Corporation | Common Stock | $1.00 |
| NYSE | GIS | General Mills, Inc | Common Stock | $0.75 |
| NYSE | GM | General Motors Corporation | Common Stock | $1.66⅔ |
| NYSE | GRN | General Re Corporation | Common Stock | $0.50 |
| NYSE | GSX | General Signal Corporation | Common Stock | $1.00 |
| NYSE | GCO | Genesco incorporated | Common Stock | $1.00 |
| NYSE | GPC | Genuine Parts Company | Common Stock | $1.00 |
| NYSE | GP | Georgia-Pacific Corporation | Common Stock | $0.80 |
| NYSE | GEB | Gerber Products Company | Common Stock | $2.50 |
| AMEX | GFSA | Giant Food, Inc | Class A Common Stock | $1.00 |
| NYSE | GS | Gillette Company (The) | Common Stock | $1.00 |
| NYSE | GDW | Golden West Financial Corporation | Common Stock | $0.10 |
| NYSE | GR | Goodrich (B.F.) Company, (The) | Common Stock | $5.00 |
| NYSE | GT | Goodyear Tire & Rubber Company (The) | Common Stock | None. |
| NYSE | GRA | Grace (W.R.) & Co | Common Stock | $1.00 |
| NYSE | GWW | Grainger (W.W.), Inc | Common Stock | $1.00 |
| NYSE | GAP | Great Atlantic & Pacific Tea Company, Inc. (The) | Common Stock | $1.00 |
| NYSE | GNN | Great Northern Nekoosa Corporation | Common Stock | $2.50 |
| NYSE | GWF | Great Western Financial Corporation | Common Stock | $1.00 |
| NYSE | G | Greyhound Corporation (The) | Common Stock | $1.50 |
| NYSE | GQ | Grumman Corporation | Common Stock | $1.00 |
| NYSE | HAL | Halliburton Company | Common Stock | $2.50 |
| NYSE | HDL | Handleman Company | Common Stock | $0.01 |
| NYSE | HBJ | Harcourt Brach Jovanovich, Inc | Common Stock | $1.00 |
| NYSE | HRS | Harris Corporation | Common Stock | $1.00 |
| NYSE | HMX | Hartmarx Corporation | Common Stock | $2.50 |
| AMEX | HAS | Hasbro Inc | Common Stock | $0.50 |
| NYSE | HNZ | Heinz (H.J.) Company | Common Stock | $0.50 |
| NYSE | HP | Helmerich & Payne, Inc | Common Stock | $0.10 |
| NYSE | HPC | Hercules Incorporated | Common Stock | None. |
| NYSE | HSY | Hershey Foods Corporation | Common Stock | $1.00 |
| NYSE | HWP | Hewlett-Packard Company | Common Stock | $1.00 |
| NYSE | HLT | Hilton Hotels Corporation | Common Stock | $2.50 |
| NYSE | HIA | Holiday Corporation | Common Stock | $1.50 |
| NYSE | HD | Home Depot, Inc. (The) | Common Stock | $0.05 |
| NYSE | HM | Homestake Mining Company | Common Stock | $1.00 |
| NYSE | HON | Honeywell Inc | Common Stock | $1.50 |
| NYSE | HI | Household International, Inc | Common Stock | $1.00 |
| NYSE | HOU | Houston Industries Incorporated | Common Stock | None. |
| NYSE | HUM | Humana Inc | Common Stock | $0.16⅔ |
| NYSE | ISS | INTERCO, INCORPORATED | Common Stock | None. |
| NYSE | ITT | ITT Corporation | Common Stock | $1.00 |
| NYSE | ITW | Illinois Tool Works Inc | Common Stock | None. |
| NYSE | N | Inco Lmited | Common Stock | None. |
| NYSE | IR | Ingersoll-Rand Company | Common Stock | $2.00 |
| NYSE | IAD | Inland Steel Industries, Inc | Common Stock | $1.00 |
| NASDAQ | INTC | Intel Corporation | Capital Stock | None. |
| NASDAQ | INGR | Intergraph Corporation | Common Stock | $0.10 |
| NYSE | IK | Interlake Corporation | Common Stock | $1.00 |
| NYSE | IBM | International Business Machines Corporation | Common Stock | $1.25 |
| NYSE | IFF | International Flavors & Fragrances Inc | Common Stock | $0.125 |
| NYSE | IGL | International Minerals & Chemical Corporation | Common Stock | $5.00 |
| NYSE | IP | International Paper Company | Common Stock | $1.00 |
| NYSE | JR | James River Corporation of Virginia | Common Stock | $0.10 |
| NYSE | JP | Jefferson-Pilot Corporation | Common Stock | $1.25 |
| NYSE | JNJ | Johnson & Johnson | Common Stock | $1.00 |
| NYSE | JCI | Johnson Controls, Inc | Common Stock | $0.16⅔ |
| NYSE | JOS | Jostens, Inc | Common Stock | $0.33⅓ |
| NYSE | KM | K mart Corporation | Common Stock | $1.00 |
| NYSE | KBH | Kaufman and Broad Home Corporation | Common Stock | $1.00 |
| NYSE | K | Kellogg Company | Common Stock | $0.25 |
| NYSE | KMG | Kerr-McGee Corporation | Common Stock | $1.00 |
| NYSE | KMB | Kimberly-Clark Corporation | Common Stock | $1.25 |
| NYSE | KWP | King World Productions, Inc | Common Stock | $0.01 |
| NYSE | KRI | Knight-Ridder, Inc | Common Stock | $0.02½ |
| NYSE | KR | Kroger Co. (The) | Common Stock | $1.00 |
| NASDAQ | LINB | LIN Broadcasting Corporation | Common Stock | $0.01 |
| NYSE | LLY | Lilly (Eli) and Company | Common Stock | $0.62½ |

EXHIBIT A—Continued

| Traded | Ticker | Company | Security | Par value |
|---|---|---|---|---|
| NYSE | LTD | Limited, Inc. (The) | Common Stock | None. |
| NYSE | LNC | Lincoln National Corporation | Common Stock | $.125 |
| NYSE | LIT | Litton Industries, Inc | Common Stock | $1.00 |
| NASDAQ | LIZC | Liz Claiborne, Inc | Common Stock | $1.00 |
| NYSE | LK | Lockheed Corp | Common Stock | $1.00 |
| NYSE | LCE | Lone Star Industries, Inc | Common Stock | $1.00 |
| NYSE | LDG | Longs Drug Stores Corp | Common Stock | None. |
| NYSE | LOR | Loral Corporation | Common Stock | $0.25 |
| NASDAQ | LOTS | Lotus Development Corporation | Common Stock | $0.01 |
| NYSE | LLX | Louisiana Land & Exploration Company (The) | Capital Stock | $0.15 |
| NYSE | LPX | Louisiana-Pacific Corporation | Common Stock | $1.00 |
| NYSE | LOW | Lowe's Companies, Inc | Common Stock | $0.50 |
| NYSE | LUB | Luby's Cafeterias, Inc | Common Stock | $0.32 |
| NYSE | MAI | M/A-Com, Inc | Common Stock | $1.00 |
| NYSE | MCA | MCA Inc | Common Stock | None. |
| NASDAQ | MCIC | MCI Communication Corporation | Common Stock | $0.10 |
| NYSE | MNR | Manor Care, Inc | Common Stock | $0.10 |
| NYSE | MHC | Manufacturers Hanover Corporation | Common Stock | $1.00 |
| NYSE | MHS | Marriott Corporation | Common Stock | $1.00 |
| NYSE | MMC | Marsh & McLennan Companies, Inc | Common Stock | $1.00 |
| NYSE | ML | Martin Marietta Corporation | Common Stock | $1.00 |
| NYSE | MAS | Masco Corporation | Common Stock | $1.00 |
| NYSE | MAT | Mattel, Inc. | Common Stock | $1.00 |
| NYSE | MXS | Maxus Energy Corporation | Common Stock | $1.00 |
| NYSE | MA | May Department Stores Company (The) | Common Stock | $1.66⅔ |
| NYSE | MYG | Maytag Corporation | Common Stock | $1.25 |
| NYSE | MDR | McDermott International, Inc. | Common Stock | $1.00 |
| NYSE | MCD | McDonald's Corporation | Common Stock | None. |
| NYSE | MD | McDonnell Douglas Corporation | Common Stock | $1.00 |
| NYSE | MHP | McGraw-Hill, Inc. | Common Stock | $1.00 |
| NYSE | MCK | McKesson Corporation | Common Stock | $2.00 |
| NYSE | MEA | Mead Corporation (The) | Common Stock | None. |
| NYSE | MDT | Medtronic, Inc. | Common Stock | $.10 |
| NYSE | MEL | Mellon Bank Corporation | Common Stock | $.50 |
| NYSE | MES | Melville Corporation | Common Stock | $1.00 |
| NYSE | MST | Mercantile Stores Company, Inc. | Common Stock | $.36⅔ |
| NYSE | MRK | Merck & Co., Inc. | Common Stock | $.00 |
| NYSE | MDP | Meredith Corporation | Common Stock | $1.00 |
| NYSE | MER | Merrill Lynch & Co., Inc. | Common Stock | $1.33⅓ |
| NYSE | MIL | Millipore Corporation | Common Stock | $1.00 |
| NYSE | MMM | Minnesota Mining & Manufacturing Company | Common Stock | None. |
| NYSE | MOB | Mobile Corporation | Common Stock | $2.00 |
| NYSE | MMO | Monarch Machine Tool Company (The) | Common Stock | None. |
| NYSE | MTC | Monsanto Company | Common Stock | $2.00 |
| NYSE | MCL | Moore Corporation Limited | Common Stock | None. |
| NYSE | JPM | Morgan (J.P.) & Co. Incorporated | Common Stock | $2.50 |
| NYSE | MII | Morton International, Inc. | Common Stock | $1.00 |
| NYSE | MOT | Motorala, Inc. | Common Stock | $3.00 |
| NYSE | NBO | NBO Bancorp, Inc. | Common Stock | $1.00 |
| NYSE | NCB | NCNB Corporation | Common Stock | $2.50 |
| NYSE | NCR | NCR Corporation | Common Stock | $5.00 |
| NYSE | GAS | NICOR Inc. | Common Stock | $5.00 |
| NYSE | NL | NL Industries, Inc. | Common Stock | $.125 |
| NYSE | NC | NACCO Industries, Inc. | Class A Common Stock | $1.00 |
| NYSE | NEC | National Education Corporation | Common Stock | $.01 |
| NYSE | NII | National Intergroup, Inc. | Common Stock | $5.00 |
| NYSE | NME | National Medical Enterprises, Inc. | Common Stock | $.15 |
| NYSE | NSM | National Semiconductor Corporation | Common Stock | $.50 |
| NYSE | NSI | National Service Industries, Inc. | Common Stock | $1.00 |
| NYSE | NAV | Navistar International Corporation | Common Stock | $1.00 |
| AMEX | NYTA | New York Times Company (The) | Class A Common Stock | $.10 |
| NYSE | NWL | Newell Co. | Common Stock | $1.00 |
| NYSE | NEM | Nemone Mining Corporation | Common Stock | $1.60 |
| NYSE | NMK | Niagara Mohawk Power Corporation | Common Stock | $1.00 |
| NASDAQ | NIKE | NIKE, Inc. | Class A Common Stock | None. |
| | | | Class B Common Stock | None. |
| NASDAQ | NOBE | Nordstrom, Inc. | Common Stock | None. |
| NYSE | NSC | Norfolk Southern Corporation | Common Stock | $1.00 |
| NYSE | NSP | Northern States Power Company | Common Stock | $2.50 |
| NYSE | NT | Northern Telecom Limited | Common Stock | None. |
| NYSE | NOC | Northrop Corporation | Common Stock | $1.00 |
| NYSE | NRT | Norton Company | Common Stock | $5.00 |
| NYSE | NOB | Norwest Corporation | Common Stock | $1.00⅔ |
| NASDAQ | NOXLB | Noxell Corporation | Class B Common Stock | $1.00 |
| NYSE | NUE | Nucor Corporation | Common Stock | $.40 |
| NYSE | NYN | NYNEX Corporation | Common Stock | $1.00 |
| NYSE | OKE | ONEOK Inc. | Common Stock | None. |
| NYSE | OXY | Occidental Petroleum Corporation | Common Stock | $.20 |
| NYSE | OG | Ogden Corporation | Common Stock | $.50 |
| NYSE | OEC | Ohio Edison Company | Common Stock | $9.00 |

EXHIBIT A—Continued

| Traded | Ticker | Company | Security | Par value |
|---|---|---|---|---|
| NASDAQ | ORCL | Oracle Systems Corporation | Common Stock | $.01 |
| NYSE | ORX | Oryx Energy Company | Common Stock | $1.00 |
| NASDAQ | GOSHA | Oshkosh B'Gosh, Inc. | Class A Common Stock | $.01 |
| NYSE | OM | Outboard Marine Corporation | Common Stock | $.30 |
| NYSE | OCF | Owens-Corning Fiberglass Corporation | Common Stock | $.10 |
| NASDAQ | PCAR | PACCAR Inc | Common Stock | $12.00 |
| NYSE | PHM | PHM Corporation | Common Stock | $.01 |
| NYSE | PNC | PNC Financial Corp. | Common Stock | $5.00 |
| NYSE | PPG | PPG Industries, Incorporated | Common Stock | $1.66⅔ |
| NYSE | PIN | PSI Moldings, Inc. | Common Stock | None. |
| NYSE | PPW | PacifiCorp | Common Stock | $3.25 |
| NYSE | PET | Pacific Enterprises | Common Stock | None. |
| NYSE | PCG | Pacific Gas & Electric Company | Common Stock | $10.00 |
| NYSE | PAC | Pacific Telesis Group | Common Stock | $.10 |
| AMEX | PLL | Pall Corporation | Common Stock | $.25 |
| NYSE | PN | Pan Am Corporation | Common Stock | $.25 |
| NYSE | PEL | Panhandle Eastern Corporation | Common Stock | $1.00 |
| NYSE | PCI | Paramount Communications Inc. | Common Stock | $1.00 |
| NYSE | PH | Parker Hannifin Corporation | Common Stock | $.50 |
| NYSE | JCP | Penney (J.C.) Company, Inc. | Common Stock | $.50 |
| NYSE | PZL | Pennzoil Company | Common Stock | $.83⅓ |
| NYSE | PGL | Peoples Energy Corporation | Common Stock | None. |
| NYSE | PEP | PepsiCo. Inc. | Common Stock | $.05 |
| NYSE | PKN | Perkin-Elmer Corporation (The) | Common Stock | $1.00 |
| NYSE | PFE | Pfizer Inc. | Common Stock | $.10 |
| NYSE | PD | Phelps Dodge Corporation | Common Stock | $6.25 |
| NYSE | PE | Philadelphia Electric Company | Common Stock | None. |
| NYSE | MO | Philip Morris Companies, Inc. | Common Stock | $1.00 |
| NYSE | PHL | Philips Industries Inc. (Ohio) | Common Stock | None. |
| NYSE | P | Phillips Petroleum Company | Common Stock | $1.25 |
| NYSE | PBI | Pitney Bowes, Inc. | Common Stock | $2.00 |
| NYSE | PCO | Pittston Company (The) | Common Stock | $1.00 |
| NYSE | PDG | Placer Dome Inc. | Common Stock | $0.00 |
| NYSE | PRD | Polaroid Corporation | Common Stock | $1.00 |
| NYSE | PCH | Potlatch Corporation | Common Stock | $1.00 |
| NYSE | PMI | Premark International, Inc. | Common Stock | $1.00 |
| NASDAQ | PCLB | Price Company (The) | Common Stock | None. |
| NYSE | PDQ | Prime Motor Inns, Inc. | Common Stock | $.05 |
| NYSE | PA | Primerica Corporation | Common Stock | $.01 |
| NYSE | PG | Procter & Gamble Company (The) | Common Stock | None. |
| NYSE | PEG | Public Service Enterprise Group Incorporated | Common Stock | None. |
| NYSE | OAT | Quaker Oats Company (The) | Common Stock | $5.00 |
| NYSE | CUE | Quantum Chemical Corporation | Common Stock | $2.50 |
| NYSE | RAL | Ralston Purina Company | Common Stock | $.41⅔ |
| NYSE | RAM | Ramada Inc. | Common Stock | $.10 |
| NYSE | RYC | Raychem Corporation | Common Stock | None. |
| NYSE | RTN | Raytheon Company | Common Stock | $1.00 |
| NYSE | RBK | Reebok International Ltd. | Common Stock | $.01 |
| NYSE | RLM | Reynolds Metals Company | Common Stock | None. |
| NYSE | RAD | Rite Aid Corporation | Common Stock | $1.00 |
| NASDAQ | ROAD | Roadway Services, Inc. | Common Stock | None. |
| NYSE | ROK | Rockwell International Corporation | Common Stock | $1.00 |
| NYSE | ROH | Rohm & Haas Company | Common Stock | $2.50 |
| NYSE | REN | Rollins Environmental Services, Inc. | Common Stock | $1.00 |
| NYSE | RDC | Rowan Companies, Inc. | Common Stock | $.12½ |
| NYSE | RD | Royal Dutch Petroleum Co. | Share Capital | 5 Guilders. |
| NYSE | RBD | Rubbermaind Incorporated | Common Stock | $1.00 |
| NYSE | RML | Russell Corporation | Common Stock | $.01 |
| NYSE | R | Ryder System, Inc. | Common Stock | $.50 |
| NASDAQ | SAFC | SAFECO Corporation | Common Stock | $5.00 |
| NYSE | SCE | SCE Corp | Common Stock | $4⅛ |
| NYSE | SPW | SPX Corporation | Common Stock | $10.00 |
| NYSE | SK | Safety-Kleen Corp. | Common Stock | $.10 |
| NYSE | SB | Salomon Inc. | Common Stock | $1.00 |
| NYSE | SFX | Santa Fe Pacific Corporation | Common Stock | $1.00 |
| NYSE | SLE | Sara Lee Corporation | Common Stock | $1.33⅓ |
| NYSE | SGP | Shering-Plough Corporation | Common Stock | $1.00 |
| NYSE | SLB | Schlumberger Limited | Common Stock | $.01 |
| NYSE | SFA | Scientific-Atlanta Inc. | Common Stock | $.50 |
| NYSE | SPP | Scott Paper Company | Common Stock | None. |
| NYSE | VO | Seagram Company Ltd. (The) | Common Stock | None. |
| NYSE | S | Sears, Roebuck & Co. | Common Stock | $.75 |
| NYSE | SPC | Security Pacific Corporation | Common Stock | $10.00 |
| NYSE | SRV | Service Corporation International | Common Stock | $1.00 |
| NASDAQ | SMED | Shared Medical Systems Corporation | Common Stock | $.01 |
| NYSE | SNC | Shawmut National Corporation | Common Stock | $.01 |
| NYSE | SHW | Sherwin-Williams Company (The) | Common Stock | $1.00 |
| NYSE | SHN | Shoney's, Inc. | Common Stock | $1.00 |
| NYSE | SKY | Skyline Corporation | Common Stock | $.0277 |
| NYSE | SNA | Snap-On Tools Corporation | Common Stock | $1.00 |

EXHIBIT A—Continued

| Traded | Ticker | Company | Security | Par value |
|---|---|---|---|---|
| NYSE | SNT | Sonat Inc. | Common Stock | $1.00 |
| NYSE | SO | Southern Company (The) | Common Stock | $5.00 |
| NYSE | SBC | Southwestern Bell Corporation | Common Stock | $1.00 |
| NYSE | SOV | Sovran Financial Corporation | Common Stock | $5.00 |
| NYSE | SMI | Springs Industries, Inc. | Common Stock | $0.50 |
| | | | Class A Common Stock | $0.25 |
| | | | Class B Common Stock | $0.25 |
| NYSE | SQD | Square D Company | Common Stock | $1.66⅔ |
| NASDAQ | STPL | St. Paul Companies, Inc. (The) | Common Stock | None. |
| NYSE | SWK | Stanley Works (The) | Common Stock | $2.50 |
| NYSE | STO | Stone Container Corporation | Common Stock | None. |
| NYSE | SUN | Sun Company, Inc. | Common Stock | $1.00 |
| NYSE | STI | SunTrust Bank, Inc. | Common Stock | $1.00 |
| NYSE | SVU | Super Valu Stores, Inc. | Common Stock | $1.00 |
| NYSE | SYN | Syntex Corporation | Common Stock | $1.00 |
| NYSE | SYY | Sysco Corporation | Common Stock | $1.00 |
| NYSE | TJX | TJX Companies, Inc. (The) | Common Stock | $1.00 |
| NYSE | TRW | TRW Inc. | Common Stock | $0.625 |
| NYSE | TDM | Tandem computers Incorporated | Common Stock | $0.02½ |
| NYSE | TAN | Tandy Corporation | Common Stock | $1.00 |
| NYSE | TEK | Tektronix, Inc. | Common Stock | None. |
| NASDAQ | TCOMA | Tele-Communications, Inc. | Class A Common Stock | $1.00 |
| NYSE | TDY | Teledyne, Inc. | Common Stock | $1.00 |
| NYSE | TIN | Temple-Inland Inc. | Common Stock | $1.00 |
| NYSE | TGT | Tenneco Inc. | Common Stock | $5.00 |
| NYSE | TX | Texaco Inc. | Common Stock | $6.25 |
| NYSE | TXN | Texas Instruments Incorporated | Common Stock | $1.00 |
| NYSE | TXU | Texas Utilities Company | Common Stock | None. |
| NYSE | TXT | Textron Inc. | Common Stock | $0.12½ |
| NYSE | TNB | Thomas & Betts Corp. | Common Stock | $0.50 |
| NYSE | TL | Time Incorporated | Common Stock | $1.00 |
| NYSE | TMC | Times Mirror Company (The) | Series A Common Stock | None. |
| NYSE | TKR | Timken Company (The) | Common Stock | None. |
| NYSE | TKA | Tonka Corporation | Common Stock | $0.66⅔ |
| NYSE | TMK | Torchmark Corporation | Common Stock | $2.00 |
| NYSE | TOY | Toys "R" Us, Inc. | Common Stock | $0.10 |
| NYSE | TA | Transamerica Corporation | Common Stock | $1.00 |
| NYSE | TIC | Travelers Corporation (The) | Common Stock | $1.25 |
| NYSE | TRB | Tribune Company | Common Stock | None. |
| NYSE | TNV | Trinova Corporation | Common Stock | $5.00 |
| NYSE | TYC | Tyco Laboratories, Inc. | Common Stock | $0.50 |
| NYSE | FG | USF&G Corporation | Common Stock | $2.50 |
| NYSE | UAL | UAL Corporation | Common Stock | $5.00 |
| NYSE | USW | US West, Inc. | Common Stock | None. |
| NYSE | U | USAir Group, Inc. | Common Stock | $1.00 |
| NYSE | USG | USG Corporation | Common Stock | $0.10 |
| NYSE | USH | USLIFE Corporation | Common Stock | $1.00 |
| NYSE | UST | UST Inc. | Common Stock | $0.50 |
| NYSE | X | USX Corporation | Common Stock | $1.00 |
| NYSE | UN | Unilever N.V. | Ordinary Shares | $4 Guilders. |
| NYSE | UCC | Union Camp Corporation | Common Stock | $1.00 |
| NYSE | UK | Union Carbide Corporation | Common Stock | $1.00 |
| NYSE | UNP | Union Pacific Corporation | Common Stock | $2.50 |
| NYSE | UIS | Unisys Corporation | Common Stock | $5.00 |
| NYSE | UH | U.S. Home Corporation | Common Stock | $0.10 |
| NYSE | UTX | United Technologies Corporation | Common Stock | $5.00 |
| NYSE | UT | United Telecommunication, Inc. | Common Stock | $2.50 |
| NYSE | UCL | Unocal Corporation | Common Stock | $1.00 |
| NYSE | UPJ | Upjohn Company (The) | Common Stock | $1.00 |
| NYSE | VFC | V.F. Corporation | Common Stock | None. |
| NYSE | VAT | Varity Corporation | Common Stock | None. |
| NYSE | WMT | Wal-Mart Stores, Inc. | Common Stock | $0.10 |
| NYSE | WAG | Walgreen Co. | Common Stock | $1.25 |
| NYSE | DIS | The Walt Disney Company | Common Stock | $0.10 |
| AMEX | WANB | Wang Laboratories, Inc. | Class B Common Stock | $0.50 |
| NYSE | WLA | Warner-Lambert Company | Common Stock | $1.00 |
| NYSE | WMX | Waste Management, Inc. | Common Stock | $1.00 |
| NYSE | WFC | Well Fargo & Company | Common Stock | $5.00 |
| NYSE | WEN | Wendy's International, Inc. | Common Stock | $0.10 |
| NYSE | WX | Westinghouse Electric Corporation | Common Stock | $1.00 |
| NASDAQ | WMOR | Westmoreland Coal Company | Common Stock | $2.50 |
| NYSE | W | Westvaco Corporation | Common Stock | $5.00 |
| NASDAQ | WETT | Wetterau, Incorporation | Common Stock | $1.00 |
| NYSE | WY | Weyerhaeuser Company | Common Stock | $1.25 |
| NYSE | WHR | Whirlpool Corporation | Common Stock | $1.00 |
| NYSE | WH | Whitman Corporation | Common Stock | None. |
| NYSE | WMB | Williams Companies (The) | Common Stock | $1.00 |
| NYSE | WIN | Winn-Dixie Stores, Incorporated | Common Stock | $1.00 |
| NYSE | Z | Woolworth Corporation | Common Stock | $1.00 |
| NASDAQ | WTHG | Worthington Industries, Inc. | Common Stock | $0.01 |

EXHIBIT A—Continued

| Traded | Ticker | Company | *Security | Par value |
|---|---|---|---|---|
| NYSE | WWY | Wrigley (Wm.) Jr. Company | Common Stock | None. |
| NYSE | XRX | Xerox Corporation | Common Stock | $1.00 |
| NASDAQ | YELL | Yellow Freight Systems, Inc. of Delaware | Common Stock | $1.00 |
| NYSE | ZE | Zenith Electronics Corporation | Common Stock | $1.00 |
| NYSE | ZRN | Zurn Industries, Inc. | Common Stock | $0.50 |
| NASDAQ | RYAN | Ryan's Family Steak Houses, Inc. | Common Stock | $1.00 |
| NYSE | | Harnischfeger Industries, Inc. | Common Stock | $1.00 |

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BILLING CODE 8010-01-M

[Rel. No. 34-27388; File No. SR-NSCC-89-08]

## Self-Regulatory Organizations; National Securities Clearing Corporation; Order Approving Proposed Rule Change Providing for the Processing of Basket Trades

On June 7, 1989, the National Securities Clearing Corporation ("NSCC") filed a proposed rule change (SR-NSCC-89-08) with the Commission pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act").[1] On July 18, 1989, the Commission published notice of the proposal in the **Federal Register** to solicit comments from interested parties.[2] On August 24, 1989, NSCC submitted an amendment to its filing. No comments were received. As discussed below, the Commission is approving the amended proposal.

### I. Description

NSCC proposed to revise its rules to enable it to clear and settle basket trades.[3] NSCC will accept locked-in basket trade data from an exchange[4] or a marketplace selfregulatory organization ("SRO"). NSCC will net reported basket trades so that each member will have either a net long position or a net short position in basket trades. After netting a member's basket trades, NSCC will "burst" the member's net basket position into its individual security components based on information received from the exchange or marketplace SRO.

The extent to which NSCC must burst a member's net basket position depends on the quotation off of which the member's basket trades were executed. For example, if a member executes a basket trade off of a quote established by a competitive basket market maker,[5] NSCC will receive a locked-in basket trade from the NYSE into its comparison system, and thus will be responsible for bursting the basket into its 500 component securities. If, on the other hand, a member executes a basket trade off of a Tier 1 or Tier 2 quote,[6] the NYSE will burst the basket into 461 separate locked-in trades for securities traded on the NYSE and one locked-in trade of a mini-basket of 39 securities that are not traded on the NYSE. NYSE will submit the 461 separate locked-in trades and the locked-in mini-basket trade to NSCC's comparison system. NSCC will then be responsible for bursting the mini-basket into its 38 component securities.

NSCC will issue a report ("Basket Trade Detail Report") to members showing the results of their basket trades on the day after the trade date ("T+1"). This report will contain, among other things, the member's net position with respect to basket trades, the individual security components of such net position, the individual and aggregate settlement value [7] for such components and any adjustment to basket trades or component securities as described below.

At the same time NSCC issues the Basket Trade Detail Report to its members, it also will issue a report to

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[1] 15 U.S.C. 78s(b)(1) (1982).

[2] *See* Securities and Exchange Act Release No. 27021 (July 11, 1989), 54 FR 30125.

[3] In its proposed rules, NSCC defines a "basket trade" as a trade in a group of securities that an exchange or marketplace self-regulatory organization [as defined in § 3(a)(26 of the Act. *See* 15 U.S.C. 78c (1982)] designates as eligible for execution in a single trade. The Commission has approved a proposal by the New York Stock Exchange ("NYSE") to begin trading a market basket product called Exchange Stock Portfolios ("ESPs"). *See* Securities Exchange Act Release No. 27382 (October 26, 1989), File No. SR-NYSE-89-05 ("Exchange Approval Order"). Although this Release refers only to the NYSE's ESPs, NSCC's filing is generic and its proposed rules would apply to all market basket products cleared and settled through NSCC.

[4] All comparison of ESP trade data will occur at the NYSE. The NYSE's method for comparing basket trades and its format for submission of data to NSCC depends upon whether the trade occurred between two market makers or between a market maker and the basket book broker ("BBB"). For example, two market makers who agree to a basket trade must bring the trade to the BBB for execution. The BBB executes the trade by entering it into his terminal on the floor of the NYSE. Entry of the trade will result in a report showing the two market makers as the counterparties to a locked-in basket trade. The NYSE takes this report, adds it to a file containing all of these reports, and passes this file to NSCC at the end of the day. Consequently, for market maker to market maker basket trades, NSCC receives basket trade reports from the NYSE that show the market makers as the counterparties to locked-in basket trades.

NYSE will use an omnibus comparison system for trades between market makers and the BBB, and has established a new omnibus account, TAB, for this purpose. After a market maker agrees to trade a basket with the BBB, the BBB will enter the trade into his terminal. This will create a report showing that the market maker bought or sold a basket from TAB. This also will automatically send a message to the specialists in the 461 component stocks traded on the NYSE informing them that their bids have been hit or their offers have been taken. Each specialist will see TAB as his counterpart, and must take or provide the appropriate number of shares either from his inventory or off his book. Similarly, the BBB also is notified that he must take or provide the 39 stocks that do not trade on the NYSE to TAB. All trades executed against TAB are locked-in trades.

The NYSE will create a file comprised of all NYSE locked-in omnibus basket trades and pass this file to NSCC at the end of the day. Thus, NSCC will see the market maker v. TAB on one side of the trade, and will see the appropriate specialist v. TAB, and the BBB v. TAB on the other side of the trade. NSCC will burst the market maker v. TAB position into 500 "pieces" and burst the BBB v. TAB position into 30 "pieces", thus allowing it to zero out the TAB account. Telephone conversation between John Limerick, NYSE, and Ross Pazzol, Attorney, Branch of Clearing Agency Regulation, Division of Market Regulation, SEC, on October 12, 1989.

[5] A competitive basket market maker has four specific market-making obligations: (1) Establish and maintain a course of dealings consistent with a fair and orderly market; (2) help alleviate temporary disparities between supply and demand; (3) effect proprietary trades in a reasonable and orderly manner in relation to the market in general and the basket market in particular; and (4) maintain a continuous, two-sided quotation in the basket within specified bid-ask parameters. *See* Exchange Approval Order at 8.

[6] Under NYSE's basket trading rules, each NYSE specialist has the obligation to contribute quotes in his specialty stock(s) for the purpose of facilitating market basket transactions. All of these contributed specialist quotes will comprise aggregate "Tier 1" and "Tier 2" basket quotes, and will consist of the prevailing bids and offers in all basket stocks as disseminated through the consolidated quotation system. When an aggregate Tier 1 quote is hit, a specialist must take or supply the number of shares of his specialty stocks needed to complete one basket. Similarly, when a Tier 2 quote is hit, each specialist must take or supply the number of shares of his specialty stocks needed to complete three baskets.

[7] The aggregate settlement value for each component security is equal to the product of the settlement price (*i.e.*, the current NSCC system price) of the component security and the number of shares of the component in the basket as reported by the exchange or marketplace SRO.

the BBB,[8] for its position in mini-baskets arising from trades executed off of Tier 1 or Tier 2 quotes. This report will contain the same information for mini-baskets that the Basket Trade Detail Report contains for basket trades as a whole. NSCC makes this information available to the BBBs so they can determine their net deliver and receive obligations for the securities comprising the mini-basket. If, however, a BBB executes a basket trade for his own account, the mini-basket component of his proprietary trades will not be netted with the mini-basket trades he executes pursuant to his function as a passive market maker for trades executed off of Tier 1 and Tier 2 quotes.

One result arising from a basket trading system in which a member must deliver or receive the component securities comprising the basket is that the value of the basket contract may differ from the settlement value of the component securities.[9] To eliminate that disparity, NSCC will make a cash adjustment for the difference between the contract value [10] of the market basket and the aggregate settlement values of all of the component securities. The cash adjustment will be collected and paid to the appropriate party on the settlement date.

After the component stocks are separated and assigned a settlement value, they are processed through NSCC with the member's other trades. Securities acquired or sold through basket trading will be netted with all of the member's other transactions in the same securities and entered into either NSCC's continuous net settlement ("CNS") system or balance order accounting system, as appropriate. The results of the processing cycle will be reported to the members on the appropriate compared trade summary on the morning of T+4.

Throughout the basket trade processing cycle, NSCC will be able to accept adjustment data from the exchange or marketplace SRO with respect to market basket transaction prices and the prices of the component securities. If NSCC makes an adjustment on T+4 or later which causes a change in the quantity of securities to be received or delivered, or the value to be received or delivered for a CNS-eligible security, the trade will settle two business days after such adjustment. If a similar adjustment is made to a component security which is a balance order security, NSCC will issue a trade-for-trade ticket between the original parties to the basket trade.

## II. Rationale for the Proposal

NSCC believes its proposed rule change is consistent with the purposes and requirements of section 17A of the Act. Specifically, NSCC believes that its proposal will promote the prompt and accurate clearance and settlement of securities transactions by increasing the number of securities transactions that are subject to its efficient clearance and settlement procedures. NSCC also believes that its proposal will promote the safeguarding of funds and securities within its possession or control by subjecting market basket transactions to its risk assessment procedures and safeguards.

## III. Discussion

The Commission believes that NSCC's proposal is consistent with section 17A of the Act and NSCC's obligation to promote the prompt and accurate clearance and settlement of securities transactions and to safeguard securities and funds in NSCC's custody and control. Accordingly, for the reasons discussed below, the Commission is approving NSCC's proposal.

Since the October 1987 market break, a number of studies have recommended creating a market basket product.[11] These studies suggest that such a product may, among other things, address the volatility and steep price declines experienced during and since October 1987.[12] These studies did not discuss the clearance and settlement issues raised by the development of a market basket product. It appears, however, that the feasibility of developing a workable market basket product is directly related to the development of a system that provides for the safe and efficient clearance and settlement of such products [13] This order focuses on NSCC's proposed system.

The Commission believes that NSCC's procedures for processing market basket transactions will promote the prompt and accurate clearance and settlement of securities transactions. In general, NSCC's proposed procedures are substantially similar to its existing procedures for the clearance and settlement of equity securities transactions.

Notwithstanding the similarity between the procedures set forth in NSCC's proposal and its existing processing procedures, NSCC's proposal does contain some items that are unique to the clearance and settlement of market baskets. The first of these items concerns the manner in which NSCC will deal with the possibility that the aggregate value of the securities comprising the basket may differ from the value of the market basket contract. As described above,[14] NSCC will account for the possible disparity between these values by creating a cash adjustment equal to the amount of the disparity between the market basket contract price and the aggregate settlement values of the underlying component securities. The Commission believes this is appropriate because it enables NSCC to combine obligations arising out of market basket with obligations arising out of individual stock transactions for netting purposes while simultaneously allowing the purchaser or seller of the market basket to deliver or receive the agreed value of the component stocks comprising the basket.[15] Thus, the Commission believes NSCC's market basket cash adjustement mechanism enhances NSCC's ability to clear and settle securities transactions in a timely and accurate manner.

The second new item presented by NSCC's proposal is the fact that NSCC will be responsible for "bursting" a basket of 500 stocks into its individual security components within a relatively short time frame. NSCC will receive

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[8] The BBB performs many of the same functions for market baskets performed by specialists for individual stocks. *See* Exchange Approval Order at 13–16.

[9] For example, assume a basket is comprised of two stocks, A and B, and that the market price of A is $50 and the market price of B is also $50. Assume also that the purchaser buys a market basket for $100 and that the last sale price of A and B at the end of the day was $50½. Because the purchaser would be obligated to deliver $101 on the settlement date, the purchaser would be entitled to receive a $1.00 cash adjustment from NSCC.

[10] At present, the current contract value of a NYSE market basket is $5 million.

[11] *See, e.g.*, N. Katzenbach, *An Overview of Program Trading and Its Impact on Current Market Practices* (December 21, 1987) and Division of Market Regulation, *The October 1987 Market Break* (February 1988). *See also* Report of the Presidential Task Force on Market Mechanisms (January 1988) and the Interim Report of the Working Group on Financial Markets (May 1988) for other reccommendations arising out of the October 1987 market break.

[12] *See* Exchange Approval Order, *supra*, note 7, for a more detailed discussion of the benefits of market basket products.

[13] This is because settlement of the ESP will involve the actual transfer of the component stocks underlying the ESP. *See* Exchange Approval Order at 2. Similarly, settlement of the Chicago Board Options Exchange's market basket product also will result in the transfer of the component stocks comprising the basket. *See* Securities Exchange Act Release No. 27383 (October 26, 1989), File No. SR-CBOE-89-20.

[14] *See* note 8, *supra*.

[15] The Commission notes that NSCC's cash adjustment procedure for market baskets is similar to NSCC's existing cash adjustment mechanism used in connection with its balance order and CNS systems. *See* NSCC Procedures at V and VII.

data by 2:00 a.m. (Eastern Time) and for those members with automated output capacity, will be responsible for reporting a member's positions by 4:00 a.m. (Eastern Time). NSCC has represented to the Commission that its computer systems have the capacity to perform such functions and that such performance will not adversely affect NSCC's processing capabilities.[16] Thus, the Commission believes that this aspect of NSCC's proposal will not detract from NSCC's ability to promote the prompt and accurate clearance and settlement of securities transactions.

The Commission also believes that NSCC's procedures enable NSCC to safeguard securities and funds in its custody and control consistent with its obligations under the Act. Members desiring to trade market baskets are subject to the same financial responsibility and reporting requirements currently imposed on all NSCC members.[17] In addition, member's equity security deliver and receive obligations arising out of basket trading will be guaranteed by NSCC on midnight of the day after the trade date.[18] Members, therefore, will be exposed to the credit risk of their counterparty for only a short period of time. Moreover, NSCC will add a member's deliver and receive obligations arising out of basket trading to all of the member's other obligations for the purposes of calculating the member's required clearing fund contribution. In this way, NSCC will ensure that it will be covered for any additional exposure resulting from its member's market basket trading.[19]

For the reasons stated above, the Commission believes that NSCC's proposal is consistent with section 17A of the Act.

## IV. Conclusion

*It is therefore ordered,* pursuant to section 19(b)(2) of the Act, that the proposed rule change (SR–NSCC–89–08) be, and hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority. 17 CFR 200.30.3.

Dated: October 26, 1989.

**Jonathan G. Katz,**

*Secretary.*

[FR Doc. 89–25604 Filed 10–30–89; 8:45 am]

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**[Rel. No. 34–27389; File No. SR–OCC–89–10]**

## Self-Regulatory Organizations; Options Clearing Corporation; Order Approving Proposed Rule Change Providing for the Clearance and Settlement of Market Baskets

On August 14, 1989, the Options Clearing Corporation ("OCC") filed a proposed rule change (SR–OCC–89–10) with the Commission pursuant to Section 19(b) of the Securities Exchange Act of 1934 ("Act").[1] Notice of the proposal was published in the **Federal Register** on August 29, 1989 [2] to solicit comments from interested parties. On September 21, 1989 and October 13, 1989, OCC filed amendments to its proposal. No comments were received. As discussed below, the Commission is approving the amended proposal.

## I. Introduction

OCC proposes to revise its rules to provide for the clearance and settlement of market baskets traded on the Chicago Board Options Exchange ("CBOE").[3] OCC's proposed By-laws define a "market basket" as a contract obligating the seller to sell and the purchaser to purchase a designated number of shares of each of the stocks comprising the index group on which the market basket is based.[4] Although market basket trades are purchases and sales of the component basket stocks, OCC will process market basket trades as if market baskets were exercised equity options, but will include market baskets as a class group within the non-equity option system for other purposes. To account for the differences between market baskets and options, OCC also proposes to add a new set of rules and procedures designed specifically to accommodate market baskets. These are described more fully below.

## II. Description

OCC proposes to revise its rules so that clearing members involved in basket trading ("market basket clearing members") are subject to the same general requirements as OCC clearing members that trade non-equity options. For example, any clearing member desiring to trade market baskets first would have to obtain OCC's approval to do so. Before receiving such approval, each clearing member, among other things, would be required to meet OCC's minimum initial net capital requirements.[5] After receiving approval to trade market baskets, a market basket clearing member would have to deposit the minimum required contribution to OCC's non-equity securities clearing fund,[6] and maintain the level of minimum net capital required by OCC.[7] A market basket clearing member also would be required to maintain the records prescribed by OCC [8] and maintain a bank account in a clearing bank [9] for each of its market basket accounts.[10]

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[16] *See* letter from Robert A. Schultz, Executive Vice President, NSCC, to Ross Pazzol, Attorney, Branch of Clearing Agency Regulation, Division of Market Regulation, SEC, dated October 19, 1989.

[17] *See* NSCC Rule 15.

[18] NSCC will treat the burst stock positions of members involved in basket trading as being reported to NSCC as compared. Thus, NSCC will guarantee the performance of these transactions at midnight on T+1. *See* letter from Allison Hoffman, Associate Counsel, NSCC, to Ross Pazzol, Attorney, Branch of Clearing Agency Regulation, Division of Market Regulation, dated October 24, 1989. *Accord,* Securities Exchange Act of Release No. 27192 (August 29, 1989), 54 FR 37070.

[19] *See* NSCC Procedure XV. The Commission is concerned that NSCC's clearning fund calculation may not reflect a member's actual mark-to-the-market exposure because it allows NSCC to collect only a percentage of a member's mark-to-the-market exposure. NSCC currently calculates each member's mark-to-the-market exposure daily, but only collects mark-to-the-market payments on the settlement date. The Commission believes that NSCC should consider collecting marks on all of its members' open obligations from the time of guarantee through the scheduled settlement date. *See* Securities Exchange Act Release No. 27192 (August 29, 1989), 54 FR 37070.

[1] 15 U.S.C. 78s(b)(1) (1982).

[2] *See* Securities Exchange Act Release No. 27157 (August 21, 1989), 54 FR 35743.

[3] OCC's proposal is generic and would apply to all market basket products cleared and settled through OCC. However, because OCC's proposal was submitted concurrently with CBOE's proposal to begin trading two market basket products based on the Standard and Poor's 100 Stock Price Index and the Standard and Poor's 500 Stock Price Index, this release will discuss OCC's proposal as it relates to CBOE's market basket products. *See* Securities Exchange Act Release No. 27383 (October 26, 1989), File No. SR–CBOE–88–20, approving CBOE's proposal ("CBOE Approval Order").

[4] *See* Article 1, Section 1( ) of OCC's proposed By-laws.

[5] *See* OCC Rule 301.

[6] *See* OCC By-laws, Article VIII, section 2. Under Rule 1001(b), a market basket clearing member's minimum required non-equity securities clearing fund contribution is equal to the greater of (1) $75,000; or (2) the member's proportionate share of 7% of the average daily aggregate margin requirement for non-equity securities options contracts, and market baskets outstanding during the preceding month. Under OCC's proposal, a market basket clearing member's proportionate share is determined by calculating the member's daily average long and short positions in non-equity securities options contracts and the daily average of the net number of market baskets purchased or sold during the preceding month and dividing it by the same sum as calculated for all non-equity securities clearing members.

[7] *See* OCC Rule 302.

[8] *See* OCC Rule 207.

[9] A "clearing bank" is a bank located in a city in which OCC has a clearing office and which has entered into an agreement with OCC for settlement of transactions on behalf of a clearing member. *See* OCC Rule 101(c).

[10] *See* OCC Rule 203.

OCC's proposal also adds new provisions to its rules and By-laws that apply specifically to market baskets. In many areas, these rules and By-laws parallel those for processing equity option transactions. For example, under OCC's proposal, each exchange must report to OCC each exchange transaction in market baskets for which the purchasing clearing member and the selling clearing member have submitted matching trade information. This report must identify the purchaser and seller of the market baskets, the number of market baskets bought and sold, and the class [11] and trade price of each market basket. This report also must identify the transaction to the clearing member's firm, market maker or customer account. After OCC receives this report, OCC will calculate the difference between the price at which a member purchased or sold a market basket and the closing price of the component securities on that day ("cash adjustment"). OCC will net the member's cash adjustments across accounts to arrive at a net cash adjustment credit or requirement.

After calculating each member's net cash adjustment, OCC will net out each member's market basket trades to either a net long or short position, burst each member's net position into its underlying component securities,[12] and assign each component security a price equal to its closing price as determined by OCC's reporting authority. OCC then will report the above information to each market basket clearing member's designated clearing corporation by 2:00 a.m. (Central Time). If OCC does not receive the closing price of any of the component securities, OCC may either set the market price of the securities based on the most recent market price available for such securities or suspend the settlement obligations of its clearing members for such securities.[13]

Each market basket clearing member must deposit margin at OCC for its net basket position by 9 a.m. (Central Time) on the day after the trade date.[14] Members with a net cash adjustment requirement also must pay this amount to OCC at this time. Members with a net cash adjustment credit may offset their required margin deposits by this amount.

Each member must pay the required margin on its net basket position on a daily basis. In addition, members with net cash adjustment requirements must maintain such amounts on deposit with OCC until the settlement date.[15] Although members with net cash adjustment credits may use these credits to offset their daily margin obligations, they may not collect these amounts until the settlement date.

After members pay their margin and net cash adjustment requirements, OCC will "accept" (*i.e.*, guarantee) their market basket transactions and interpose itself between the parties to the transactions. OCC will deem all accepted market basket positions to be in the member's firm account. OCC will report each member's net market basket settlement obligations to the member's designated clearing corporation by 2:00 a.m. (Central Time) on the day after the trade date.[16]

At 1:00 p.m. (Central Time) on the day before the settlement date, OCC's settlement obligations for accepted market basket transactions will be transferred to each member's designated Clearing Corporation. From that point forward, each member's designated Clearing Corporation will guarantee its member's market basket settlement obligations.[17]

Money and securities settlement of market baskets will occur at the member's Clearing Corporation on the settlement date. Members also will settle their net cash adjustment credits on the settlement date through OCC's cash settlement system. Any member with a net cash adjustment credit will receive this amount from OCC at or before 10:00 a.m. (Central Time).

If a certain component security is ineligible for settlement through a member's Clearing Corporation, OCC may require that the security be settled outside the Clearing Corporation on a broker to broker basis. In addition, OCC may postpone settlement of one or more component securities comprising the basket if, in its opinion, such action is required because of unusual market conditions or is in the public interest. If OCC determines that, because of extraordinary conditions, delivery of such securities is impossible or unduly burdensome for the delivering member, OCC may relieve the delivering member from its obligation to deliver such security and adjust the aggregate value of the market basket accordingly.[18]

If OCC suspends any member obligated to deliver the securities comprising a market basket before the member's Clearing Corporation becomes obligated to effect settlement (*i.e.*, before 1:00 p.m. (Central Time) on the day before the settlement date), OCC will direct a receiving member to buy-in the securities and report the execution price of the buy-in to OCC. If the member buying in suffers a loss, OCC must satisfy the loss by 10:00 a.m. (Central Time) the following business day. If such a buy-in results in a gain, the buying member must pay the gain to OCC, and OCC will deposit the amount in the suspended member's Liquidating Settlement Account.[19] If a member is suspended after his designated clearing corporation is obligated to effect settlement on his behalf, any amount the member is entitled to receive is paid

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[11] OCC's proposal amends OCC Rule 602A(b)(2) to set market baskets in a separate class group from the other non-equity options products issued, cleared and settled at OCC. Market baskets will, however, be included in OCC's broad-based index product group.

[12] The CBOE will determine the particular securities comprising the market basket and the number of shares of each such security in the basket at or prior to the opening of trading on each exchange on which the market basket is traded.

[13] *See* OCC proposed By-Law XIX, section 5.

[14] OCC will calculate margin requirements for market baskets in essentially the same manner it makes such calculations for non-equity options. Accordingly, each member must pay margin consisting of two components: (1) "Premium margin" (which covers OCC's exposure resulting from the one day price movement in the market value of the member's net basket position), and (2) "additional margin" (which covers any exposure OCC may have as a result of liquidating a member's net basket position). After OCC calculates a member's margin requirement (credit) for market baskets, it will determine the member's product group margin requirement (credit) by combining such requirement (credit) with the member's margin requirements (credits) for other broad-based index options. OCC will determine a member's aggregate margin requirement by adding the member's aggregate class group and product group margin requirements and (1) subtracting 50% of any credits attributable to such class groups and product groups; (2) adding (subtracting) any mark-to-market payments which the member has paid (collected) for its net basket position; and (3) subtracting any margin credit attributable to the member's position in equity options. *See* OCC proposed Rule 602A.

[15] All market basket transactions will settle on the fifth business day after the trade date ("T").

[16] Each market basket clearing member must designate either National Securities Clearing Corporation ("NSCC"), Midwest Clearing Corporation ("MCC") or the Stock Clearing Corporation of Philadelphia ("SCCP") ("Clearing Corporation(s)") as its designated clearing corporation for the purpose of settling the deliver and receive obligations arising out of the member's market basket activity. OCC has supplemented its options exercise settlement agreements with the Clearing Corporations to provide for settlement of these obligations.

[17] *See* Supplement to Options Exercise Settlement Agreements between OCC and NSCC, MCC and SCCP dated October 26, 1989. After OCC's market basket settlement guarantees are transferred to each member's designated Clearing Corporation, OCC will continue to calculate and collect margin from market basket clearing members until the settlement date. *See* discussion at p. 16, *infra*.

[18] *See* OCC proposed By-Law XIX, Section 4.

[19] After a member is suspended, OCC promptly converts all of the member's margin deposits, clearing fund contributions and other funds subject to OCC's control to cash and deposits these funds in a Liquidating Settlement Account in the name of the clearing member. OCC then uses these funds to satisfy the member's outstanding liabilities. *See* OCC Rule 1104.

directly into his Liquidating Settlement Account. These same procedures apply in reverse to a situation in which a member obligated to receive securities is suspended from OCC.[20]

### III. OCC's Rationale for the Proposed Rule Change

OCC believes its proposed rule change is consistent with the purposes and requirements of the Act. Specifically, OCC believes that its proposal will promote the prompt and accurate clearance and settlement of securities transactions by applying to market basket transactions rules and procedures comparable to those that have been used successfully for the clearance and settlement of options transactions. OCC also believes that its proposal will promote the safeguarding of funds and securities because it will apply to market baskets a system of safeguards which is substantially the same as those that OCC currently uses for options.

### IV. Discussion

The Commission believes that OCC's proposal is consistent with section 17A of the Act and with OCC's obligation to promote the prompt and accurate clearance and settlement of securities transactions and to safeguard funds and securities in OCC's custody and control. Accordingly, the Commission is approving OCC's proposal for the reasons provided below.

The Commission believes that market basket trading will benefit the financial markets. Indeed, one of the many recommendations in the aftermath of the October 1987 market break was the creation of a market basket product.[21] Advocates of such a product believe that trading baskets of portfolios of stock may reduce the volatility and dramatic price changes in the market that are associated with index-related trading strategies.[22] They also believe that a specific post or posts for trading market baskets will enhance the liquidity of the markets by providing a mechanism for the efficient trading of portfolios of stocks.[23]

The Commission is satisfied that OCC's proposal to clear and settle the market basket product to be traded on the CBOE is well designed to promote the prompt and accurate clearance and settlement of these transactions consistent with section 17A(b)(3) of the Act. As stated in OCC's proposal, a market basket is not a separate security;[24] instead, it is a contract to purchase and sell a designated number of shares of each of the stocks comprising the index group on which the market basket is based.[25] Thus, because the assets underlying market baskets are equity securities, and because the purchase and sale of a market basket results in an obligation to deliver or receive equity securities, the Commission believes that the clearance and settlement of market basket transactions should be similar to the exercise and settlement of equity option transactions. As described above, OCC's proposed rules, for the most part, follow OCC's well-established system for processing equity option transactions. Therefore, the Commission believes that OCC's proposed rules facilitate the same prompt and accurate clearance and settlement of market basket transactions that OCC's rules presently provide for equity option transactions.[26]

Although OCC's proposal relies heavily on its existing equity option exercise and settlement procedures, some aspects of OCC's proposal are tailored to fit the unique characteristics of market baskets. For example, unlike purchases and sales of equity options, a clearing member who buys or sells a market basket is obligated to purchase or deliver the stocks comprising the basket. Consequently, the Commission believes it is appropriate that OCC's proposed rules require both the purchasing clearing member and the selling clearing member to deposit margin on the morning of the day after the trade date.[27] Moreover, although settlement of market basket transactions results in the delivery or receipt of stock, OCC proposes to margin its members' positions in market baskets under its non-equity option margin system. The Commission believes this is appropriate because OCC's non-equity option margin system, unlike its present equity option margin system, is a "portfolio-based" system that provides a sophisticated method of calculating the amount of margin necesssary to cover the risk posed by the member's positions.[28] OCC's proposal also recognizes that the contract price of the basket may be greater or less than the aggregate settlement value of the individual stocks comprising the basket.[29] OCC will use a cash

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[20] The Commission has received an opinion from OCC's counsel stating that in the event of a suspension of a clearing member, the rights of OCC as set forth in proposed section 3(b) of Article XIX of OCC's By-Laws would be enforceable by OCC against the clearing member and any receiver, examiner or trustee appointed for the clearing member's estate under the Securities Investor Protection Act of 1970 or the Bankruptcy Code, to the same extent as if such transaction had originated in the clearing member's firm account and without regard to whether market basket transactions effected by such clearing member are or have been identified in any of OCC's reports as having originated in the customer, market-maker or other account of the clearing member. *See* letter from James R. McDaniel, Schiff, Hardin & Waite, to Jonathan Kallman, Assistant Director, Division of Market Regulation, dated October 24, 1989.

[21] *See, e.g.*, Division of Market Regulation, *The October 1987 Market Break* (February, 1988) ("Staff Report") and N. Katzenbach, *An Overview of Program Trading and Its Impact on Current Market Practices* (December 21, 1987) ("Overview of Program Trading"). *See also* Report of the Presidential Task Force on Market Mechanisms (January 1988) and The Interim Report of the President's Working Group on Financial Markets (May 1988) for other recommendations arising out of the market break.

[22] *See* Overview of Program Trading at note 20. *See also* H. Stoll, *Portfolio Trading*, Working Paper No. 87–14 (September 1987) (available at the Owen Graduate School of Management, Vanderbilt University).

[23] *Id.* For a more complete discussion of the benefits provided by the creation and trading of market basket products, *see* CBOE Approval Order note 3, *supra*, and Securities Exchange Act Release No. 27382 (October 26, 1989), File No. SR–NYSE–89–05, approving the New York Stock Exchange ("NYSE") proposal to trade a market basket product.

[24] *See* proposed section 1 (mmmm) of Article I of OCC's By-Laws.

[25] *See* CBOE approval order at 26.

[26] Section 31 of the Act requires each national securities exchange to pay certain transaction fees to the Commission. *See* 15 U.S.C. 78ee (1982). OCC and CBOE have agreed in writing that OCC will collect the so-called Section 31 fees attributable to market basket trading on CBOE's behalf and pay them to the Commission as CBOE's agent. Although Section 31 does not specifically contemplate this arrangement, the Commission does not believe that it is inconsistent with the requirements of Section 31. The Commission also notes that this arrangement does not affect CBOE's obligation to pay Section 31 fees. *See* Section 18 of the Market Basket Supplemental Agreement between OCC and CBOE dated October 26, 1989.

[27] *See* OCC proposed Rule 602A(a).

[28] Both OCC's equity and non-equity option margin calculations are based, in part, on options premiums. In both systems, open positions are marked to market daily based on closing ask prices. The second component of equity options margin, however, is based on a flat 30% of the current value of the underlying securities. The second component of non-equity option margin is more flexible and is adjusted according to the current risk posed to OCC by the member's position. *See* Staff Report at 10–50.

OCC's non-equity option margin system uses options price theory to project the cost of liquidating a member's positions in the event of an assumed "worst-case" change in the price of the underlying asset or index. The margin requirement on the same class of options equals the premium plus the additional margin calculated by determining the assumed maximum one-day price movement in the underlying assets and by projecting the liquidating value of such position. To provide additional protection, OCC presumes that the cost of liquidating a member's out of the money positions would increase by a minimum of 25% of the margin interval. For a further discussion of OCC's non-equity options margin system, *see* OCC, *The Back-up System, A Special Study by the Margin Committee Subcommittee* ("Backup Report") (August 3, 1988) at 24–41. *See also* Staff Report at 10–36.

[29] For example, assume a basket comprised of one share each of two separate stocks. Assume each stock has a fair market value of $50½ and that

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adjustment to eliminate this disparity.[30] This cash adjustment will settle through OCC's cash settlement system on the settlement date. The Commission believes this mechanism is appropriate because it simultaneously ensures that market basket clearing members pay the agreed upon price for a market basket while facilitating netting by allowing OCC to combine transactions in the same securities executed at different prices in a single netting process.[31]

Finally, OCC's proposal is designed so that market participants who buy and sell stocks through individualized stock transactions in the exchange and over-the-counter markets and who buy or sell stock through basket trading will have a report that summarizes all of their previous day's trading activity before the beginning of trading on the following day. OCC will report market basket transaction data to the Clearing Corporations in time for them to include this data in position reports that are made available to members before the opening of trading on the following day.[32] The Commission believes that this aspect of OCC's proposal is beneficial because it allows market participants to have a report that reflects all of their previous day's compared stock trades regardless of the marketplace in which such trades were executed or the trading vehicle used to acquire such stocks before trading commences on the following day. This, in turn, provides market participants a complete and accurate picture of their market exposure and the credit risk[33] to which they are subject. It also allows them to gauge their financial commitments and allows them to adjust their trading strategy accordingly.

The Commission, however, believes that there is room for further improvement in OCC's market basket processing procedures. For example, as discussed below, the Commission believes that OCC and the Clearing Corporations could enhance their protection against the credit risk associated with market basket transactions.

Under OCC's proposal, OCC will assume the credit risk involved in market basket transactions by guaranteeing transactions upon payment of the margin on the morning of T+1 at 9:00 a.m. (Central Time). OCC also will protect against the market risk[34] associated with market basket transactions by collecting market-to-market payments daily through its margin system. On T+4, each Clearing Corporation will take over OCC's guarantee by becoming the counterparty to every market basket transaction settled through its facilities. This guarantee will remain in effect until settlement occurs on T+5.

Under the Clearing Corporations' current rules, locked-in equity trades are guaranteed as of midnight on T+1.[35] This trade guarantee policy does not apply to exercise and settlement of equity option transactions. Thus, because OCC's proposal treats the clearance and settlement of market basket transactions in much the same way as the exercise and settlement of equity options, the Clearing Corporations' guarantee will not become effective until T+4. The Commission understands that OCC will be revising its exercise settlement agreements with the Clearing Corporations to reflect the Corporations' earlier trade guarantees. The Commission encourages OCC to do so with a view toward providing adequate protection against Member default in a manner that does not impose unnecessary costs on clearing members. Until such revised agreements are in effect, however, the Commission believes that OCC and the Clearing Corporations can take certain steps to increase their protection against clearing member default within the framework of their existing arrangements.

As explained above, the Clearing Corporations' trade guarantee with respect to equity option transactions and market basket transactions is currently effective from 1:00 p.m. on T+4 (Central Time) until settlement on T+5. OCC, however, collects margin from T+1 until settlement on T+5. The Commission believes OCC should explore ways to make the margin deposited in connection with equity option and market basket transactions available to the Clearing Corporations (to the extent necessary to satisfy losses arising out of equity options exercise settlement obligations and market basket transactions) from the time the Clearing Corporations' guarantee becomes effective until settlement. OCC could make this amount available by giving the Clearing Corporations a perfected, first lien on such amounts deposited at OCC.[36] This would provide the Clearing Corporations with more direct protection against market risk than is currently provided under their existing financial safeguards.[37] OCC's exposure would not be increased under such an arrangement because its loss of control over the margin on deposit would coincide with the termination of its guarantee. After settlement of exercised equity options and market basket transactions at the appropriate Clearing Corporation, the Clearing Corporation's lien would be terminated and OCC would then release

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the purchaser buys the basket for $101.00. Further assume that each stock has a system price (*i.e.*, the price used to facilitate netting) of $50 per share. Because each stock will settle at $50 per share, the seller is entitled to receive a $1.00 cash adjustment to account for the difference between the basket contract price and the settlement value of the underlying stocks.

[30] *See* OCC proposed Rule 2001(b)(3).

[31] NSCC intends to use a similar mechanism to facilitate the netting of transactions in the NYSE's market basket product. *See* Securities Exchange Act Release No. 27388 (October 26, 1989), File No. SR-NSCC-89-08.

[32] For example, NSCC will include market basket transaction data in the reports it provides to its members in automated form through the current Regional Interface Operation by 8:00 a.m. (Eastern Time) on the morning of T+1. *See* letter from Robert A. Schultz, Executive Vice President, NSCC, to Ross Pazzol, Attorney, Branch of Clearing Agency Regulation, Division of Market Regulation, dated October 19, 1989. MCC also will report market basket transaction data to its members by 9:00 a.m. on the morning of T+1. *See* letter from Jeffrey Lewis, Associate Counsel, MCC, to Ross Pazzol dated October 24, 1989.

[33] Credit risk is the risk that the counterparty to a transaction will not be able to meet its obligations under the terms of the transaction.

[34] Market risk is the risk associated with the change in the market price of a security. This risk arises where the price of the security rises or falls after trade execution but before settlement. If the price of the security rises and the seller does not deliver the security, the buyer may have to find another seller at a higher price. Conversely, if the price of the security falls and the buyer does not honor the trade, the seller may have to find another buyer at a lower price. Currently, stock clearing corporations such as NSCC calculate marks-to-the-market on a daily basis but do not collect such amounts until the settlement date. The Commission believes that requiring members to make daily mark-to-the-market payments would provide the clearing corporation (and its members) with the greatest degree of protection against the market risk. *See* Staff Report at 10-25.

[35] *See* Securities Exchange Act Release No. 27912 (August 29, 1989), 54 FR 37070.

[36] This proposal assumes that OCC would have no liability remaining with respect to the equity options and market basket settlement obligations it guaranteed after its guarantee is superceded by the Clearing Corporations' guarantee on T+4. If OCC retains some residual liability for performance of such guaranteed settlement obligations, OCC would want to maintain control over the margin deposited with it on T+4 and T+5 to satisfy any contingent liability it may have with respect to such obligations. The Commission urges OCC and the Clearing Corporations to resolve this issue expeditiously.

[37] OCC's margin calculations include a mark-to-market component. *See* note 14, *supra*. By contrast, each Clearing Corporation's current clearing fund calculations does not normally cover the full amount of its members' daily mark-to-market exposure. *See* Securities and Exchange Act Release No. 27912 (August 29, 1989), 54 FR 37070. The Commission and NSCC are currently exploring, in a separate proceeding, the appropriate calculation of clearing fund requirements.

the margin to the appropriate clearing member.[38]

For the reasons stated above, the Commission believes that OCC's proposal is consistent with Section 17A of the Act.

## V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (SR–OCC–89–10) be, and hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority. 17 CFR 200.20.3.

Dated: October 26, 1989.

**Jonathan G. Katz,**

*Secretary.*

[FR Doc. 89–25605 Filed 10–30–89; 8:45 am]

BILLING CODE 8010–01–M

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**[Rel. No. 34–27390; File No. SR–NYSE–89–05]**

## Self-Regulatory Organizations; New York Stock Exchange, Inc.; Order Granting Exemptions Relating to Basket Trading

### I. Introduction

On June 2, 1989, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission" or "SEC"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b–4 thereunder,[2] a proposed rule change to trade "Exchange Stock Portfolios" ("ESPs"), standardized baskets of stocks, on the floor of the Exchange.[3] As part of the proposal, the Exchange requested certain exemptions under Rule 11Aa3–1[4] from the Rule's requirements to report transactions in reported securities and to disseminate on a consolidated basis the total trading volume for each component stock in ESP transactions.[5] Notice of the proposal was provided by the issuance of a Commission release (Securities Exchange Act Release No. 26908, June 8, 1989), and by publication in the **Federal Register** (54 FR 25516, June 15, 1989). Seven comment letters were received regarding the proposed rule change, three of which dealt with transaction reporting.[6]

### II. Description of the Proposed ESP Service and Exemption Requests

The ESP Service will allow NYSE members to trade standardized baskets of stocks at an aggregate price in a single execution on the Exchange's stock floor.[7] Given the increased institutionalization of the stock market and the growth of index-related trading strategies, the Exchange has proposed the ESP Service to address the need for an institutional stock basket trading system with physical delivery of the underlying component stocks.[8] The Exchange intends to disseminate basket last sale information and quotations to market data vendors, thereby assuring that all ESP market participants will have ready access to the ESP transaction reports and quotations. In addition, Tier 1[9] and Tier 2[10] executions in the NYSE-listed component stocks will be disseminated to market data vendors in the same manner as individual executions in the component stocks.[11]

Further, proposed Rule 803 will impose on members obligations that are consistent with those that Commission Rule 11Ac1–1[12] and Exchange Rule 60 impose on quotations for individual stocks. Basket quotations, with one exception, will be firm under Rule 803. Outside of the existing markets in the individual component stocks trading on the Exchange in compliance with Rules 11Aa3–1 and 11Ac1–1, however, no quotes or last sale reports will be available for the individual component stocks that comprise a stock basket when it trades under the ESP market structure, unless, as discussed above, an order is executed against a Tier 1 or Tier 2 aggregate quotation. This, however, is inconsistent with paragraphs (c)(1) and (c)(2) of Rule 11Aa3–1, which require that the Exchange disseminate transaction reports in individual reported securities. In addition, the Exchange will not provide a mechanism for consolidating transaction volume in the individual reported securities, which is inconsistent with Rule 11Aa3–1(b)(2)(iv). That paragraph requires the Exchange to disseminate transaction reports pursuant to a plan that provides for the consolidation of transactions in the same securities executed on other exchanges. Thus, the NYSE filed its request that the Commission grant exemptions from those requirements.

### III. Comments

The Commission received seven comment letters in response to its request for comments on the proposed rule change, three of which addressed transaction reporting.

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[38] The Commission notes that OCC has not completed action with respect to some of the recommendations made in the Backup Report, including guaranteeing trades as they are compared, instead of making OCC's guarantee conditional on payment of the premium. OCC has represented that it will assess the feasiblity of moving to an earlier trade guarantee and the corresponding increase in risks by the end of this year. Conversation between James Yong, Deputy General Counsel, OCC and Jonathan Kallman, Assistant Director, Division of Market Regulation, on September 25, 1989. Thus, the Commission expects OCC to inform the Commission of the results of its assessment and set a timetable for completing action of Backup Report recommendations by January 1, 1990.

[1] 15 U.S.C. 78(b)(1) (1982).

[2] 17 CFR 240.19b–4 (1989).

[3] The Commission approved the proposed rule change submitted by the NYSE to establish ESPs in a separate order issued today. *See* Securities Exchange Act Release No. 27382 (October 26, 1989).

[4] Rule 11Aa3–1, the Transaction Reporting Rule, generally requires that exchanges file transaction reporting plans governing the collection, processing and dissemination of last sale data on securities traded on the exchanges. Paragraph (g) of the Rule gives the Commission authority to grant exemptions from the Rule's requirements. 17 CFR § 240.11Aa3–1 (1989).

[5] *See* letter from Richard A. Grasso, President and Chief Operating Officer, NYSE, to Brandon C. Becker, Associate Director, Division of Market Regulation ("Division"), SEC, dated October 4, 1989; and letter from Michael J. Simon, Milbank, Tweed, Hadley & McCloy, counsel for the NYSE, to Kathryn V. Natale, Assistant Director, Division of Market Regulation, SEC, dated October 13, 1989.

[6] *See* notes 13–15, *infra* and accompanying text.

[7] Initally, ESP trading will be available for executions of a standardized basket of 500 stocks comprising the Standard & Poor's 500 ("S&P 500") Portfolio Index. At the commencement of ESP trading, each 500-stock ESP will have a value of approximately $5 million.

[8] The Exchange contends that the ESP Service will address market inefficiencies resulting from the fragmented executions that currently characterize program trading. Furthermore, the Exchange believes that the ESP Service may reduce the price volatility associated with institutional demands and the selling pressures their index-oriented trading strategies currently transmit to individual component stocks.

[9] "Tier 1 component stock quotation" refers to the price of the best published bid and published offer for each basket component stock that is listed on the Exchange. An "aggregated Tier 1" quotation will be derived from the weighted summation of the prevailing bids and offers for each of the component stocks as disseminated through the consolidated quotation system, plus Tier 1 "mini-basket" bids and offers for the non-NYSE component stocks.

[10] "Tier 2 component stock quotation" refers to the bid or offer for the number of shares of a basket's component stocks necessary to comprise three baskets. An "aggregated Tier 2" quotation will be derived from the weighted summation of the prevailing bids and offers for each of the component stocks necessary to fill three baskets, plus the Tier 2 "mini-basket" bids and offers for the non-NYSE component stocks.

[11] When a basket order is executed at the aggregated Tier 1 quote, upon receiving the basket execution notice through the ESP Service, each component-stock specialist must assign, take or supply the number of shares of the component stock at the execution price needed to complete one basket and must report the size and price as a trade in the same manner as all reported stocks. If a basket order is executed at the aggregate Tier 2 quote, each component-stock specialist must assign, take, or supply at the execution price the number of shares of his specialty stock needed to complete three baskets.

[12] 17 CFR § 240.11Ac1–1 (1989). The Commission notes that Rule 11Ac1–1 applies to quotations on ESP baskets.

The Alliance of Floor Brokers ("AFB"),[13] criticized certain aspects of the ESP market structure as anti-competitive. The AFB believes that ESP trading may exacerbate structural market risks that exist because of the different regulatory treatment accorded derivative products. The AFB argues that, in comparison to existing equity auction market trading procedures, the alternative trading procedures evisioned by the ESP System ultimately would result in a fragmented securities market structure with increased market volatility.

Richard Ney & Associates Asset Management Inc. ("Ney"), an investment management company, criticizes the configuration of ESP transaction reporting.[14] The Commission also received letters from Thomas G. and Ruth M. Roberts ("the Roberts"), and Burton Roger ("Roger"), individual investors residing in California, who similarly criticized the Exchange's proposed transaction reporting plan as it would apply to the basket's component stocks.[15] Specifically, Ney, Roger and the Roberts criticized the lack of real time price and volume reporting for the ESP stock companies when NYSE specialists do not participate in a basket execution. Further, the Ney letter questioned the usefulness of the consolidated tape when such information is not included.[16]

The Exchange generally addressed these commentators' concerns and other issues raised by Commission staff in a letter to Commission staff ("September 6 letter"), which, among other things, further explained the rationale underlying ESP trading and its accompanying market structure.[17] In its September 6 letter, the Exchange notes that ESP trading is structured with the goal of providing institutional customers and member firms with a trading vehicle suited for an institutional, composite-asset market. The Exchange believes that the rules supporting ESP trading are designed appropriately to accommodate the particular needs of the portfolio market in a fair and competitive market structure. Because ESP trades are executed at aggregated prices, the Exchange contends that a last sale reporting requirement for the price and volume of a basket's individual component stocks does not translate well into the ESP context.

## IV. Discussion

Pursuant to Commission Rule 11Aa3–1 [18] the NYSE is required to collect and disseminate transaction data on securities listed and traded on the exchange. More specifically, Rule 11Aa3–1 requires that the Exchange disseminate transaction reports for individual reported securities traded on the Exchange,[19] and that the Exchange disseminate on a consolidated basis trading volume for each of the component stocks represented by ESP transactions.[20]

The NYSE will provide trading facilities through the ESP Service for reported securities (as components of baskets) but will not report transactions in the individual component stocks, as is required by paragraphs (c)(1) and (c)(2) of Rule 11Aa3–1. The Commission agrees with the Exchange that, with the exception of specialist Tier 1 and Tier 2 executions, real-time last sale and volume reporting for the individual component stocks underlying a basket trade would not be appropriate in the ESP context. Pricing of the baskets is based on the aggregate value of the underlying securities and, thus, any assignment of a "price" to any of the component stocks in the basket would be derivative of the aggregate price.

Further, for the first six months, the NYSE will not disseminate on a consolidated basis the total daily trading volume for each component stock. The NYSE believes that its proposal to exclude end-of-day transaction volume in the ESP component stocks from the consolidated transaction volume figures is appropriate to provide the Division and the Exchange with an opportunity to assess whether the absence of individual basket component stocks in the end-of-day consolidated volume figures merits modification in light of actual trading experience.[21]

At the end of the first six months of basket trading, however, the NYSE has committed to submit to the Commission a proposed rule change that will provide for the inclusion of end-of-day transaction volume in the ESP component stocks in the consolidated transaction volume figures. The Exchange has reserved the right to provide views and information that would express and support its continued opposition to the inclusion of end-of-day transaction volume in the ESP component stocks in the consolidated transaction volume figures, which would be reflected in the publication of the proposed rule change for comment. The Exchange would withdraw the amendment should the Commission concur with the Exchange at that time. The Commission believes that a six-month delay is reasonable in order to determine whether the absence of the consolidated reporting of end-of-day transaction volume in the basket components stocks merits modification.

The Commission believes that the ESPs will provide institutional investors with a cost-efficient means to make investment decisions based on the direction of standardized measures of stock market segments and the stock market as a whole, and may provide stock market participants several advantages over existing methods of effecting program trades of stocks and transactions in portfolios of securities. The Commission believes that appropriate conditional relief from Rules 11Aa3–1 is necessary and appropriate if the benefits of trading in market basket contracts are to be achieved.

## V. Conclusion

The Commission believes that the ESP market structure balances appropriately the competing concerns of various Exchange constituencies and is consistent with the maintenance of fair and orderly markets and the protection of investors. Accordingly, based upon the aforementioned factors, the Commission finds that the requested exemptions under Rule 11Aa3–1 are consistent with the requirements of the Act and the rules and regulations thereunder.

It is therefore ordered, pursuant to Section 11A of the Act, and Rule 11Aa3–1(g) thereunder, that the following requested exemptions from Rule 11Aa3–

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[13] *See* letter from Michael D. Robbins, President, AFB, to Jonathan G. Katz, Secretary, SEC, dated July 13, 1989.

[14] *See* letter from Richard Ney, Richard Ney & Associates Asset Management, Inc., to Richard G. Ketchum, Director, Division of Market Regulation, dated July 5, 1989.

[15] *See* letter from Thomas G. and Ruth M. Roberts, to the Hon. Esteban E. Torres, U.S. House of Representatives, dated August 10, 1989; and letter from Burton Roger to the Hon. Howard L. Berman, U.S. House of Representatives, dated August 19, 1989.

[16] The consolidated tape refers to the data stream of last sale reports on NYSE, American Stock Exchange and certain regional exchange stocks, which is collected, processed and disseminated pursuant to the Consolidated Transaction Association Plan.

[17] *See* letter from James E. Buck, Secretary, NYSE, to Mary Revell, Branch Chief, Division of Market Regulation, SEC, dated September 6, 1989.

[18] 17 CFR 240.11Aa3–1 (1989).

[19] Rule 11Aa3–1(c) (1) and (2). "Reported securities" are securities for which there is in effect a transaction reporting plan.

[20] Rule 11Aa3–1(b)(2)(iv).

[21] *See* letter from Richard A. Grasso, President and CEO, NYSE, to Brandon C. Becker, Associate Director, Division of Market Regulation, SEC, dated October 4, 1989.

1 be, and hereby are, granted: (1) an exemption from the requirements of paragraphs (c)(1) and (c)(2) of Rule 11Aa3–1 that the NYSE disseminate last sale transaction reports for individual securities and (2) a temporary exemption for a six-month period commencing on the date of this order from the requirement of paragraph (b)(2)(iv) of Rule 11Aa3–1 that the Exchange provide for the consolidation of transaction reports.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.

Dated: October 26, 1989.

Jonathan G. Katz,

*Secretary.*

[FR Doc. 89–25602 Filed 10–30–89; 8:45 am]

BILLING CODE 8010–01–M

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**[Release No. 34–27391; File No. SR–CBOE–88–20]**

## Self-Regulatory Organizations; Chicago Board Options Exchange, Inc.; Order Granting Exemptions Relating to Market Basket Trading

### I. Introduction

On May 12, 1989, the Chicago Board Options Exchange, Inc. ("CBOE" or "Exchange") filed with the Securities and Exchange Commission ("Commission" or "SEC"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b–4 thereunder,[2] a proposed rule change that establishes Exchange rules governing the trading of "market basket contracts" on the floor of the Exchange.[3] As part of the proposal, the Exchange requested certain exemptions under Rules 11Aa3–1 and 11Ac1–1.[4] The Exchange requested, pursuant to Rule 11Aa3–1(g) an exemption from the Rule's requirements to report transactions in reported securities pursuant to an effective transaction reporting plan and to disseminate on a consolidated basis the total trading volume for each component stock of the market basket contracts.[5] CBOE also requested, pursuant to Rule 11Ac1–1(d), an exemption from the Rule 11Ac1–1 requirement that disseminated quotations include the size associated with those quotations.[6] The proposal was published for comment in Securities Exchange Act Release No. 26882 (June 1, 1989), 54 FR 24442 (June 7, 1989).[7] No direct comment letters were received regarding the proposed rule change, however, commentators did discuss the CBOE proposal in responding to proposals by other exchanges to trade baskets of stock.[8] The Commission considered those comments in reviewing the CBOE proposal.[9]

### II. Description of the Proposed Basket Product and Exemption Requests

CBOE's proposed market basket contract will enable CBOE members to trade standardized baskets of stocks at an aggregate price in a single execution on the Exchange's floor. A market basket trade will result in a transfer to the buyer of ownership of each of the component stocks. When the transaction is completed, the buyer will be entitled to all rights attending ownership of the basket stocks (including rights to vote and receive dividends), and will be free to sell or hold each stock separately. The CBOE proposes to trade market basket contracts based on the Standard & Poor's 100 Stock Price Index ("S&P 100") and the Standard & Poor's 500 Stock Price Index ("S&P 500").

The Exchange intends to disseminate quotation and last sale information for market basket contracts but not for the individual component stocks comprising the market basket.[10] This is, however, inconsistent with paragraphs (c)(1) and (c)(2) of Rule 11Aa3–1, which require CBOE to disseminate transaction reports in individual reported securities. In addition, CBOE will not provide a mechanism for consolidating transaction volume in the individual reported securities, which is inconsistent with Rule 11Aa3–1(b)(2)(iv). That paragraph requires CBOE to disseminate transaction reports pursuant to a plan that provides for the consolidation of transactions in the same securities executed on other exchanges.[11] Further, the Options Price Reporting Authority ("OPRA"), which CBOE will use to disseminate last sale and quotation information, does not have the capacity to show sizes for bids and offers. This also is inconsistent with the Act, specifically Rule 11Ac1–1(b)(1), which requires that the Exchange disseminate the size associated with quotations published on the floor. The CBOE, therefore filed its request that the Commission grant exemptions from these requirements.

### III. Discussion

As noted above, paragraphs (c)(1) and (c)(2) of Rule 11Aa3–1 require the CBOE to disseminate last sale transaction reports for individual reported securities pursuant to an effective transaction reporting plan. Because CBOE proposes to trade reported securities only as part of standardized market basket contracts and not individually, the last sale information to be made available for market baskets will be limited to the price at which the basket last traded and the size of the trade. No last sale reports will be generated or disseminated for the individual component stocks comprising a market basket during the trading day. The CBOE proposes to disseminate basket last sale information and quotations through OPRA; thus providing ready access to market basket transaction reports and quotations to all market participants.[12] The Commission agrees with the Exchange that real-time last sale and volume reporting for the individual component stocks underlying a basket trade would not be appropriate

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[1] 15 U.S.C. 78s(b)(1) (1982).

[2] 17 CFR 240.19b–4 (1989).

[3] The Commission approved the proposed rule change submitted by CBOE to establish the trading of market basket contracts in a separate order issued today. *See* Securities Exchange Act Release No. 27383.

[4] 17 CFR 240.11Aa3–1(g) and 240.11Ac1–1(d) (1989).

[5] *See* letter from Nancy R. Crossman, First Vice President and General Counsel, CBOE, to Howard L. Kramer, Assistant Director, Division of Market Regulation, SEC, dated October 11, 1989.

[6] *See* letter from Nancy R. Crossman, First Vice President and General Counsel, CBOE, to Teresa Fink, Attorney, Branch of National Market System Regulation, Division of Market Regulation, SEC, dated October 19, 1989.

[7] The substance of the proposed rule change was filed with the Commission in Amendment No. 2 to File No. SR–CBOE–88–20 on May 20, 1989.

[8] The New York Stock Exchange, Inc. ("NYSE") filed with the Commission a proposal that sets forth a framework for trading "Exchange Stock Portfolios", standardized baskets of stocks, on the floor of the NYSE. *See* Securities Exchange Act Release No. 26908 (June 8, 1989), 54 FR 25516 (June 15, 1989). Additionally, the Midwest Stock Exchange, Inc. ("MSE") filed with the Commission a proposal to establish a secondary trading session for the execution of transactions in portfolios of securities. *See* Securities Exchange Act Release No. 26887 (June 2, 1989), 54 FR 24779 (June 9, 1989).

[9] The Commission received comment letters from the Alliance of Floor Brokers ("AFB") on the NYSE proposal and the MSE proposal. The AFB comments regarding the NYSE proposal are discussed in Securities Exchange Act Release No. 27382, (October 26, 1989) at notes 62–63 and accompanying text. The AFB comments regarding the MSE proposal are discussed in Securities Exchange Act Release No. 27385, (October 26, 1989) at notes 21–24 and accompanying text.

[10] The transactions in each basket will be reported within 90 seconds of their occurrence. *See* letter from Robert P. Ackermann, Vice President, CBOE, to Mark McNair, Attorney, Options Branch, Division of Market Regulation, SEC, dated September 20, 1989.

[11] "Reported securities" are securities for which there is in effect a transaction reporting plan (*e.g.*, the Consolidated Tape Association Plan). The securities that make up the baskets that will trade on CBOE are all reported securities.

[12] OPRA collects from the options exchanges last sale and quotation information for all standardized options and disseminates that information to vendors and other subscribers.

in the market basket context. Pricing of the baskets is based on the aggregate value of the underlying securities and, thus, any assignment of a "price" to any of the component stocks in the basket would be derivative of the aggregated price.

Additionally, for the first six months of basket trading, the CBOE will not disseminate on a consolidated basis the total daily trading volume in individual securities represented by basket trades. Volume in market basket contracts will be reported over the OPRA system, as a result of reporting each market basket transaction as it takes place, and in the end-of-day message.[13] While the Commission is aware of the limited usefulness of price information on the underlying securities in the baskets, it believes that dissemination of the share volume in the underlying securities is important information and should be included in the daily consolidated volume for each of the underlying securities. Because this presents a number of technological difficulties for CBOE, CBOE has represented that it will evaluate trading in the baskets over a six-month period and, at the end of that period in consultation with the Commission, CBOE will reconsider whether its volume dissemination procedures should be modified.[14] Thus, the Commission has decided to grant CBOE a six-month exemption from the requirement. At the end of the exemption period, CBOE will be required to file with the Commission a proposal describing how it will consolidate the total daily trading volume for component stocks with volume from the other markets trading those securities, or submit to the Commission the reasons why its exemption should be extended.

Finally, the Exchange requested an exemption from Rule 11Ac1–1(b)(1), which requires that disseminated quotations include the size associated with the quote. Because OPRA, the facility through which CBOE basket quotes will be reported, cannot disseminate size, the Commission has agreed to grant a temporary exemption from the Rule for a six-month period.[15] It is important to note that other than the requirements to disseminate the size associated with quotations, all other requirements of Rule 11Ac1–1 will apply to market basket quotations; including, most notably, the requirement that quotations for baskets be firm. Thus, if basket market makers are disseminating quotes on the CBOE floor that are good for greater than one contract, regardless of the fact that this size will not be disseminated through OPRA, market makers will have to honor their size quotes.

The Commission believes that the CBOE market baskets will provide institutional investors with a cost-efficient means to make investment decisions based on the direction of standardized measures of stock market segments and the stock market as a whole, and may provide stock market participants several advantages over existing methods of effecting program trades of stocks and transactions in portfolios of securities. The Commission believes that appropriate conditional relief from Rules 11Aa3–1 and 11Ac1–1 is necessary and appropriate if the benefits of trading in market basket contracts are to be achieved.

## IV. Conclusion

The Commission believes that the proposed transaction and quotation reporting mechanisms for trading market baskets on CBOE are designed to provide accurate, timely information on basket trading. Moreover, given the institutional character of stock portfolio trading for which market basket trading is designed, the Commission believes that the Exchange's chosen reporting mechanisms are consistent with the maintenance of fair and orderly markets and the protection of investors. Accordingly, based upon the aforementioned factors, the Commission finds that the requested exemptions under Rules 11Aa3–1 and 11Ac1–1 are consistent with the requirements of the Act and the rules and regulations thereunder.

It is therefore ordered, pursuant to Section 11A of the Act and Rules 11Aa3–1(g) and 11Ac1–1(d) thereunder, that the following exemptions be, and hereby are, granted: (1) an exemption from the requirement of paragraphs (c)(1) and (c)(2) of Rule 11Aa3–1 that the CBOE disseminate last sale transaction reports for individual reported securities pursuant to an effective transaction reporting plan; (2) a temporary exemption for a six-month period commencing on the date of this order, from the requirement of paragraph (b)(2)(iv) of Rule 11Aa3–1 that the CBOE provide for the dissemination of the total daily trading volume of the component stocks on a consolidated basis; and (3) a temporary exemption for a six-month period commencing on the date of this order from the requirement of paragraph (b)(1) of Rule 11Ac1–1 that the CBOE disseminate the quotation sizes associated with quotations on market basket contracts.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Dated: October 26, 1989.

**Jonathan G. Katz,**

*Secretary.*

[FR Doc. 89–25600 Filed 10–30–89; 8:45 am]

BILLING CODE 8010–01–M

[13] In addition, the end-of-day total number of shares of all component stocks represented by market basket trading and the number of shares of each individual component stock represented by market basket trading will be provided through the CBOE Newswire to the Associated Press, Dow Jones and Reuters, for the six-month period.

[14] *See* letter from Nancy R. Crossman, First Vice President and General Counsel, CBOE, to Howard L. Kramer, Assistant Director, Division of Market Regulation, SEC, dated October 11, 1989.

[15] The Commission intends to evaluate with the exchanges all aspects of quotation and last sale reporting for the three market basket proposals (*i.e.*, the CBOE, MSE and NYSE proposals) during this six-month period to assess the adequacy of the reporting mechanisms for all three.

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[Rel. No. IC–17186; 812–7359]

## Boston Financial Qualified Housing Tax Credits L.P. V, a Limited Partnership and Arch Street IV, Inc.; Notice of Application

October 19, 1989.

**AGENCY:** Securities and Exchange Commission ("SEC").

**ACTION:** Notice of Application for Exemption under the Investment Company Act of 1940 ("1940 Act").

*Applicants:* Boston Financial Qualified Housing Tax Credits L.P. V, a Limited Partnership, a Massachusetts limited partnership (the "Partnership"), and its managing general partner, Arch Street V, Inc., a Massachusetts corporation ("Managing General Partner").

*Relevant 1940 Act Sections:* Exemption under Section 6(c) from all provisions of the 1940 Act.

*Summary of Application:* Applicants seek an order exempting the Partnership from all provisions of the 1940 Act and the rules thereunder to permit the Partnership to invest in other limited partnerships that in turn will engage in the development, rehabilitation, ownership, and operation of housing for low and moderate income persons.

*Filing Date:* The application was filed on July 18, 1989 and amended on October 16, 1989.

*Hearing or Notification of Hearing:* If no hearing is ordered, the application will be granted. Any interested person may request a hearing on this application, or ask to be notified if a hearing is ordered. Any requests must be received by the SEC by 5:30 p.m., on November 13, 1989. Request a hearing in

writing, giving the nature of your interest, the reason for the request, and the issues you contest. Serve the Applicants with the request, either personally or by mail, and also send it to the Secretary of the SEC, along with proof of service by affidavit or, for lawyers, by certificate. Request notification of the date of a hearing by writing to the Secretary of the SEC.

**ADDRESSES:** Secretary, SEC, 450 5th Street, NW., Washington, DC 20549. Applicants, c/o The Boston Financial Group Incorporated, 101 Arch Street, Boston, Massachusetts 02110.

**FOR FURTHER INFORMATION CONTACT:** Barbara Chretien-Dar, Staff Attorney, at (202) 272–3022, or Stephanie M. Monaco, Branch Chief, at (202) 272–3030 (Division of Investment Management, Office of Investment Company Regulation).

**SUPPLEMENTARY INFORMATION:** Following is a summary of the application; the complete application is available for a fee from either the SEC's Public Reference Branch in person or the SEC's commercial copier who can be contacted at (800) 231–3282 (in Maryland (301) 258–4300).

**Applicants' Representations**

1. The Partnership was organized on June 16, 1989, under the Uniform Limited Partnership Act of the Commonwealth of Massachusetts as a vehicle for equity investment in apartment complexes to be qualified, in the opinion of counsel, for the low income housing tax credit (the "Low Income Housing Credits') under the Internal Revenue Code of 1986, as amended ("Code"). It is anticipated that the Partnership will invest both in apartment complexes that receive operating and financing subsidies and in apartment complexes that do not receive such subsidies.

2. The Partnership will operate as a "two-tier" entity, *i.e.*, the Partnership, as a limited partner, will invest in other limited partnerships ("Local Limited Partnerships") which, in turn, will engage in the development, rehabilitation, ownership, and operation of apartment complexes in accordance with the purposes and criteria set forth in Investment Company Act Release No. 8456 (August 9, 1974) ("Release No. 8456"). The Partnership's investment objectives are: (i) to provide current tax benefits in the form of tax credits which Qualified Investors (defined herein) may use to offset their federal income tax liability; (ii) to preserve and protect the Partnership's capital; (iii) to provide limited cash distributions which are not expected to constitute taxable income during Partnership operations; and (iv) to provide cash distributions from sale or refinancing transactions, as defined in the Partnership's partnership agreement (the "Partnership Agreement").

3. The Partnership will normally acquire at least a 90% interest in the cash distributions, profits, losses and tax credits of the Local Limited Partnerships, with the balance remaining with the local general partners. However, in certain cases, at the discretion of the Managing General Partner, the Partnership may acquire a lesser interest in a Local Limited Partnership. Should the Partnership invest in any Local Limited Partnership in which it acquires less than 50% of the limited partnership interest, the Partnership Agreement will provide that the Partnership will have at least a 50% vote to: amend such partnership agreement of such Local Limited Partnership; dissolve such Local Limited Partnership; remove the local general partner and elect a replacement; and approve or disapprove the sale of substantially all of the assets of such Local Limited Partnership. In addition, the Partnership will require that the Local Limited Partnership agreements provide to the limited partners of the Local Limited Partnerships substantially all of the rights required by Section VII of the guidelines adopted by the North American Securities Administrators Association, Inc. ("NASAA").

4. On July 13, 1989, the Partnership filed a registration statement under the Securities Act of 1933 (the "Securities Act") for the sale of up to 100,000 units of limited partnership interest ("Units") at $1,000 per Unit with a minimum subscription of five units ($5,000) per investor.

5. Subscriptions for Units must be approved by the Managing General Partner, and such approval will be made conditional upon representations as to suitability of the investment for each subscriber. The form of subscription for Units provides that each subscriber will represent, among other things, that he meets the general investor suitability standards established by the Partnership and set forth in the Prospectus under the heading "Who Should Invest." Such general investor suitability standards provide, among other things, that investment in Partnership is suitable only for an investor (a "Qualified Investor") who meets the following requirements: (a) in the case of an investor that is a corporation, other than a corporation subject to Subchapter S of the Code, such corporation (a"C Corporation") has a net worth of not less than $75,000; (b) in the case of a noncorporate investor, such investor reasonably expects to have substantial unsheltered passive income or, if an individual, such investor reasonably expects to have adjusted gross income of *less* than $250,000 in the next twelve years and reasonably expects to have income tax liability during those years in respect of which the tax credits can be utilized and either (1) has a net worth (exclusive of home, furnishings, and automobiles) of at least $50,000 ($35,000, if such investor is a resident of New Hampshire) and an annual gross income of not less than $30,000 ($35,000, if such investor is a resident of New Hampshire) in the current year and estimates he will maintain these levels for the twelve succeeding years and that (without regard to investment in the Partnership) some part of his income for the current year and the twelve succeeding years will be subject to federal income tax at the rate of 28% or more, or (2) irrespective of annual taxable income, he has a net worth (exclusive of home, furnishings, and automobiles) of at least $75,000, or (3) is purchasing in a fiduciary capacity for a person or entity having such set worth and annual gross income as set forth in clause (1) or such net worth as set forth in clause (2); or (c) in the case of an investor that is a corporation subject to Subchapter S of the Code, each of its shareholders (or if a partnership each of its partners) meets the criteria applicable to non-corporate investors. Units will be sold in certain states only to persons who meet additional or alternative standards which will be set forth in the Prospectus, any supplement to the Prospectus, or the Subscription Agreement; *provided, however,* that in no event shall the Partnership employ any such suitability standard which is less restrictive than that set forth above. The Partnership Agreement also imposes certain restrictions on transfer and assignment of the Units, including that each proposed assignee must deliver to the Managing General Partner evidence of his suitability. The Partnership will not redeem or repurchase Units, does not anticipate formation of a public market for the Units, and thus believes purchases of Units should be considered illiquid investments.

6. The Partnership will be controlled by its general partners, the Managing General Partner and Arch Street V Limited Partnership (collectively, the "General Partners"). The Limited Partners, consistent with their limited liability status, will not be entitled to participate in the control of the business of the Partnership. However, the majority in interest of the Limited Partners will have the right to amend the

Partnership Agreement (subject to certain limitations), dissolve the Partnership, and remove any General Partner and elect a replacement therefor. In addition, under the Partnership Agreement, each Limited Partner is entitled to review all books and records of the Partnership at any and all reasonable times.

7. The Partnership Agreement provides that certain significant actions cannot be taken by the Managing General Partner without the express consent of a majority in interest of the Limited Partners. Such actions include: (a) until the end of the 10-year period commencing on the date of the Prospectus, the sale in a 12-month period of Local Limited Partnership interests constituting more than 33% of the Partnership's then existing total investment in Local Limited Partnership interests; (b) the sale at any one time of all or substantially all of the assets of the Partnership, except for sales in connection with the liquidation and winding up of the Partnership's business upon its dissolution; (c) dissolution of the Partnership; and (d) causing the Partnership to merge or be consolidated with any other entity. The admission of a successor or additional General Partner would also require express consent under the Partnership Agreement.

8. Boston Financial Securities, Inc., an affiliate of the General Partners (the "Selling Agent"), will receive customary commissions and an underwriting advisory fee on the sale of the Units, together with an expense allowance to defray accountable due diligence activities. The Selling Agent may authorize other members ("Soliciting Dealers") of the National Association of Securities Dealers, Inc. (" NASD") to sell Units. The Selling Agent will pay a concession to each Soliciting Dealer on all sales of Units by such Soliciting Dealer and may reallow all or any portion of its underwriting advisory fee and expense allowance to such Soliciting Dealer. Such selling commissions and fees are customarily charged in securities offerings of this type and are consistent with NASD guidelines.

9. During the offering and organizational phase, the Managing General Partner and its affiliates (as defined in the Partnership Agreement) will receive from the Partnership reimbursement of organizational and offering expenses.

10. Acquisition phase fees payable to all persons, including the General Partners or their affiliates, in connection with the acquisition of interests in Local Limited Partnerships, will be limited by the guidelines adopted by NASAA. During the operating phase, the Partnership may pay additional fees or compensation to the General Partners or their affiliates including, without limitation, an asset management fee. Such asset management fee is paid in consideration of the administration of the affairs of the Partnership in connection with each Local Limited Partnership in which the Partnership invests. Such other fees may be paid in consideration of property management services rendered by the General Partners or their affiliates as the management and leasing agent for some of the Local Limited Partnerships and for consulting services rendered by the General Partners or their affiliates as consultants to some of the Local Limited Partnerships. All such fees shall be subject to the terms of the Partnership Agreement. In addition, the General Partners or their affiliates may receive amounts from Local Limited Partnerships to the extent permitted by applicable law and regulations. Such amounts shall be subject to the terms of the Partnership Agreement. Compensation to the General Partners or their affiliates during the liquidating stage will be in the form of distributions of the sale or refinancing proceeds of Local Limited Partnership projects or interests, or of real or personal property of the Partnership. In addition to the foregoing fees and interests, the General Partners and their affiliates will be allocated generally 1% of profits and losses of the Partnership for tax purposes.

11. All compensation to be paid to the General Partners and their affiliates is specified in the Partnership Agreement and Prospectus, and no compensation will be payable to the General Partners or their affiliates not so specified. The substantial fees and other forms of compensation that will be paid to the General Partners and their affiliates will not have been negotiated through arm's length negotiations. Terms of all such compensation, however, will be fair and not less favorable to the Partnership than would be the case if such terms had been negotiated with independent third parties. In addition, compensation in various forms will be paid to the local general partner of each Limited Partnership.

12. All proceeds of the public offering of Units will initially in an escrow account with Shaumut Bank, N.A. ("Escrow Agent"). Pending release of offering proceeds to the Partnership, the Escrow Agent will desposit escrowed funds in the "Shawmut Interest Bearing Account," a federally insured money market deposit account. The offering of Units will terminate not later than one year from the date upon which the Partnership's Registration Statement shall have been declared effective. If subscriptions for at least 5,000 Units have not been received by such termination date, no Units will be sold and funds paid by subscribers will be returned promptly, together with a pro rata share of any interest earned thereon. The Partnership will not admit any subscribers as Limited Partners to the Partnership until the exemptive order applied for herein is granted or the Partnership receives an opinion of counsel that it is exempt from registration under the 1940 Act. Upon receipt of the prescribed minimum number of subscriptions, funds in escrow will be released to the Partnership and held in trust pending investment in Local Limited Partnerships. Any net proceeds not immediately utilized to acquire Local Limited Partnership interests or for other Partnership purposes will be invented and held in highly liquid, non-speculative securities set forth in the application and which provide adequately for the preservation of capital ("Temporary Investments"). The Partnership intends to apply capital raised in its public offering to the acquisition of Local Limited Partnership interests as soon as possible and does not intend to trade or speculate in Temporary Investments.

13. The Partnership Agreement provides that, subject to certain limitations including negligence and misconduct, the Partnership shall indemnify the General Partners and certain affiliates for losses sustained by them or their affiliates in connection with the business of the Partnership. However, the Partnership has been advised in the opinion of the SEC indemnification for liabilities under the Securities Act is contrary to public policy as expressed in the Securities Act and is therefore unenforceable.

**Applicant's Legal Conclusions**

1. The exemption of the Partnership from all provisions of the 1940 Act is both necessary and appropriate in the public interest, because: (a) investment in low and moderate income housing in accordance with the national policy expressed in Title IX of the Housing and Urban Development Act of 1968 is not economically suitable for private investors without the tax and organizational advantages of the limited partnership form; (b) the limited partnership structure provides the only means of bringing private equity capital into such housing; (c) the limited

partnership form insulates each Limited Partner from personal liability and limits his financial risk to the amount he has invested in the program, while also allowing the Limited Partner to claim on his individual tax return his proportionate share of the tax credits, income and losses from the investment; (d) the limited partnership form of organization is incompatible with fundamental provisions of the 1940 Act, such as the requirement of annual approval by investors of a management contract and the requirements concerning election of directors and the termination of the management contract; and (e) real estate limited partnerships such as the Partnership generally cannot comply with the asset coverage limitations imposed by Section 18 of the 1940 Act. Also, an exemption from these basic provisions is necessary and appropriate so as not to discourage use of the two-tier limited partnership entity or frustrate the public policy established by the housing laws.

2. Interests in the Partnership will be sold only to, and transfers will be permitted only to, investors who meet specified suitability standards (as described above) which the Partnership believes are consistent with the requirements in Release No. 8456, with the guidelines of those states which prescribe suitability standards, and with the securities laws of all states where the Units will be sold. Such investors will receive extensive reports concerning the Partnership's business and operations. Although the interests of the General Partners and their affiliates may conflict in various ways with the interests of Limited Partners, Limited Partners are adequately protected through disclosures of all political conflicts in the Prospectus, including competition by Local Limited Partnerships with affiliates for properties and the participation by an affiliate as the Selling Agent for the offering. To address this conflict, the General Partners agree, in Section 5.7 of the Partnership Agreement, that each General Partner and each affiliate thereof, prior to entering into an investment which could be suitable for the Partnership or recommending such investment to others, must present to the Partnership the opportunity to enter into such investment and my not enter into such investment on its own behalf nor recommend it to others unless the Partnership has declined to enter into such investment. Further protection for the interests of Limited Partners is provided by the numerous provisions of the Partnership Agreement designed to prevent overreaching by the General Partners and to assure fair dealing by the General Partners vis-a-vis the Limited Partners. The Partnership will also file with the SEC and distribute certain financial documents and reports on its activities.

3. Release No. 8456 lists two conditions, designed for the protection of investors, which must be satisfied in order to quality for the type of exemptive relief which the Partnership seeks: (1) "interests in the issuer should be sold only to persons for whom investments in limited profit, essentially tax-shelter, investments would not be suitable * * *;" and (2) "requirements for fair dealing by the general partner of the issuer with the limited partners of the issuer should be included in the basic organizational documents of the company." The Partnership will comply with these conditions and will otherwise operate in a manner deisigned to ensure investor protection.

4. The contemplated arrangement of the Partnership is not susceptible to abuses of the sort the 1940 Act was designed to remedy. The suitable standards described above, the requirements for fair dealing provided by the Partnership's governing instruments, and pertinent governmental regulations imposed on each Local Limited Partnership by various federal, state and local agencies, provide protection to investors in Units comparable to and in some respects greater than that provided by the 1940 Act. An exemption would therefore be entirely consistent with the protection of investors and the purposes and policies of the 1940 Act.

For the Commission, by the Division of Investment Management, under delegated authority.

**Jonathan G. Katz,**

*Secretary.*

[FR Doc. 89-25500 Filed 10-30-89; 8:45 am]

BILLING CODE 8010-01-M

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**[Rel. No. IC-17187; 811-5481]**

## Templeton Constant Pay-Out Fund, Inc. (Formerly, Templeton Emerging Growth Stock Fund, Inc.); Application for Deregistration

October 20, 1989.

**AGENCY:** Securities and Exchange Commission ("SEC").

**ACTION:** Notice of Application for Deregistration under the Investment Company Act of 1940 (the "1940 Act").

*Applicant:* Templeton Constant Pay-Out Fund, Inc. ("Applicant").

*Relevant 1940 Act Section:* Section 8(f).

*Summary of Application:* Applicant seeks an order declaring that it has ceased to be an investment company under the 1940 Act.

*Filing Dates:* The application on Form N-8F was filed on September 18, 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 Applicant with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on November 15, 1989, and should be accompanied by proof of service on the Applicant, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of 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.

**ADDRESSES:** Secretary, SEC, 450 Fifth Street, NW., Washington, DC 20549. Applicant, 700 Central Avenue, St. Petersburg, Florida 33733-8030.

**FOR FURTHER INFORMATION CONTACT:** Patricia Copeland, Legal Technician, (202) 272-3009, or Karen L. Skidmore, Branch Chief, (202) 272-3023 (Office of Investment Company Regulation).

**SUPPLEMENTARY INFORMATION:** Following is a summary of the application; the complete application is available for a fee from either the SEC's Public Reference Branch in person or the SEC's commercial copier (800) 231-3282 (in Maryland (301) 258-4300).

### Applicant's Representations

1. Applicant is an open-end diversified management investment company incorporated under the laws of the state of Maryland. On February 25, 1988, Applicant filed a Notification of Registration pursuant to Section 8(a) of the 1940 Act on Form N-8A. On that same date, Applicant filed a registration statement on Form N-1A (33-20320) with respect to an indefinite amount of common stock. The registration statement never became effective and was withdrawn by Applicant on March 21, 1989. Applicant has never made a public offering of its securities.

2. Applicant has no shareholders, assets or liabilities. Applicant is not a party to any litigation or administrative proceeding. Applicant is not engaged nor does it propose to engage in any business activities other than those necessary to wind up its affairs.

For the Commission, by the Division of Investment Management, under delegated authority.

Jonathan G. Katz,

*Secretary.*

[FR Doc. 89-25501 Filed 10-30-89; 8:45 am]

BILLING CODE 8010-01-M

## SMALL BUSINESS ADMINISTRATION

**[Declaration of Disaster Loan Area #2382 Amendment #1]**

### Territory of the Virgin Islands; Declaration of Disaster Loan Area

The above-numbered Declaration is hereby amended in accordance with the Notice of Amendment to the President's declaration, dated September 20, 1989, to include Water Island, and other inhabited islands under the jurisdiction of the Territorial Government, as a disaster area as a result of damages caused by Hurricane Hugo which occurred on September 17-18, 1989.

All other information remains the same; i.e., the termination date for filing applications for physical damage is until such time as determined by the Federal Emergency Management Agency, and for economic injury until the close of business on June 20, 1990.

(Catalog of Federal Domestic Assistance Program Nos. 59002 and 59008)

Dated: October 23, 1989.

Alfred E. Judd,

*Acting Deputy Associate Administrator for Disaster Assistance.*

[FR Doc. 89-25608 Filed 10-30-89; 8:45 am]

BILLING CODE 8025-01-M

### Region I Advisory Council Public Meeting; Connecticut

The U.S. Small Business Administration Region I Advisory Council, located in the geographical area of Hartford, will hold a public meeting at 8:00 a.m. on Monday, November 20, 1989, at the Days Inn, 900 East Main Street, Meriden, Connecticut, to discuss such matters as may be presented by members, staff of the U.S. Small Business Administration, or others present.

For further information, write or call Kenneth A. Silvia, Acting District Director, U.S. Small Business Administration, 330 Main Street, Hartford, Connecticut 06106, phone (202) 240-4670.

Dated: October 25, 1989.

Jean M. Nowak,

*Director, Office of Advisory Councils.*

[FR Doc. 89-25609 Filed 10-30-89; 8:45 am]

BILLING CODE 8025-01-M

### Region IX Advisory Council Public Meeting; Hawaii

The U.S. Small Business Administration Region IX Advisory Council, located in the geographical area of Honolulu, will hold a public meeting at 9:30 a.m. on Tuesday, November 21, 1989, at the Prince Kuhio Federal Building, 300 Ala Moana Boulevard, Conference Room 4113A, Honolulu, Hawaii, to discuss such matters as may be presented by members, staff of the U.S. Small Business Administration, or others present.

For further information, write or call Charles T.C. Lum, District Director, U.S. Small Business Administration, 300 Ala Moana Boulevard, Room 2213, Honolulu, Hawaii 96850, phone (808) 541-2990.

Dated: October 25, 1989.

Jean M. Nowak,

*Director, Office of Advisory Councils.*

[FR Doc. 89-25610 Filed 10-30-89; 8:45 am]

BILLING CODE 8025-01-M

### Region VII Advisory Council Public Meeting; Iowa

The U.S. Small Business Administration Region VII Advisory Council, located in the geographical area of Des Moines, will hold a public meeting at 10:00 a.m. on Tuesday, November 28, 1989, at the Golden Circle Incubator, Des Moines Area, Community College, 2010 South Ankeny Boulevard, Ankeny, Iowa, to discuss such matters as may be presented by members, staff of the U.S. Small Business Administration, or others present.

For further information, write or call Conrad Lawlor, District Director, U.S. Small Business Administration, 210 Walnut Street, Des Moines, Iowa 50309, phone (515) 284-4567.

Dated: October 25, 1989.

Jean M. Nowak,

*Director, Office of Advisory Councils.*

[FR Doc. 89-25611 Filed 10-30-89; 8:45 am]

BILLING CODE 8025-01-M

### Region IV Advisory Council Public Meeting; North Carolina

The U.S. Small Business Administration Region IV Advisory Council, located in the geographical area of Charlotte, will hold a public meeting at 10:00 a.m. on Tuesday, November 14, 1989, at the Kenan Center in Chapel Hill, North Carolina, to discuss such matters as may be presented by members, staff of the U.S. Small Business Administration, or others present.

For further information, write or call Gary A. Keel, District Director, U.S. Small Business Administration, 222 South Church Street, Suite 300, Charlotte, North Carolina 28202, phone (704) 371-6561.

Dated: October 25, 1989.

Jean M. Nowak,

*Director, Office of Advisory Councils.*

[FR Doc. 89-25612 Filed 10-30-89; 8:45 am]

BILLING CODE 8025-01-M

### Region VIII Advisory Council Public Meeting; North Dakota

The U.S. Small Business Administration Region VIII Advisory Council, located in the geographical area of Fargo, will hold a public meeting at 9:00 a.m. on Tuesday, November 14, 1989, at the Kelly Inn, Bismarck, North Dakota, to discuss such matters as may be presented by members, staff of the U.S. Small Business Administration, or others present.

For further information, write or call James J. Stai, District Director, U.S. Small Business Administration, 657-2nd Avenue North, Fargo, North Dakota 58102, phone (701) 239-5131.

Dated: October 25, 1989.

Jean M. Nowak,

*Director, Office of Advisory Councils.*

[FR Doc. 89-25613 Filed 10-30-89; 8:45 am]

BILLING CODE 8025-01-M

### Region III Advisory Council Public Meeting; Cancellation of Meeting; Pennsylvania

The U.S. Small Business Administration Region III Advisory Council, located in the geographical area of Philadelphia, public meeting scheduled for 5:30 p.m., on Thursday, November 2, 1989, and 8:30 a.m., on Friday, November 3, 1989, at the Sheraton Harrisburg East, 800 East Park Drive, Harrisburg, Pennsylvania, has been canceled.

For further information, write or call William T. Gennetti, District Director, U.S. Small Business Administration, Allendale Square, Suite 201, 475

Allendale Road, King of Prussia, Pennsylvania 19406, phone (215) 962–3800.

Dated: October 25, 1989.

**Jean M. Nowak,**

*Director, Office of Advisory Councils.*

[FR Doc. 89–25614 Filed 10–30–89; 8:45 am]

BILLING CODE 8025–01–M

## Region VIII Advisory Council Public Meeting; Utah

The U.S. Small Business Administration Region VIII Advisory Council, located in the geographical area of Salt Lake City, will hold a public meeting at 9:30 a.m. on Thursday, November 9, 1989, at the Board Room of Guardian State Bank, 142 East 200 South, Salt Lake City, Utah, to discuss such matters as may be presented by members, staff of the U.S. Small Business Administration or others present.

For further information, write or call Stan Nakano, District Director, U.S. Small Business Administration, 125 South State Street, Salt Lake City, Utah 84138, phone (801) 524–5804.

Dated: October 25, 1989.

**Jean M. Nowak,**

*Director, Office of Advisory Councils.*

[FR Doc. 89–25615 Filed 10–30–89; 8:45 am]

BILLING CODE 8025–01–M

## Region X Advisory Council Public Meeting; Washington

The U.S. Small Business Administration Region X Advisory Council, located in the geographical area of Spokane, will hold a public meeting at 10:00 a.m. on Thursday, November 9, 1989, in conference Room B101, Farm Credit Building, West 601 First Avenue, Spokane, Washington, to discuss such matters as may be presented by members, staff of the U.S. Small Business Administration, or others present.

For further information, write or call Robert D. Wiebe, District Director, U.S. Small Business Administration, West 601 First Avenue, 10th Floor East, Spokane, Washington 99204, phone (509) 353–2808.

Date: October 25, 1989.

**Jean M. Nowak,**

*Director, Office of Advisory Councils.*

[FR Doc. 89–25616 Filed 10–30–89; 8:45 am]

BILLING CODE 8025–01–M

## DEPARTMENT OF TRANSPORTATION

### Coast Guard

**[CGD 89–079]**

## Omega Validation of the Indian Ocean

**AGENCY:** U.S. Coast Guard, Headquarters, Treasury.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that the U.S. Coast Guard has completed a validation study of the Omega Radionavigation System coverage in the Indian Ocean. The study shows that the measured Omega system performance generally conforms to theoretical expectations and that the system provides continuous, all weather navigation coverage, with typical position fixing accuracy of 2 nautical miles, 95% of the time. The study also provides information about anomalies and model interference patterns in the region. The report of the study's findings is available through the National Technical Information Service, Springfield, Virginia 22161. The report is identified by Government Accession number AD–A194458.

**DATE:** The report is available after October 31, 1989.

**ADDRESS:** The address of the Coast Guard command responsible for the report and the Omega validation effort is: Commanding Officer, Omega Navigation System Center, 7323 Telegraph Road, Alexandria, Virginia 22310–3998.

**FOR FURTHER INFORMATION CONTACT:** Verbal inquiries may be made to Mr. Randolph J. Doubt, Signal Analysis Division, Omega Navigation System Center; telephone (703) 866–3880, FTS 398–0990.

**SUPPLEMENTARY INFORMATION:** Omega validations are intensive studies of radionavigation propagation in specified geographical regions. Actual signal data are collected, analyzed and compared to the theoretical coverage model for a respective region. The result of the comparison provides information as to the signal coverage and accuracy of the Omega system in the region.

Dated: October 19, 1989.

**R.T. Nelson,**

*Rear Admiral, U.S. Coast Guard Chief, Office of Navigation, Safety and Waterway Services.*

[FR Doc. 89–25545 Filed 10–30–89; 8:45 am]

BILLING CODE 4910–14–M

## Federal Highway Administration

### National Highway Traffic Safety Administration

**[FHWA Docket No. 89–18]**

**RIN 2125–AC39**

## Handicapped Parking Regulatory Negotiation Advisory Committee

**AGENCY:** Federal Highway Administration (FHWA) National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

**ACTION:** Notice of public meetings.

**SUMMARY:** This notice announces the time and place of the next meetings of the Handicapped Parking Regulatory Negotiation Advisory Committee. These meetings are open to the public.

**DATES:** The meetings of the Handicapped Parking Regulatory Negotiation Advisory Committee will be held as follows:

Monday, October 30, 1989, noon to 5:00 p.m.

Tuesday and Wednesday, October 31 and November 1, 1989, 9:00 a.m. to 5:00 p.m.

Wednesday, November 29 through December 1, 1989, 9:00 a.m. to 5:00 p.m.

**ADDRESS:** The meetings of the advisory committee will be held at the Department of Transportation, Room 4200, 400 Seventh Street, SW., Washington, DC 20590.

**FOR FURTHER INFORMATION CONTACT:** Agency contact: Mr. Vincent Nowakowski, FHWA, Office of Traffic Operations (202) 366–2146, Ms. Judith S. Kaleta, FHWA, Office of the Chief Counsel (202) 366–0764, or Mr. E. William Fox, NHTSA, Office of the Chief Counsel, (202) 366–1834, 400 Seventh Street, SW., Washington, DC 20590. *Mediator:* Robert Robertory, Deputy Chief Administrative Judge, Board of Contract Appeals, 400 Seventh Street, SW., Washington, DC 20590 (202) 366–4305.

**SUPPLEMENTARY INFORMATION:** Pub. L. 100–641 directs the Secretary of Transportation to establish a uniform system for handicapped parking. This authority has been delegated to the FHWA and the NHTSA. To implement this law, the FHWA and the NHTSA have established an advisory committee

for regulatory negotiation. 54 FR 24908 and 40770 (1989). The committee will develop a report concerning the establishment of a uniform system for handicapped parking to enhance the safety of persons with disabilities. This report will include a recommended rulemaking proposal and will be submitted to the Administrators of the FHWA and the NHTSA. After the agencies issue a notice of proposed rulemaking (NPRM), the committee will review any comments submitted to the rulemaking docket, and write a second report which will include a recommended final rule.

This advisory committee will consider the following issues:

1. The adoption of the International Symbol of Access (ISA) as the only recognized symbol for the identification of vehicles used for transporting individuals with handicaps that limit or impair the ability to walk.

2. The issuance of license plates displaying the ISA for vehicles which will be used to transport individuals with handicaps which limit or impair the ability to walk.

3. The issuance of removable windshield placards (displaying the ISA) to individuals with handicaps which limit or impair the ability to walk.

4. The fees charged for the licensing or registration of a vehicle used to transport individuals with handicaps.

5. The recognition of licenses and placards, which display the ISA and are issued by other States and countries.

We anticipate that this advisory committee will discuss matters that are ancillary to the issues set forth above.

In the notice of establishment of the advisory committee, which was published on October 3, 1989, 52 FR 40770, we noted that notices of the meetings will be published in the **Federal Register**, if time permits. We noted that publication may not be possible in cases when the committee decides to meet for a few days, break for a few days, and then resume negotiations. However, through this notice, we are attempting to advise all interested parties of the committee meetings.

Issued on: October 24, 1989.

**E. Dean Carlson,**

*Acting Federal Highway Administrtor, Federal Highway Administration.*

[FR Doc. 89-25513 Filed 10-30-89; 8:45 am]

BILLING CODE 4910-22-M

## DEPARTMENT OF THE TREASURY

**[Number: 150-02]**

### Establishment of Certain Offices in the National Office of the Internal Revenue Service

October 12, 1989.

*Subject:* Establishment of certain offices in the national office of the Internal Revenue Service.

*1. Authority.* By the authority vested in me as Secretary of the Treasury by 31 U.S.C. 321(b); sections 7801(a), 7802 and 7803 of the Internal Revenue Code of 1986; and Reorganization Plan No. 1 of 1952, pursuant to section 7804(a) of the Internal Revenue Code, all offices in the National Office of the Internal Revenue Service continue uninterrupted except as follows:

a. The positions of Assistant Commissioner (Planning, Finance and Research), under the Deputy Commissioner (Planning and Resources), are abolished.

b. The Deputy Commissioner (Planning and Resources) is retitled Deputy Commissioner (Planning and Resources)/Chief Financial Officer (CFO). Three new positions are established under the Deputy Commissioner (Planning and Resources)/CFO. These are Assistant Commissioner (Finance)/Controller; Assistant Commissioner (Planning and Research); and Deputy Assistant Commissioner (Planning and Research).

c. A new position of Chief Information Officer is established under the Senior Deputy Commissioner. The Assistant Commissioner and Deputy Assistant Commissioner (Information Systems Development) are retitled Assistant Chief Information Officer and Deputy Assistant Chief Information Officer (Systems Design and Development); and the Assistant Commissioner and Deputy Assistant Commissioner (Computer Services) are retitled Assistant Chief Information Officer and Deputy Assistant Chief Information Officer (Systems and Applications Management). The Assistant Chief Information Officers will report to the Chief Information Officer.

*2. Office of Commissioner of Internal Revenue.* The Office of the Commissioner shall consist of the Commissioner, Senior Deputy Commissioner, Deputy Commissioner (Planning and Resources)/Chief Financial Officer, Deputy Commissioner (Operations), Chief Information Officer, Assistant Commissioner (Inspection), and Assistants to the Commissioner and Senior Deputy Commissioner. Except for the specific positions and titles in paragraphs 1. through 7. of this Order, the Commissioner may create, abolish, or modify offices and positions within the Internal Revenue Service as may be necessary to effectively and efficiently administer the tax laws or other responsibilities assigned to the Internal Revenue Service. The authority of the Commissioner to create, abolish, or modify offices under this delegation is subject only to limitations that exist by law or Department of Treasury rules and regulations.

*3. Senior Deputy Commissioner.* The Senior Deputy Commissioner serves as chief operating officer of the Service. This official is the highest career official in the Service and is responsible for the following activities.

a. Assists and acts for the Commissioner in planning, directing, coordinating, and controlling the policies, programs and other activities of the Internal Revenue Service.

b. Assists the Commissioner in establishing tax administration policy and developing strategic issues and objectives as a basis for strategic management of the Service.

c. Supervises the Deputy Commissioners, Chief Information Officer, and Assistants to the Commissioner and Senior Deputy Commissioner.

*4. Deputy Commissioner (Operations).* The Deputy Commissioner (Operations) is the principal advisor to the Commissioner and Senior Deputy Commissioner on policy and operational matters affecting field functions. The Deputy Commissioner is responsible for the following activities.

a. Serves as national spokesperson for the field operations functions which are:

(1) Assisting taxpayers in complying with the tax laws;

(2) Processing tax returns and information documents;

(3) Accounting for revenue collected by the Service;

(4) Collecting delinquent accounts;

(5) Investigating delinquent taxpayers;

(6) Investigating criminal tax fraud;

(7) Examining tax returns;

(8) Approving and examining employee plans and exempt organizations;

(9) Tax treaty administration; and

(10) Foreign tax administration assistance and disclosure.

b. Supervises the regional commissioners and the following assistant commissioners: Collection, Criminal Investigation, Employee Plans and Exempt Organizations, Examination, International, Returns Processing, and Taxpayer Services.

c. As designated by the Commissioner, represents the Service to other Executive Branch agencies, the Congress, other tax authorities and the public on field operations and major cross-functional issues.

*5. Deputy Commissioner (Planning and Resources)/Chief Financial Officer.* The Deputy Commissioner (Planning and Resources)/Chief Financial Officer is the principal advisor to the Commissioner and Senior Deputy Commissioner on Servicewide planning and the management of human and financial resources. The Deputy Commissioner is responsible for the following activities.

a. Serves as national spokesperson for the planning and management of resources functions which are:

(1) Administering the Strategic Management System;

(2) Conducting research;

(3) Formulating budgets and controlling their execution; and

(4) Administering human resource policies, facilities and logistical support, and contracting.

b. Serves as the Service's chief financial officer and establishes practices, procedures, standards and controls for the Service's financial systems.

c. Supervises the following assistant commissioners: Finance/Controller; Human Resources Management and Support; and Planning and Research.

d. As designated by the Commissioner, represents the Service to other Executive Branch agencies, the Congress, other tax authorities, and the public on Servicewide planning, management of resources, and major cross-functional issues.

*6. Chief Information Officer.* The Chief Information Officer is the principal advisor to the Commissioner and Senior Deputy Commissioner on Servicewide information resources and technology management. The Chief Information Officer is responsible for the following activities.

a. Serves as the national spokesperson for the functions of strategic technology planning, data administration, technology standards, and telecommunications.

b. Establishes policies and standards affecting these functions and the development and acquisition of computer hardware and software.

c. Provides the focus for technology management within the Service and plays an essential role in shaping Servicewide technology goals and programs and fostering a shared commitment to them.

d. Supervises the following assistant chief information officers: Systems Design and Development, and Systems and Applications Management.

e. As designated by the Commissioner, represents the Service to other Executive Branch agencies, the Congress, other tax authorities, and the public on Servicewide information resources and technology management and major cross-functional issues.

*7. Assistant Commissioner (Inspection).* The Assistant Commissioner (Inspection) will, to ensure objectivity and integrity, report directly to the Commissioner.

8. The changes shall be implemented at a date determined by the Commissioner of Internal Revenue. Effective immediately, the Commissioner of Internal Revenue is authorized to effect, at appropriate times and in an orderly manner, such transfers of functions, personnel, positions, equipment and funds as may be necessary to implement the provisions of this Order.

*9. The Chief Counsel.* The Chief Counsel, pursuant to delegated authority from the General Counsel, is authorized to take necessary action on all personnel and administrative matters pertaining to the Office of Chief Counsel, including but not limited to those for the appointment, classification, promotion, demotion, reassignment, transfer or separation of officers or employees; however, all personnel and administrative matters concerning Senior Executive Service or Performance Management Recognition System employees in the Offices of Associate Chief Counsels (International) and (Technical) whose primary duties do not involve litigation, and the Office of National Director of Appeals, shall be approved by the Commissioner of Internal Revenue prior to implementation.

a. The National Director of Appeals is supervised by the Chief Counsel. The Commissioner of Internal Revenue exercises line supervision over the Chief Counsel for this function.

b. The Commissioner of Internal Revenue will exercise the Service's final authority concerning substantive interpretation of the tax laws as reflected in legislative and regulatory proposals, revenue rulings, letter rulings, and technical advice memoranda.

*10. Cancellations.* This Order supersedes the following:

a. Treasury Order 150–02, "Establishment of Certain Offices in the National Office of the Internal Revenue Service," dated July 2, 1987; and

b. Treasury Order 150–31, "Establishment of the Office of Assistant Commissioner (Taxpayer Services)," dated May 8, 1989.

**Nicholas F. Brady,**

*Secretary of the Treasury.*

[FR Doc. 89–25520 Filed 10–30–89; 8:45 am]

BILLING CODE 4830–01–M

## Fiscal Service

### Treasury Current Value of Funds Rate

**AGENCY:** Fiscal Service, Financial Management Service, Treasury.

**ACTION:** Notice of rate for use in Federal debt collection and discount evaluation.

**SUMMARY:** Pursuant to section 11 of the Debt Collection Act of 1982 (31 U.S.C. 3717), the Secretary of the Treasury is responsible for computing and publishing the percentage rate to be used in assessing interest charges for outstanding debts on claims owed the Government. Treasury's Cash Management Regulations (I TFM 6–8000) also prescribe use of this rate by agencies as a comparison point in evaluating the cost-effectiveness of a cash discount. Notice is hereby given that the applicable rate is 9% for calendar year 1990.

**DATES:** The rate will be in effect for the period beginning on January 1, 1990 and ending on December 31, 1990.

**FOR FURTHER INFORMATION CONTACT:** Inquiries should be directed to the Cash Management Division (Program Compliance Branch), Financial Management Service, Department of the Treasury, 401 14th Street SW., Washington, DC 20227 (Telephone: (202) 287–0745).

**SUPPLEMENTARY INFORMATION:** The rate reflects the current value of funds to the Treasury for use in connection with Federal Cash Management systems and is based on investment rates set for purposes of Public Law 95–147, 91 Stat. 1227. Computed each year by averaging investment rates for the 12-month period ending every September 30 for applicability effective January 1, the rate is subject to quarterly revisions if the annual average, on the moving basis, changes by 2 per centum. The rate in effect for calendar year 1990 reflects the average investment rates for the 12-month period ended September 30, 1989.

Dated: October 25, 1989.

**Michael T. Smokovich,**

*Assistant Commissioner Federal Finance.*

[FR Doc. 89-25559 filed 10-30-89; 8:45 am]

BILLING CODE 4810-35-M

## Internal Revenue Service (IRS)

### Assistant Commissioner (EP/EO) Employee Plans Ad Hoc Group; Open Meeting

A meeting of the Assistant Commissioner (Employee Plans and Exempt Organizations) Employee Plans Ad Hoc Group will be held on December 7, 1989 at the IRS Baltimore District Office. The office is located at 31 Hopkins Plaza in the Fallon Federal Building, Baltimore, Maryland. The meeting will begin at 9:00 a.m. on Thursday, December 7, 1989. The agenda will include the following topics:

Discussion of Employee Plans Determination and Examination Programs.
Discussion of Service Center Processing Issues
Discussion of Employee Plans Technical Issues
Member Forum

Due to limited conference space, notification of intent to attend the meeting must be made with Jane Baniewicz, Staff Assistant to the Assistant Commissioner, no later than November 27, 1989. Ms. Baniewicz may be reached on (202) 566-9204 (not toll-free).

**FOR FURTHER INFORMATION CONTACT:** Jane Baniewicz, Staff Assistant to Assistant Commissioner (EP/EO), (202) 566-9204 (not toll-free).

**Robert I. Brauer,**

*Assistant Commissioner (E).*

[FR Doc. 89-25503 Filed 10-30-89; 8:45 am]

BILLING CODE 4830-01-M

## DEPARTMENT OF VETERANS AFFAIRS

### Cost-of-Living Adjustments and Headstone or Marker Allowance Rate

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Notice.

**SUMMARY:** As required by law the Department of Veterans Affairs (VA) is hereby giving notice of cost-of-living adjustments (COLAs) in certain benefit rates and income limitations. These COLAs affect the pension and parents' dependency and indemnity compensation (DIC) programs. These adjustments are based on the rise in the Consumer Price Index (CPI) during the one year period ending September 30, 1989. VA is also giving notice of the maximum amount of reimbursement that may be paid for headstones or markers purchased in lieu of Government-furnished headstones or markers in fiscal year 1990 which began on October 1, 1989.

**DATES:** These COLAs are effective December 1, 1989. The headstone or marker allowance rate is effective October 1, 1989.

**FOR FURTHER INFORMATION CONTACT:** Robert M. White, Chief, Regulations Staff, Compensation and Pension Service (211B), Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420 (202) 233-3005.

**SUPPLEMENTARY INFORMATION:** Under the provisions of 38 U.S.C. 3112 and section 306 of Public Law 95-588, VA is required to increase the benefit rates and income limitations in the pension and parents' DIC programs by the same percentage, and effective the same date, as increases in the benefit amounts payable under title II of the Social Security Act. The increased rates and income limitations are also required to be published in the **Federal Register.**

The Social Security Administration has announced that there will be a 4.7 percent cost-of-living increase in social security benefits effective December 1, 1989. Therefore, applying the same percentage, the following increased rates and income limitations for the VA pension and parents' DIC programs will be effective December 1, 1989.

**Table 1—Improved Pension**

Maximum annual rates

(1) Veterans permanently and totally disabled (38 U.S.C. 521).
Veteran with no dependents, $6,767.
Veteran with one dependent, $8,864.
For each additional dependent, $1,150.

(2) Veterans in need of aid and attendance (38 U.S.C. 521).
Veteran with no dependents, $10,824.
Veteran with one dependent, $12,922.
For each additional dependent, $1,150.

(3) Veterans who are housebound (38 U.S.C. 521).
Veteran with no dependents, $8,271.
Veteran with one dependent, $10,368.
For each additional dependent, $1,150.

(4) Two veterans married to one another; combined rates (38 U.S.C. 521).
Neither veteran in need of aid and attendance or housebound, $8,864.
Either veteran in need of aid and attendance, $12,922.
Both veterans in need of aid and attendance, $16,977.
Either veteran housebound, $10,368.
Both veterans housebound, $11,873.
One veteran housebound and one veteran in need of aid and attendance, $14,424.
For each dependent child, $1,150.

(5) Surviving spouse alone and with a child or children of the deceased veteran in custody of the surviving spouse (38 U.S.C. 541).
Surviving spouse alone, $4,535.
Surviving spouse and one child in his or her custody, $5,941.
For each additional child in his or her custody, $1,150.

(6) Surviving spouses in need of aid and attendance (38 U.S.C. 541).
Surviving spouse alone, $7,254.
Surviving spouse with one child in his or her custody, $8,656.
For each additional child in his or her custody, $1,150.

(7) Surviving spouses who are housebound (38 U.S.C. 541).
Surviving spouse alone, $5,544.
Surviving spouse and one child in his or her custody, $6,947.
For each additional child in his or her custody, $1,150.

(8) Surviving child alone (38 U.S.C. 542), $1,150.

*Reduction for income.* The rate payable is the applicable maximum rate minus the countable annual income of the eligible person. (38 U.S.C. 521, 541, and 542).

*Mexican border period and World War I veterans.* The applicable maximum annual rate payable to a Mexican border period or World War I veteran under this table shall be increased by $1,530. (38 U.S.C. 521(g))

*Parents' DIC*

DIC (dependency and indemnity compensation) shall be paid monthly to parents of a deceased veteran in the following amounts. (38 U.S.C. 415)

**Table 2**

*One parent.* If there is only one parent the monthly rate of DIC paid to such parent shall be $318 reduced on the basis of the parent's annual income according to the following formula:

| For each $1 of annual income | | |
|---|---|---|
| The $318 monthly rate shall be reduced by | Which is more than | But not more than |
| $0.00 | 0 | $800 |
| .08 | $800 | 7,697 |

No DIC is payable under this table if annual income exceeds $7,697.

*One Parent Who Has Remarried.* If there is only one parent and the parent has remarried and is living with the parent's spouse, DIC shall be paid under table 2 or under table 4, whichever shall

result in the greater benefit being paid to the veteran's parent. In the case of remarriage, the total combined annual income of the parent and the parent's spouse shall be counted in determining the monthly rate of DIC.

*Two parents not living together.* The rates in table 3 apply to (1) two parents who are not living together, or (2) an unmarried parent when both parents are living and the other parent has remarried. The monthly rate of DIC paid to each such parent shall be $228 reduced on the basis of each parent's annual income, according to the following formula:

**Table 3**

| For each $1 of annual income | | |
|---|---|---|
| The $228 monthly rate shall be reduced by | Which is more than | But not more than |
| $0.00 | 0 | $800 |
| .06 | $800 | 900 |
| .07 | 900 | 1,100 |
| .08 | 1,100 | 7,697 |

No DIC is payable under this table if annual income exceeds $7,697.

*Two parents living together or remarried parents living with spouses.* The rates in table 4 apply to each parent living with another parent; and each remarried parent, when both parents are alive. The monthly rate of DIC paid to such parents will be $214 reduced on the basis of the combined annual income of the two parents living together or the remarried parent or parents and spouse or spouses, as computed under the following formula:

**Table 4**

| For each $1 of annual income | | |
|---|---|---|
| The $214 monthly rate shall be reduced by | Which is more than | But not more than |
| 0.00 | 0 | $1,000 |
| .03 | $1,000 | 1,500 |
| .04 | 1,500 | 1,900 |
| .05 | 1,900 | 2,400 |
| .06 | 2,400 | 2,900 |
| .07 | 2,900 | 3,200 |
| .08 | 3,200 | 10,350 |

No DIC is payable under this table if combined annual income exceeds $10,350.

The rates in this table are also applicable in the case of one surviving parent who has remarried, computed on the basis of the combined income of the parent and spouse, if this would be a greater benefit than that specified in table 2 for one parent.

*Aid and attendance*

The monthly rate of DIC payable to a parent under tables 2 through 4 shall be increased by $169 if such parent is (1) a patient in a nursing home, or (2) helpless or blind, or so nearly helpless or blind as to need or require the regular aid and attendance of another person.

*Minimum rate*

The monthly rate of DIC payable to any parent under tables 2 through 4 shall not be less than $5.

**Table 5—Section 306 Pension Income Limitations**

(1) Veteran or surviving spouse with no dependents, $7,697 (Pub. L. 95–588, section 306(a)).

(2) Veteran with no dependents in need of aid and attendance, $8,197 (38 U.S.C. 521(d) as in effect on December 31, 1978)

(3) Veteran or surviving spouse with one or more dependents, $10,350 (Pub. L. 95–588, section 306(a))

(4) Veteran with one or more dependents in need of aid and attendance, $10,850 (38 U.S.C. 521(d) as in effect on December 31, 1978)

(5) Child (no entitled veteran or surviving spouse), $6,291 (Pub. L. 95–588, section 306(a)).

(6) Spouse income exclusion (38 C.F.R. § 3.262), $2,454 (Pub. L. 95–588, section 306(a)(2)(B)).

**Table 6—Old-Law Pension Income Limitations**

(1) Veteran or surviving spouse without dependents or an entitled child, $6,738 (Pub. L. 95–588, section 306(b)).

(2) Veteran or surviving spouse with one or more dependents, $9,716 (Pub. L. 95–588, section 306(b))

**Headstone or Market Allowance**

Under 38 U.S.C. 906(d) the VA may provide reimbursement for the cost of non-Government headstones or markers at a rate equal to the actual cost or the average actual cost of Government-furnished headstones or markers during the fiscal year preceding the fiscal year in which the non-Government headstone or marker was purchased, whichever is less.

The average actual cost of Government-furnished headstones and markers during any fiscal year is determined by dividing the sum of the VA costs during that fiscal year for procurement, transportation, Monument Service and miscellaneous administration, inspection and support staff by the total number of headstones and markers procured by the VA during that fiscal year and rounding to the nearest whole dollar amount.

The average actual cost of Government-furnished headstones or markers for fiscal year 1989 under the above computation method was $85. Therefore, effective October 1, 1989, the maximum rate of reimbursement for non-Government headstones or markers purchased during fiscal year 1990 is $85.

Dated: October 25, 1989.

**Edward J. Derwinski,**

*Secretary.*

[FR Doc. 89–25492 Filed 10–30–89; 8:45 am]

BILLING CODE 8320–01–M

# Sunshine Act Meetings

Federal Register
Vol. 54, No. 209
Tuesday, October 31, 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).

**FARM CREDIT ADMINISTRATION**

Farm Credit Administration; Special Meeting

**AGENCY:** Farm Credit Administration.

**SUMMARY:** On January 26, 1989, a notice (54 FR 3900) was published stating that no further regularly scheduled meetings of the Farm Credit Administration Board (Board) would be held due to lack of a quorum. A quorum has been constituted with the recent appointment of Harold B. Steele as Chairman of the Board. Notice is hereby given, pursuant to the Government in the Sunshine Act (5 U.S.C. 552b(e)(3)), that the regular meeting of the Board scheduled for November 7, 1989 will not be held and that a special meeting of the Board has been scheduled for Tuesday, November 21, 1989, starting at 10:00 a.m. An agenda for this meeting will be published at a later date.

**FOR FURTHER INFORMATION CONTACT:** David A. Hill, Secretary to the Farm Credit Administration Board, (703) 883–4003, TDD (703) 883–4444.

**ADDRESS:** Farm Credit Administration, 1501 Farm Credit Drive, McLean, Virginia 22102–5090.

Dated: October 26, 1989.

**David A. Hill,**

*Secretary, Farm Credit Administration Board.*

[FR Doc. 89–25753 Filed 10–27–89; 1:25 am]

BILLING CODE 6705–01–M

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**FEDERAL ENERGY REGULATORY COMMISSION**

**"FEDERAL REGISTER" CITATION OF PREVIOUS ANNOUNCEMENT:** October 24, 1989, 54 FR 43214.

**PREVIOUSLY ANNOUNCED TIME AND DATE OF MEETING:** October 25, 1989, 10:00 a.m.

**CHANGE IN THE MEETING:** The following Docket Numbers have been added to Item CAG–9 for the agenda of October 25, 1989:

*Item NO., Docket No. and Company*

CAG–9—RP89–48–000 and RP89–222–000, Transwestern Pipeline Company

**Lois D. Cashell,**

*Secretary.*

[FR Doc. 89–25677 Filed 10–26–89; 8:45 am]

BILLING CODE 6717–02–M

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**FEDERAL RESERVE SYSTEM BOARD OF GOVERNORS**

**TIME AND DATE:** 9:30 a.m., Friday, October 27, 1989.

The business of the Board required that this meeting be held with less than one week's advance notice to the public, and no earlier announcement of the meeting was practicable.

**PLACE:** Marriner S. Eccles Federal Reserve Board Building, C Street entrance between 20th and 21st Streets, NW., Washington, DC 20551.

**STATUS:** Closed.

**MATTERS TO BE CONSIDERED:** Proposed 1990 Federal Reserve Board officer and employee salary structure adjustments.

**CONTACT PERSON FOR MORE INFORMATION:** Mr. Joseph R. Coyne, Assistant to the Board; (202) 452–3204. You may call (202) 452–3207, beginning at approximately 5 p.m. two business days before this meeting, for a recorded announcement of bank and bank holding company applications scheduled for the meeting.

Dated: October 27, 1989.

**Jennifer J. Johnson,**

*Associate Secretary of the Board.*

[FR Doc. 80–25765 Filed 10–31–89; 3:25 pm]

BILLING CODE 6210–01–M

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**FEDERAL RESERVE SYSTEM BOARD OF GOVERNORS**

**TIME AND DATE:** 11:00 a.m., Monday, November 6, 1989.

**PLACE:** Marriner S. Eccles Federal Reserve Board Building, C Street entrance between 20th and 21st Streets, NW., Washington, DC 20551.

**STATUS:** Closed.

**MATTERS TO BE CONSIDERED:**

1. Personnel actions (appointments, promotions, assignments, reassignments, and salary actions) involving individual Federal Reserve System employees.
2. Any items carried forward from a previously announced meeting.

**CONTACT PERSON FOR MORE INFORMATION:** Mr. Joseph R. Coyne, Assistant to the Board; (202) 452–3204. You may call (202) 452–3207, beginning at approximately 5 p.m. two business days before this meeting, for a recorded announcement of bank and bank holding company applications scheduled for the meeting.

Dated: October 27, 1989.

**Jennifer J. Johnson,**

*Associate Secretary of the Board.*

[FR Doc. 89–25766 Filed 10–27–89; 3:25 pm]

BILLING CODE 6210–01–M

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**FEDERAL RESERVE SYSTEM BOARD OF GOVERNORS**

**"FEDERAL REGISTER" CITATION OF PREVIOUS ANNOUNCEMENT:** 54 FR 43519, October 25, 1989.

**PREVIOUSLY ANNOUNCED TIME AND DATE OF THE MEETING:** 10:00 a.m., Monday, October 30, 1989.

**CHANGES IN THE MEETING:** Change in the time of the open meeting to 9:30 a.m., Monday, October 30, 1989.

**CONTACT PERSON FOR MORE INFORMATION:** Mr. Joseph R. Coyne, Assistant to the Board; (202) 452–3204.

Dated: October 26, 1989.

**Jennifer J. Johnson,**

*Associate Secretary of the Board.*

[FR Doc. 89–25683 Filed 10–27–89; 9:47 am]

BILLING CODE 6710–01–M

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**NUCLEAR REGULATORY COMMISSION**

**DATE:** Weeks of October 30, November 6, 13, and 20, 1989.

**PLACE:** Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

**STATUS:** Open and Closed.

**MATTERS TO BE CONSIDERED:**

**Week of October 30**

*Tuesday, October 31*

8:30 a.m.
Collegial Discussion of Items of Commission Interest (Public Meeting)

*Wednesday, November 1*

10:00 a.m.
Briefing by General Electric on the Advanced BWR Standard Plant Review (Public Meeting)

11:00 a.m.
Affirmation/Discussion and Vote (Public Meeting) (if needed)

1:00 p.m.
Briefing by Combustion Engineering on ALWR System 80+ (Public Meeting)

2:30 p.m.
Briefing by Westinghouse on Advanced LWR SP 90 (Public Meeting)

**Week of November 6—Tentative**

*Thursday, November 9*

3:30 p.m.
Affirmation/Discussion and Vote (Public Meeting) (if needed)

**Week of November 13—Tentative**

*Thursday, November 16*

3:30 p.m.
Affirmation/Discussion and Vote (Public Meeting) (if needed)

**Week of November 20—Tentative**

*Tuesday, November 21*

10:00 a.m.
Briefing on Implementation of the U.S. Environmental Protection Agency's HLW Disposal Standards (Public Meeting)

*Wednesday, November 22*

11:30 a.m.
Affirmation/Discussion and Vote (Public Meeting) (if needed)

**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 time has as yet been identified as requiring any Commission vote on this date.

To verify the status of meetings call (recording)—(301) 492–0292

**FOR FURTHER INFORMATION CONTACT:**
William Hill (301) 492–1661.

Dated: October 26, 1989.

**William M. Hill, Jr.,**

*Office of the Secretary.*

[FR Doc. 89–25714 Filed 10–27–89; 12:39 pm]

BILLING CODE 7590–01–M

# Corrections

Federal Register
Vol. 54, No. 209
Tuesday, October 31, 1989

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

### 7 CFR Part 1137

[DA-89-035]

### Milk in the Eastern Colorado Marketing Area; Order Suspending Certain Provisions

*Correction*

In rule document 89-23839 beginning on page 41437 in the issue of Tuesday, October 10, 1989, make the following correction:

On page 41438, in the second column, in the first and second lines immediately preceding the signature, the date should read "October 3, 1989".

BILLING CODE 1505-01-D

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. TQ90-1-63-000]

### Carnegie Natural Gas Co.; Proposed Changes in FERC Gas Tariff

*Correction*

In notice document 89-24639 appearing on page 42985 in the issue of Thursday, October 19, 1989, make the following correction:

In the first column, in the heading, the docket number should read as set forth above.

BILLING CODE 1505-01-D

## DEPARTMENT OF ENERGY

### Western Area Power Administration

### Loveland Area Projects; Rate Order

*Correction*

In notice document 89-24245 beginning on page 42025 in the issue of Friday, October 13, 1989, make the following corrections:

1. On page 42028, in the first column, in the fourth line from the bottom, "process" should read "product".

2. On page 42029, in the third column, in the line immediately preceding **Availability of Information**, "or" should read "nor".

3. On the same page, in the same column, under **Availability of Information**, in the eighth line, remove the comma following "Crossroads".

BILLING CODE 1505-01-D

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 372

[OPTS-400035; FRL-3660-9]

### Cadmium Sulfide and Cadmium Selenide; Toxic Chemical Release Reporting; Community Right-to-Know

*Correction*

In proposed rule document 89-24674 beginning on page 42962 in the issue of Thursday, October 19, 1989, make the following corrections:

1. On page 42962, in the second column, under **SUPPLEMENTARY INFORMATION**, in the first paragraph, in the second line, "(3)(1)" should read "(e)(1)".

2. On the same page, in the third column, under **SUPPLEMENTARY INFORMATION**, in the third complete paragraph, in the fifth line, "meeting" should read "melting".

BILLING CODE 1505-01-D

## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 90

[DA 89-767]

### Private Radio Services; Editorial Amendments of Parts 90 and 94 of the Commission's Rules

*Correction*

In rule document 89-22056 beginning on page 38680 in the issue of Wednesday, September 20, 1989, make the following correction:

**§ 90.241 [Corrected]**

On page 38681, in the first column, in item 20., in the first line, "§ 90.241(c)" should read "§ 90.241(e)".

BILLING CODE 1505-01-D

## FEDERAL DEPOSIT INSURANCE CORPORATION

### 12 CFR Chapters III and IV

### Regulations Transferred From Federal Savings and Loan Insurance Corporation; Redesignation From Chapter V to Chapter III

*Correction*

In rule document 89-24539 beginning on page 42799 in the issue of Wednesday, October 18, 1989, make the following corrections:

1. On page 42800, in the second column, in the 12th line, "others" should read "orders".

2. On page 42801, in the first column, in the table, remove the third line from the bottom.

BILLING CODE 1505-01-D

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

[ID-943-09-4214-11; IDI-05384]

### Proposed Continuation of Withdrawal; Idaho

*Correction*

In notice document 89-21149 beginning on page 37385 in the issue of Friday, September 8, 1989, make the following correction:

On page 37385, in the second column, under **EFFECTIVE DATE:**, "September" should read "December".

BILLING CODE 1505-01-D

## INTERNATIONAL TRADE ADMINISTRATION

[A-475-084]

### Spun Acrylic Yarn From Italy; Final Results of Antidumping Duty Administrative Review

*Correction*

In notice document 89-24107 beginning on page 42005 in the issue of Friday,

October 13, 1989, make the following correction:

On page 42008, in the third column, in the second column of the table, the margin for the first entry should read "- 0 -".

BILLING CODE 1505-01-D

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## SMALL BUSINESS ADMINISTRATION

### 13 CFR Part 120

### RIN: 3245-AB85

### Business Loan Policy

*Correction*

In rule document 89-22783 beginning on page 39517 in the issue of Wednesday, September 27, 1989, make the following corrections:

**§ 120.502-1 [Corrected]**

1. On page 39518, in the third column, in § 120.502-1, in the sixth line, "of" should read "and".

**§ 120.502-2 [Corrected]**

2. On page 39519, in the first column, in § 120.502-2(a), in the third line, "to" should read "of".

BILLING CODE 1505-01-D

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### 14 CFR Part 75

**[Airspace Docket No. 89-AEA-12]**

### Proposed Alteration and Revocation of Jet Routes

*Correction*

In proposed rule document 89-20853 beginning on page 36998 in the issue of Wednesday, September 6, 1989, make the following correction:

On page 36999, in the second column, in the first complete paragraph, in the eighth line, "12201" should read "12291".

BILLING CODE 1505-01-D

Federal Register

Tuesday
October 31, 1989

Part II

# Department of Labor

Occupational Safety and Health Administration

29 CFR Part 1926

Occupational Safety and Health Standards—Excavations; Final Rule

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1926

[Docket No. S-204]

RIN 1218-AA36

# Occupational Safety and Health Standards—Excavations

**AGENCY:** Occupational Safety and Health Administration, Labor.

**ACTION:** Final rule.

**SUMMARY:** The Occupational Safety and Health Administration (OSHA) hereby amends its Construction Standards for Excavations, 29 CFR part 1926, subpart P.

The existing standards regulate the use of support systems, sloping and benching systems and other systems of protection as means of protection against excavation cave-ins. In addition, the standards regulate the means of access to and egress from excavations, and employee exposure to vehicular traffic, falling loads, hazardous atmospheres, water accumulation, and unstable structures in and adjacent to excavations.

The revised standard uses performance criteria where possible, rather than specification requirements; consolidates and simplifies many of the existing provisions; adds and clarifies definitions; reformats the standard to eliminate duplicate provisions and ambiguous language; provides a consistent method of soil classification; and gives employers added flexibility in providing protection for employees. This Final Rule is being issued after appropriate consultation with the Advisory Committee on Construction Safety and Health (ACCSH).

OSHA initiated this rulemaking action to establish clearly the requirements for protection of employees in excavations. The intended effect of this regulation is to increase safety for these workers.

**EFFECTIVE DATE:** January 2, 1990.

**ADDRESS:** In compliance with 28 U.S.C. 2112(a), the Agency designates for receipt of petitions for review of the standard, the Associate Solicitor for Occupational Safety and Health, Office of the Solicitor, Room S-4004, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210.

**FOR FURTHER INFORMATION CONTACT:** Mr. James Foster, Director, Office of Information and Consumer Affairs, Occupational Safety and Health Administration, U.S. Department of Labor, Room N-3637, 200 Constitution Avenue, NW., Washington, DC 20210, (202) 523-8151.

**SUPPLEMENTARY INFORMATION:**

## I. Background

### *A. History*

Congress amended the Contract Work Hours Standards Act (CWHSA) (40 U.S.C. 327 et seq.) in 1969 by adding a new section 107 (40 U.S.C. 333) to provide employees in the construction industry with a safer work environment and to reduce the frequency and severity of construction accidents and injuries. The amendment, commonly known as the Construction Safety Act (CSA) (Pub. L. 91-54; August 9, 1969), significantly strengthened employee protection by providing for occupational safety and health standards for employees of the building trades and construction industry in Federal and federally-financed or federally-assisted construction projects.

Accordingly, the Secretary of Labor issued Safety and Health Regulations for Construction in 29 CFR part 1518 (36 FR 7340, April 17, 1971) pursuant to section 107 of the Contract Work Hours and Safety Standards Act. Included in these regulations were the existing safety standards for trenches and excavations.

The Occupational Safety and Health Act (the Act) (84 Stat. 1580; 29 U.S.C. 650 et seq.) was enacted by Congress in 1970, and authorized the Secretary of Labor to adopt established Federal Standards issued under other statutes, including the Construction Safety Act, as occupational safety and health standards. Accordingly, the Secretary of Labor adopted the Construction Standards in 29 CFR part 1518 as established Federal Standards in accordance with section 6(a) of the Act (36 FR 10466, May 29, 1971). Part 1518 was redesignated as part 1926 later in 1971 (36 FR 25232, December 30, 1971). The standards in existing subpart P of part 1926, titled § 1926.650—General Protection Requirements; § 1926.651—Specific Excavation Requirements; § 1926.652—Specific Trenching Requirements; and § 1926.653—Definitions Applicable to this subpart, were adopted as OSHA standards as part of this process.

The need for review and revision of §§ 1926.650 through 1926.653 has been recognized by OSHA since the earliest days of the Agency's existence. Consequently, after a Notice of Proposed Rulemaking (36 FR 19083, September 28, 1971) and after a review by the Advisory Committee on Construction Safety and Health (ACCSH), several amendments of a technical nature were made to subpart P (37 FR 3512, February 17, 1972). Subsequent to the adoption of those amendments, OSHA found it necessary to further amend the standard. After a Notice of Proposed Rulemaking (37 FR 15317, July 29, 1972) § 1926.652 was amended to require ladders as a means of access and egress in trenches greater than four feet (1.2 m) in depth—instead of three feet (.9 m) in depth (37 FR 24345, November 16, 1972).

In 1976, OSHA, in response to continued complaints concerning the adequacy of the standards in subpart P, engaged the National Bureau of Standards (NBS) to study the compatibility of the technical provisions in the regulations with actual construction practice. In addition, NBS was to examine the state of the knowledge in geotechnical and structural engineering; to review the field experience accumulated since the promulgation of the standards; and to recommend potential modifications that could improve the effectiveness of the standards.

Findings and preliminary recommendations of the NBS studies were presented and discussed at a federally-sponsored workshop in September 1978. Six reports were then completed as a result of NBS' work, and these were published in 1979 and 1980. Copies of these reports are part of the public record (Exs. 2-1 through 2-6).

As a result of the development of these recommended changes, private industry proposed and sponsored a series of five workshops in the spring and summer of 1981 to discuss and comment on ways to implement the NBS recommendations. An unpublished text was used at these workshops (Ex. 2-7). Final recommendations for technical changes to the standards incorporating the comments from the industry-sponsored workshops were prepared by NBS in May 1983 (Ex. 2-26).

Excavation-related accidents resulting in injuries and fatalities have continued to occur at construction sites despite the development and promulgation of the OSHA Construction Standards in 1971 and 1972. Based on a careful review of compliance problems and public comments received since 1972, OSHA believed that the present standard needed updating. Therefore, the Agency developed a proposed revision to the existing standard.

A draft of the proposed changes to the standard was reviewed by ACCSH in October 1982. Transcripts of this meeting are part of the public record (Ex. 2-8). The Committee's comments and recommendations, and those of

other interested parties, were carefully analyzed in connection with the proposed rulemaking. Many of the changes in the proposed standard reflected the recommendations and suggestions of these participants. Relevant ACCSH comments are discussed below in section III—"Summary and Explanation of the Final Rule." Committee discussions that were inconclusive have been considered, but are not discussed in this preamble. Several suggestions for changes to the draft standard were made by members of the ACCSH. OSHA sought more discussion on these suggestions and, therefore, raised individual points as issues in the preamble of the proposal.

On April 15, 1987, OSHA issued a notice of proposed rulemaking (NPRM) on excavations (52 FR 12288). The NPRM established a sixty day period, which ended June 15, 1987, for submission of written comments. Several commenters requested an extension of the written comment period. Therefore, on June 16, 1987 (52 FR 22799), the Agency extended the written comment period until October 14, 1987.

On August 5, 1987, OSHA consulted with the ACCSH for a second time, regarding the issues raised in the NPRM. In addition to making recommendations regarding these issues, the ACCSH suggested changes to the proposed regulations. The transcript of this meeting is part of the record of this rulemaking (Ex. 4–119).

During the extended comment period, OSHA received requests for an informal public hearing. On February 23, 1988, OSHA announced it would convene an informal public hearing on April 19, 1988, and extended the period for submitting testimony, documentary evidence, and additional comments until April 1, 1988 (53 FR 5280). The hearing was held on April 19, 1988, with Administrative Law Judge Michael Schoenfeld presiding. At the close of the hearing, Judge Schoenfeld set a period, ending May 20, 1988, for the submission of additional data, and a period ending June 20, 1988, for the submission of briefs and arguments.

At the request of one participant at the public hearing, Judge Schoenfeld extend the comment period until June 24, 1988, for the submission of additional data and until July 29, 1988, for the submission of additional views and arguments (Ex. 31).

On December 15, 1988 Judge Schoenfeld certified the hearing transcript and related submissions, closing the record for this proceeding.

OSHA received over 150 comments in response to its NPRM and hearing notice. A wide range of employers, businesses, labor unions, trade associations, state governments and other interested parties contributed to the development of this record. OSHA appreciates the efforts interested parties have made to help develop a rulemaking record which would provide a sound basis for the promulgation of a Final Rule.

*B. Problems with the Existing Standards*

OSHA's efforts to revise its excavation and trenching standards were initiated primarily because the Agency has experienced difficulty in enforcing the existing standards. Several of these problems are discussed in detail below.

(1) "Specific Excavation"/"Specific Trenching Requirements"

The first major problem with the existing standards is that because §§ 1926.651 and 1926.652 are two separate sections, one entitled "Specific Excavation Requirements" and the other "Specific Trenching Requirements," the standards are not clear as to whether the excavation requirements must also be followed when digging trenches. It was intended by OSHA that many of the excavation standards would also apply to trenches since a trench is a type of excavation, but that intention is not clearly stated.

The Occupational Safety and Health Review Commission (OSHRC), and two United States Court of Appeals, have sanctioned the application of the excavation standards in § 1926.651 to trenches (Dobson Brothers Construction Company, 3 BNA OSHC 2035 (R.C. 1976); *Texas Eastern Products Pipeline Co.* v. *OSHRC*, 827 F. 2d 46 (7th Cir. 1987); and *D. Federico Company, Inc.* v. *OSHRC and Usery*, 558 F. 2d 614 (1st Cir. 1977) 5 BNA OSHC 1528, respectively). However, other Courts of Appeals have held, to the contrary, that excavation standards cannot be applied to trenches (*Lloyd C. Lockrem, Inc.* v. *OSHRC*, 609 F. 2d 940 (9th Cir 1979) 8 BNA OSHC 1316; *Kent Nowlin Construction Co.* v. *OSHRC*, 593 F. 2d 388 (10th Cir. 1979)).

This Final Rule resolves the uncertainty left by these decisions and by the ambiguous language of the existing standards by establishing one set of requirements which are applicable to all excavations, including trenches. Where there are requirements intended to be applicable only to trenches—such as the requirement that ladders or equivalent means of egress be provided every 25 feet horizontally—the Final Rule makes it clear that the requirement applies only to those excavations which are also trenches (see § 1926.651(c)(2)).

(2) Excavations (Non-Trench)

A second major problem with the existing standards involves the requirements for protecting employees in non-trench excavations from the hazards of cave-ins. Existing § 1926.651(c) currently requires that "The walls and faces of all excavations in which employees are exposed to danger from moving ground shall be guarded by a shoring system, sloping of the ground, or some other equivalent means." The term "danger from moving ground" is not defined in the standard and, thus, the standard does not specify when an employer must take precautions to protect employees from a cave-in. Furthermore, the standard does not specify what degree of precaution an employer must take even when employees are exposed to a "danger from moving ground." Requirements contained in existing § 1926.651 (e), (f), (g), and (h), discuss employee protection again, however, only in very general terms.

The language was resolved somewhat when the OSHRC, in agreement with the Secretary of Labor, interpreted the standard to require shoring or sloping in accordance with Table P–1 of subpart P, whenever employees are exposed to unstable soil in excavation sides (M.J. Lee Construction Company, 7 BNA OSHC 1140 ((R.C. 1979)); Terra Motus Company, Inc., 5 BNA OSHC 1696 ((R.C. 1977)); D. Federico Company, Inc., 3 BNA OSHC 1970 ((R.C. 1976)) affirmed on other grounds 558 F. 2d 614 ((1st Cir. 1977)) 5 BNA OSHC 1528). However, this problem was revived by two OSHRC decisions which are inconsistent with the cases mentioned above. In the first case, Seaward Construction Company, Inc., 5 BNA OSHC 1422 ((R.C. 1977)), the OSHRC interpreted § 1926.651(c) to require sloping and shoring only if OSHA establishes that the ground to which employees are exposed is actually moving. In the second case, Pipe-Rite Utilities Ltd., Inc., 10 BNA OSHC 1289 ((R.C. 1982)), the OSHRC, relying on Seaward vacated a citation and did not address the other cases interpreting existing § 1926.651(c). These decisions reestablished the uncertainty as to when and to what degree an employer must slope, shore or otherwise protect employees in a non-trench excavation. OSHA has long maintained that employees exposed to potential cave-ins must be protected by shoring or sloping long before the excavation face is in imminent danger of collapse.

Another problem with the existing standards for non-trench excavations (§ 1926.651) is that the degree of protection required is not always easily determined. With regard to sloping, the existing § 1926.651(g) provides that "All slopes shall be excavated to at least the angle of repose except for areas where solid rock allows for line drilling or presplitting." To find the angle of repose an employer must consult Table P–1, which appears at the end of § 1926.652, "Specific Trenching Requirements." Table P–1 is titled "Approximate Angle of Repose for Sloping of Sides of Excavations." The difficulty with table P–1 is that it describes the approximate angle of repose for various soil types in terms that are not the same as terms commonly used in the industry to classify soils. In addition, the terms are not defined in the standard. Thus, it is sometimes very difficult to determine what OSHA considers to be the appropriate degree of sloping from this table.

OSHA recognizes a problem with the term "angle of repose." The term is used in the standard in a manner which is inconsistent with its meaning in the civil engineering profession. In the American Society for Testing and Materials (ASTM) Standard D653–67, "Standard Definitions of Terms and Symbols Relating to Soil and Rock Mechanics," the term "angle of repose" is defined as follows: "The angle between the horizontal and maximum slope that a soil assumes through natural processes. For dry granular soils the effect of height is negligible; for cohesive soils the effect of height is so great that the angle of repose is meaningless." Thus, to talk in terms of a single "angle of repose" is technically inaccurate. The "angle of repose" for cohesive soil depends on the depth of the excavation, whereas the "angle of repose" for granular soil depends largely on its density and changes in environmental conditions of exposure, such as the drying process.

This Final Rule resolves the uncertainty created by the ambiguous language of the existing standard by establishing requirements for the sloping of all excavations that convey clearly when precautions must be taken to protect employees and the degree of protection that is necessary. The Final Rule uses terms that are consistent with both the civil engineering profession and the construction industry.

(3) Need for Clarification of Trench Requirements .

OSHA learned from its enforcement experience with § 1926.652, "Specific Trenching Requirements" that much needed to be done to clarify the meaning and intent of these standards.

The key provisions of the current specific trenching standards are § 1926.652(b) (for trenches in soft or unstable material) and § 1926.652(c) (for trenches in hard or compact soil). The main difficulty with existing § 1926.652 (b) and (c) is that the terms "soft or unstable" soil and "hard or compact" soil do not, in some instances, provide sufficient guidance to employers as to the requirements applicable to digging a trench. The OSHRC has held that any trench requiring a slope less steep than 63 degrees from the horizontal under table P–1 must be considered to be in soft or unstable soil, within the meaning of § 1926.652(b). The OSHRC has ruled:

> Since § 1926.652(c) requires a slope of not steeper than ½ to 1 for hard or compact soil, it is evident that these materials listed in Table P–1 as having a less steep angle of repose must be considered soft or unstable, and are therefore regulated by § 1926.652(b). (*Connecticut Natural Gas Corporation*, 6 BNA OSHC 1796, (R.C. 1978)).

Although the OSHRC ruling harmonized the existing regulations, OSHA prefers employers to know which requirements they are subject to before determining the extent to which they must slope, rather than determining the slope first and then determining the regulation with which they must comply. In some instances, this determination is not a difficult problem under the current standard. For example, for many granular soils, an employer is not going to have a problem determining that a slope of ½ to 1 (approximately 63 degrees from the horizontal) is inadequate, and that § 1926.652(b) applies to the trenches excavated in such soil. Indeed, the OSHRC has ruled that there is a rebuttable presumption that predominately sandy soils, unless cemented, are soft or unstable within the meaning of 1926.652(b). (Duane Meyer d/b/a D.T. Construction Company, 7 BNA OSHC 1560 ((R.C. 1979)). However, there are situations in which under the existing standard it is not easily determined which sloping angle applies. For example, if a trench is excavated in previously disturbed cohesive soil, the existing standard gives little guidance as to which standard applies or what constitutes an adequate slope under table P–1. And, since the sloping requirements of § 1926.652 are contained in table P–1, the shortcomings of that table (previously discussed above under non-trench excavations) are also a problem with the existing standards regulating trenches. In addition to the technical misuse of the term "angle of repose," the table classifies soils in a manner that is difficult to relate to the soil descriptions used in § 1926.652(b) and (c), and the terms used are not the same as terms generally used in the construction industry.

The Final Rule rectifies these problems in two ways. First, it provides employers with a soil classification system in appendix A which describes the variables in soil composition an employer can encounter; and secondly, it sets forth sloping and shoring requirements in accordance with the types of soil, as determined with respect to the soil classification system. In OSHA's opinion, the soil classification system in appendix A will make it much easier for employers to determine whether their slopes comply with OSHA's requirements.

Paragraph 1926.652(c) has caused compliance problems in one other important respect. The standard requires sloping of at least ½ to 1 (horizontal to vertical), but requires only that sloping begin five feet (1.52 m) from the bottom of the trench. This standard has been interpreted as permitting a trench dug in hard or compact soil to be vertical for the first five feet (1.52 m) from the bottom, and sloped not more than 63 degrees from the horizontal beginning at the five feet (1.52 m) level (Horowitz Brothers, Inc., 3 BNA OSHC 1131 ((R.C. 1975)). OSHA believes that this interpretation is inadequate because it is, in most instances, dangerous to allow employees to work in a trench excavated in soils in which the sides are vertical for the bottom five feet (1.52 m) portion and then sloped starting at the five foot level. This is particularly true in a relatively deep trench in which the weight of cohesive soils adversely affects the stability of the trench side. OSHA has always interpreted and enforced this provision to require shoring or a trench shield in the unsloped, vertical sided portion of the trench.

The proposed standard required that trenches and excavations be sloped or benched from the bottom instead of from the five foot (1.52 m) level, unless a qualified person or qualified engineer designs an alternate configuration. Acceptable configurations for sloped excavations were illustrated in Figure B–1 of appendix B of the proposal.

OSHA still believes that sound engineering principles dictate that a five foot deep vertical-sided portion should be shored in most instances. The Agency notes that the National Bureau of Standards depicts a similar situation in Figure A–2 (Ex. 2–3), but recommends only a three foot maximum vertical-

sided portion and a slope of not more than 1 horizontal: 1 vertical (45°). Additionally, Figure A–7 depicts another similar situation where the depth of the vertical-sided portion is approximately four feet deep, shored, and the slope is 1 horizontal : 1 vertical (45°). OSHA solicited comment on the appropriateness, and costs and benefits of the configurations discussed above with special emphasis on the OSHA interpretation.

The Final Rule addresses this situation by allowing employees to use trench configurations with a vertical portion in the bottom of the trench in accordance with the limitations that have been successfully used in the State of California, or with the approval of a registered professional engineer.

(4) Trench Boxes and Shields

The requirements for trench boxes and shields are contained in existing § 1926.652(k). The requirements are not clear as to their intent with regard to the design of shields. For example, the standard requires that such devices "shall be designed, constructed, and maintained in a manner which will provide protection equal to or greater than the sheeting or shoring required for the trench." In addition, the standard defines a trench shield as "A *shoring system* (emphasis added) composed of steel plates and bracing * * * which support the walls of a trench * * *." Shields may be constructed of steel, but need not be, and they may provide support to the side of a trench. However, shields are more often used in a manner where they do not support the side of a trench but rather act as a barrier in the event a cave-in occurs. Because of the restrictive nature of the existing definition, and since the design of sheeting and shoring is tied to the requirements for timber shoring and sheeting set forth in Table P–2 "Trench Shoring—Minimum Requirements," some observers have perceived a lack of flexibility on the part of OSHA regarding the design of trench shields.

Another problem with the existing requirements for trench shields is the lack of coverage addressing hazardous situations that arise out of the use of shields. Shields are used differently than shoring, and situations can arise when using shields that do not arise when using shoring. For example, shields are moved into position by sliding them along the trench bottom or by lowering them into position. Employees who are within the confines of a shield being repositioned by other than horizontal movement are subject to being injured if the shield suddenly shifts in an unintended way—a hazard not generally arising when timber shoring is used.

The requirements for trench boxes and shields in existing § 1926.652(k) were changed in the proposal to allow employers more flexibility in the design of trench shields. The Final Rule also clarifies the way in which an employer must assure that shields provide equivalent protection to sloping or shoring required by the standard. It allows an employer to use a trench box or shield that is either designed or approved by a registered professional engineer or that is based upon tabulated data prepared or approved by a registered professional engineer.

For manufactured rather than job-made trench boxes or shields, the revised standard requires that employers comply with all manufacturer's warnings and instructions which might affect the safety of employees. Because of concerns with product liability, the manufacturers typically include instructional materials that establish a method or methods which the manufacturer has determined will provide for safe installation and use of a product. The employer is on notice of the precautions set forth in these materials, and is responsible for implementing them. Additionally, requirements were added that address the hazardous situations that arise during the course of using a shield, but are not addressed in the existing standard. In OSHA's opinion, these requirements will assure that shield systems will adequately protect employees.

## II. The Nature of Excavation Accidents

*Accidents and Injuries*

Studies show that excavation work is one of the most hazardous types of work done in the construction industry (Ex. 2–9 and Ex. 2–10). Accidents in excavation work occur more frequently than do accidents in construction in general. The primary type of accident of concern in excavation-related work is a cave-in. The actual number of cave-in accidents is not large when compared to the total number of accidents occurring in all of construction. However, those that do occur tend to be of a very serious nature. Cave-in accidents are much more likely to be fatal to the employees involved than other construction-related accidents.

The true extent of excavation-related injuries and deaths cannot be readily determined from available accident data such as those maintained by the Bureau of Labor Statistics (BLS). This is because a large number of cave-in accidents are classified under a general "accident-type" heading that does not specifically identify whether the accident involved a cave-in. For example, cave-in accidents are most likely to be recorded under the "accident-type" categories of "caught in, under, or between" or "asphyxiation," which encompass many accidents that are not excavation-related, such as those in which an employee becomes caught in the moving parts of machinery. There is no apparent way to separate out those accidents that are cave-ins. Furthermore, many cave-ins are not reported to BLS. OSHA received testimony at the public hearing asserting that the exemptions for small employers from the BLS reporting and recordkeeping requirements contributes significantly to the underreporting of excavation injuries and fatalities (Tr. 4/19/88 pp. 62–69).

Nevertheless, estimates of the number of injuries and fatalities occurring in excavations have been made. In a 1975 study, based primarily on a previous study of newspaper articles and other data made available from OSHA files, it was estimated that more than 100 persons were killed in excavation cave-ins each year (Ex. 2–11). In a recent report prepared by NIOSH, based on OSHA's inspection data, it was estimated that at least 73 persons were killed each year in cave-in accidents, and at least 97 persons were killed as a result of all excavation-related accidents (Exs. 2–24, 2–30, 2–31 and 2–32). Using the same inspection data, OSHA has estimated a fatality rate due to excavation-related work injuries of .318 per 1,000 full time workers for all SIC's involved and .508 per 1,000 full-time workers for SIC 1623. These rates are at least similar to, if not higher than the fatality rate of .248 per 1,000 full time workers due to all types of work injuries occurring in construction SIC's in general. The fatality rate for trenching work was estimated to be as high as 112 percent greater than the rate for construction in general.

Estimates of non-fatal injuries in excavation and trenching work have also been made. California has reported that the ratio of non-fatal, lost-time injuries to fatalities for all types of accidents in sewer, pipeline, and trenching work was 50 to 1. That is, one fatality occurred for every 50 non-fatal, lost time injuries. In contrast, the ratio for all contract construction was 174 to 1 (Ex. 2–9).

In another report specifically related to cave-ins, California reported that the ratio of lost-time injuries to fatalities due only to cave-in accidents was 17 to 1. In contrast the lost-time work injuries

to fatalities for all types of accidents in all industries in California was 250 to 1 (Ex. 2–10).

As a measure of the seriousness of cave-in accidents, Thompson and Tannenbaum stated that ratios of injuries to fatalities due to cave-ins as high as 10 to 1 and 14 to 1 have been reported (Ex. 2–11).

OSHA has determined that the available accident and injury data clearly establish a significant risk to employees working in and around excavations. A high rate of injuries has continued to occur in excavations throughout the years since subpart P was first adopted by OSHA. OSHA believes that this revision of subpart P will help reduce the current accident toll associated with excavation work.

### III. Summary and Explanation of the Final Rule

In order to solicit desired public comment, OSHA identified fifteen issues in the preamble of the proposal on which the Agency needed additional information. These issues, the comments received relating to these issues, and OSHA's determination on the appropriate way to address these issues are discussed below.

Issue 1, raised in the preamble of the proposed rule (52 FR 12293), solicited public input on the suggestion that OSHA include a "standard practice" in its revision of Subpart P in addition to those set forth in the appendices. These data, in the form of charts and tables, would be used to protect employees against cave-ins, and would be capable of being understood and used by the journeyman worker. As an alternative, the employer could have a qualified engineer design the protective system. These data (standard practice) would include generic tables and charts for metal hydraulic shoring, timber shoring, trench shields, protection for footing excavations (bell-bottom pier holes), and sloping and benching systems.

OSHA received 13 comments on this issue. Several commenters supported the incorporation of a standard practice and suggested that OSHA adopt the CAL–OSHA Title 8 standards as the National "standard practice" (Exs. 4–28, 4–35, 4–37, 4–82, 4–102, 4–106 4–109 and 4–115). Another commenter (Ex. 4–96) favored OSHA providing this type of data as an alternative to the use of an engineer, but made no suggestions as to a specific source that OSHA should use for these data.

On the other hand, several commenters disagreed with the incorporation of a standard practice. In particular, the Building and Construction Trades Department (BCTD) of the AFL–CIO (Ex. 4–17) noted that the approach was feasible, but not recommended because of the difficulty of making revisions, and the difficulty of incorporating the necessary flexibility. Union Electric Company (Ex. 4–35) commented that "We do not see the need for such charts and/or tables in addition to that already included." In addition, the National Utility Contractors of America (NUCA) (Ex. 3–91) contended that it would be inappropriate for OSHA to sponsor any particular set of charts or tables, and that this approach would not be feasible because regional work practices are different. NUCA also expressed support for the flexibility of the performance-oriented approach of the proposal.

The Washington Metropolitan Area Construction Safety Association (WMACSA) (Ex. 4–101) commented that "Standard practices appear to have been provided for by the options provided by OSHA." WMACSA also pointed out the difficulty of revision and in deciding, regionally, what was appropriate.

Finally, Lone Star Gas Company, (Ex. 4–105), commented that charts and tables need to incorporate flexibility and permit the option of individual design to meet unique circumstances.

OSHA notes that many responses to this issue included comments on other sections of the proposal. These comments will be addressed later in this preamble as appropriate.

Based on the above discussion, OSHA has determined that a "standard practice," in the context of Issue 1, would not be appropriate because it would limit flexibility and would not recognize regional work practices. The Agency believes that the current format, as revised, provides the necessary degree of flexibility; provides a mechanism for the recognition and use of regional shoring and sloping practices; and allows rapid introduction and use of new products and technology, while insuring that appropriate employee protection is provided.

OSHA believes that adoption of CAL–OSHA standards as the National "standard practice," as suggested by some commenters, would not be appropriate as those standards were developed regionally for local interests, and are not recognized nationally as appropriate for all regions. However, OSHA notes that the flexibility of the final rule permits California contractors to use any standard approved by a registered professional engineer, while contractors in other states may choose to use other standards which are equally effective, and which reflect the necessary regional differences in soils, climate, and work practices.

Therefore, with respect to this issue the agency makes no change and promulgates the standard as proposed.

In Issue 2 of the NPRM (52 FR 12294), OSHA requested comment on whether or not it should limit design responsibility to a "qualified engineer," which was defined in the proposal as "A person who has attained (through engineering education and experience) a special knowledge of mathematical, physical, and engineering sciences and the principles and methods of engineering analysis and design; and who, therefore, is qualified to practice engineering, i.e., apply the principles and methods of engineering analysis and design to specific problems." The proposal permitted design by either a "qualified person or a qualified engineer." The Agency also solicited information, opinion, and comment on costs; the rationale for requiring or not requiring a "qualified engineer;" situations which would require a "qualified engineer;" the proposed definition; criteria to evaluate experience; impacts on small businesses; the rationale for requiring or not requiring a "registered professional engineer;" and any evidence supporting or disproving that requiring a "qualified engineer" decreases the risk of injuries and fatalities.

OSHA received 30 comments on this issue, including input from the ACCSH (Tr. 8/5/87 pp. 456–470). Some comments supported the idea that a "qualified person" could properly perform design work. Several comments, like that of H. J. Schneider Construction, Inc. (Ex. 4–3), expressed support for "qualified person," but provided no rationale. Other commenters, like the Underground Construction Co. and the Associated Builders and Contractors, Inc. (ABC) (Exs. 4–57 and 4–78), argued that allowing only a "qualified engineer" to do design work would deprive contractors of the ability to use capable supervisors to do such work. However, ABC also stated that a qualified engineer would be appropriate in complex cases such as excavations under foundations and trenches deeper than 15 feet.

Several other commenters, such as W. M. Lyles Co., Kaweah Construction Co., ARB, Inc., and Herman Weissker, Inc. (Exs. 4–5 and 4–82, 4–13, 4–102 and 4–109), objected to the suggestion of limiting design responsibility to a "qualified engineer" because of severe cost implications; however, they supplied no specific cost data or supporting rationale. These commenters

also objected to the suggested use of a registered professional engineer, stating that they felt experience and training were more important than registration as an engineer. However, the commenters did not indicate what amount of experience or training would qualify a person to do this type of work. In addition, these commenters apparently misinterpreted the proposal as requiring an engineer's involvement with every excavation because they also noted that their firms do not employ engineers to be involved with every excavation.

Three commenters (Exs. 4–82, 4–102 and 4–109) noted that the State of California has laws which require such design to be done by engineers, but they objected to this becoming a national standard. The three commenters argued that they knew of no evidence that requiring a "qualified engineer" to do design work would reduce the risk of fatality or injury. They also contended that the proposed definition of "qualified person" contained adequate criteria for evaluation of an individual's qualifications.

Union Electric Company (Ex. 4–35) objected to limiting design responsibility to engineers, noting that their designs were often developed in the field or adapted to field conditions on site, within accepted parameters. The Company also noted that the adequacy of their design was verified by company engineers.

The Carolina Branch of the Associated General Contractors (CBAGC) (Ex. 4–54) objected to limiting design responsibility to engineers in "routine situations." However, they noted that a "qualified engineer" should be required in complicated situations, such as excavations under foundations and trenches deeper than 15 feet. The CBAGC also stated that they have no evidence that a qualified engineer would improve safety.

The Laclede Gas Company (Ex. 4–88) commented that it was unnecessary to limit design responsibility to qualified engineers, considering the definition of "qualified person," and noted that field experience is as important as formal training.

The Public Service Electric and Gas Co. (Ex. 4–89) commented that company supervisors trained in the proper application of existing standards and aware of field conditions are their primary means of controlling on-the-job safety. The commenter recognized the need for a "qualified engineer" to do basic planning and design on large projects such as building construction, tunnel construction, and major infrastructure installation and noted that this is a current business practice. The commenter also stated that they knew of no evidence to support the fact that injuries and fatalities would decrease by the presence of a "qualified engineer" at the excavation site.

Lone Star Gas Company (Ex. 4–105) stated that limiting design responsibility to "qualified engineers" would exclude individuals who are fully capable of performing the required duties, but do not possess an engineering degree. Lone Star also noted that the risk of injury in an excavation designed by an unqualified engineer or person would be high, and that design of high risk excavation, i.e., excavations under the foundations of buildings, should very likely be performed by a "qualified engineer." Lone Star also emphasized experience, training, number of years of apprenticeship, and the type of soil in which these individuals gained their experience as being "objective criteria" to determine qualification. Lone Star commented that the cost would range from $30,000 on up for each job because each job would require an engineer on site at all times. Lone Star also commented that it knew of no evidence to support the conclusion that requiring a "qualified engineer" would decrease the risk of injuries and fatalities.

Underground Contractors, Inc. (Ex. 4–115), objected to limiting design responsibility to "qualified engineers," citing a financial burden. They estimated the cost for engineers would be $60 to $100 per hour. The commenter also objected to the use of "registered professional engineer" for the same reason. Underground Constructors, Inc. also suggested OSHA consider experience or specific safety training as proof of qualification for designing protective systems. As an example, the commenter suggested qualification requirements of 10–20 years experience, and noted that individuals who feel directly responsible for employees in the field may in fact be better suited to this duty and more safety conscious than an outside "card-carrying engineer."

One other commenter, Schield Construction Co. Inc. (Ex. 4–56), although not specifically addressing Issue 2, commented that a registered professional engineer would not always be more qualified than a contractor who has the experience with trench protective systems.

The Agency notes that many of the commenters opposed to a requirement limiting design responsibility to a "qualified engineer" misinterpreted the proposed requirement, and concluded, as evidenced by many of the above comments, that such a requirement would require an engineer to be on site at every excavation, and that experienced supervisors would no longer be able to determine the selection of protection systems. This was not OSHA's intent, and, as discussed later in the preamble, the Final Rule will clarify the point.

Most of the commenters on this issue, as well as the ACCSH, supported limiting design responsibility to an "engineer." However, many of the commenters, along with the ACCSH, recommended that the proposed "qualified engineer" be changed to "registered professional engineer." In order to solicit public input on a requirement for the use of a registered professional engineer, the Agency again raised this topic in its Notice of Informal Public Hearing (53 FR 5280).

Many of these commenters noted the shortcoming of allowing design by a "qualified person" and pointed out the difficulty of determining who is, in fact, qualified (Exs. 4–17, 4–27, 4–28, 4–37, 4–75, 4–91, 4–101, and 4–114). In particular, Granite Construction Company (Ex. 4–28) stated that "While there may be 'qualified persons' who by experience and/or education can perform design function, we feel the majority of people who may fit the broad definition of 'qualified person' lack the qualifications necessary for design of excavation protective systems, in the absence of standard practices." Granite did not support a requirement for a registered professional engineer, and noted that the cost for hiring a "qualified engineer" should not fall disproportionally on small businesses because it would be passed on to the consumer.

Griswald Machine and Engineering, Inc. (GME) (Ex. 4–27) noted that "a 'qualified person' is too subjective a level of expertise," and recommends that OSHA require that only a qualified engineer, or a person working under the direction of a qualified engineer, be allowed to do design work.

The Washington Metropolitan Area Construction Safety Association (WMACSA) (Ex. 4–101) pointed out that dropping "qualified person" from the standard "* * * would appear to be in the best interest of the industry. There is no way to decide if a person is in fact qualified. Anyone can say he or she is qualified by reason of extensive experience, knowledge, and training. The lack of any method to prove or disprove this could be very expensive to any employer." WMACSA also noted that under the proposal, if a company could not afford to hire an engineer, there were a great many other options available for providing protection which would not require the services of an

engineer. WMACSA commented that it would be difficult to prove that requiring a "qualified engineer" would decrease injuries and fatalities. WMACSA also recommended that a "qualified engineer" be a professional engineer registered in the state where he or she works, because the registered engineer works with a license that can be withdrawn for cause. The commenter also pointed out the difficulty for OSHA to set standards for an individual designing protective systems and evaluate and certify candidates, and notes that this would be impractical. Finally, the commenter also noted that with all the options available, the use of an engineer should seldom, if ever, be required.

Speed Shore Corporation (Ex. 4–114) stated that allowing a "qualified person" to design an intricate, detailed safety system would provide a "loophole," explaining that terms such as "extensive knowledge, training and experience" are too general to use for properly qualifying individuals. Speed Shore strongly recommended that protective systems not utilizing the other more specific options should be designed by a qualified engineer who works under registration and a code of ethics applicable to his field.

The Building and Construction Trades Department (BCTD) of the AFL–CIO (Ex. 4–17) recommended eliminating "qualified person" from the standard because, in their view, there is no way to determine if a person is in fact qualified. They also supported the use of a registered professional engineer, noting that registration is a state prerogative, and that engineers are registered to protect the public for the same reasons and in the same manner as physicians and attorneys. BCTD argued that it would be hard to find "prima facie" evidence to support the conclusion that requiring an engineer would decrease the risk of injury and noted that it would be just as hard to prove that an attorney practicing at the bar decreases client risk. The commenter also pointed out the difficulty of incorporating criteria into the standard to define who would be qualified to design protective systems, and, as an example, suggested that OSHA consider the difficulty of incorporating a surgeon's education into a health standard. BCTD also notes that the options available in the standard would avoid the necessity for hiring engineers in most cases.

Rader, Addision and Story (Ex. 4–1) supported the use of "qualified engineer" but pointed out the potential controversy as to who is a qualified engineer. The commenters suggested that a qualified engineer should be a registered professional engineer, for legal reasons. The commenter noted that licensed engineers carry insurance which is negated if all applicable laws, ordinances, rules and regulations of any Federal, state or local government are not followed. Additionally, the commenter noted that improperly designed excavations can only be cured by proper design and accurate construction. The commenter also pointed out that solving design problems in the beginning (before digging begins) decreases costs.

Pacific Gas Transmission Co. (PGT) (Ex. 4–37) supported a requirement for design by a qualified engineer. The commenter noted that:

> While we respect the importance of qualified persons in the development of the area of trench protection, we feel it is now time to rely on the training and tools of the qualified engineer to provide this service. Both the qualified engineer and the qualified person have the same physical tools to work with: soil type, plasticity, water content, weight, compaction, etc. The difference is in how these tools are used. Through his training the engineer is able to apply sometimes complex engineering techniques to design a trench protection system. The qualified person gets his engineering training through trial and error. The preamble to the PRM indicates that this trial and error process is costing time and lives.

Although the commenter did not directly recommend the use of a registered professional engineer, several comments indicated that PGT did in fact support this concept. For example:

> First of all, if the qualified engineer is also a registered engineer, he is legally liable for his work. If he continues to provide faulty design he is no longer allowed to practice. And the preamble to this PRM indicates that the majority of excavation accidents result from the use of designs or systems selected, prepared or implemented by unqualified personnel.
>
> PGT feels that this responsibility should be given to qualified engineers. It should be noted that this responsibility may already be delegated to registered engineers in some states (e.g., California) and that under most extraordinary conditions it would be prudent for the employer to hire a consultant or use in-house engineers to protect his employees as well as avoiding damage to adjoining properties.
>
> In certain states only registered engineers may call themselves "engineer." The registration process is the only nationwide certification program in place that attests to the suitability, through education and experience, of a person to do the required work. As we said earlier, the registered engineer is legally liable for his work and in some states personally liable.

PGT also noted that an engineer would be required only if site conditions required specific expertise in evaluation, or if the employer felt that through special design he or she could realize a project savings. PGT further commented that in neither case would this requirement adversely impact small business, and that without such a requirement costly and fatal accidents would continue to occur.

The National Utility Contractors Association (NUCA) (Ex. 4–91) endorsed the use of a registered professional engineer or a person working under the direction of a registered professional engineer. NUCA pointed out the difficulty of proving or disproving the qualifications of a qualified person. NUCA also noted the liability consequences of using a qualified person. Cost figures provided by the commenter indicate total design of a protective system would cost approximately $3,000, but did not provide specfic details as to the type of system or size of project this cost represents. In addition, the commenter pointed out that small contractors do not bid work where such levels of expertise are necessary.

The Los Angeles Section of the American Society of Civil Engineers (LAASCE) (Ex. 4–75) supported the use of registered professional engineers. The commenter noted that under the California State Plan, an alternate shoring design (i.e., one not specifically permitted in the California standard) for excavations under 20 feet in depth, and all shoring designs for excavations over 20 feet in depth, must be prepared by a civil engineer registered in California. The commenter also noted that because of this requirement, the safety record of California has been exemplary compared to the rest of the nation. The LAASCE also commented that allowing design preparation by a "qualified person" would be considered a significant lowering of safety standards for the construction industry and also a possible undermining of professional engineering standards. The commenter also stated:

> We would prefer to see registration as a civil engineer a requirement in the definition. This would totally relieve OSHA of the responsibility of determining a person's qualifications to design shoring. Each State has its own criteria of what is acceptable to them for a person to practice engineering. It would also make enforcement by OSHA inspection personnel much easier when questioning the qualifications of the person responsible for a shoring design.
>
> Qualified engineers use the physical laws of nature to estimate applied loads and the strength of construction materials with

appropriate factors of safety to ensure against all possible failures of a proposed shoring system. A wealth of data is available to help a qualified engineer predict the behavior of a proposed shoring system. A person designing by "experience" has but one method to establish his limiting design criteria. That method is to encounter a design failure in actual practice and relate that to future designs. Unfortunately, the application of this design technique may come at a high price in injuries and lives. This method of design should be as totally unacceptable to OSHA as it is to us.

The commenter did not support including criteria for qualifications of persons designing protective systems, noting that it would require the establishment of an "OSHA Board of Registration." Such a board would duplicate State licensing boards, which are currently an adequate means of setting qualification criteria. Cost data supplied by the commenter indicated that the cost for shoring drawings for a typical $500,000 project would run about $800, and noted that often these cost were recovered by increased efficiency. Finally, the commenter raised the following legal issue:

One other question not asked in your proposed rulemaking, but one that is certainly pertinent, is "Does the recognition of experience as a qualification for shoring design conflict with any existing laws?

In the State of California, the practice of civil engineering requires that an individual be licensed with the Board of Registration for Professional Engineers. Other states have similar statutes which would be in conflict with your proposed rulemaking. In the event of a civil action regarding a trench bracing failure, what will be a defendant's position regarding compliance with the law if a workman is injured or killed while working in a trench shored in accordance with an unprofessionally prepared shoring plan?

The Structural Engineers Association of Southern California (Ex. 4–80) commented in support of the LASACE position, favoring the use of a registered professional engineer.

Consultant Services Institute, Inc. (CSI) (Ex. 4–64) was strongly opposed to the use of a qualified person, and recommended that the standard require a qualified civil or soils engineer licensed in the state where the work is being done.

Neyer, Tiseo and Mundo, Ltd. (Ex. 4–71) also opposed allowing design by anyone who is not an engineer. The commenter noted that design tables and charts should not be used by people who are unfamiliar with soil mechanics since the user must know how soils will behave in order to use the charts and tables properly.

The Associated General Contractors (AGC) of California (Ex. 4–106) endorsed the use of a "qualified engineer" for alternative design (anything other than a standard practice) and for any design for excavations deeper than 20 feet. The commenter stated that their organization could not cite any evidence that requiring designs by qualified engineers would decrease the risk of injuries and fatalities, but noted that they were not aware of any failures of engineered plans which were properly followed. The AGC of California did not support the use of a registered professional engineer, but noted the qualified engineer must have expertise and skill in structural design and soils mechanics. The commenter also confirmed the cost data supplied by the LASACE (Ex. 4–75) discussed above, citing hourly fees of $65 to $75, and complete shoring plans for small to medium projects at $200 to $800.

Other commenters, like the State of California, the Michigan Department of Labor, and Schield Construction (Exs. 4–4, 4–46 and 4–56) did not address Issue 2 directly, but supported limiting design responsibility to a "qualified engineer" or a registered professional engineer (California) in their comments on the standard.

The comments received prompted OSHA to seek additional information in the hearing notice (53 FR 5280) on the suggestion that a registered professional engineer be required instead of either a "qualified person" or "qualified engineer" for all original design work, for the development of all original tabulated data, and for determinations regarding the stability of adjacent structures. In response the Agency received the following comments:

Peoples Gas (Ex. 8–6) commented that most companies use qualified engineers from within the company to examine special cases.

The W.M. Lyles Co. (Ex. 8–7) objected to the suggested requirement for a registered professional engineer. The commenter's objection was basically the same as the previously discussed objections to a requirement for a "qualified engineer" (Exs. 4–5 and 4–82).

The Exxon Company (Ex. 8–10) commented that its procedure involved performing soil borings and laboratory analysis of soils, and based on the results, its "qualified engineers" apply previously developed equations to calculate a stable slope. Exxon noted that possession of an engineering license is not required to apply these equations safely.

The Milwaukee Construction Industry Safety Council and the Associated General Contractors of America (Exs. 8–14 and 8–16) commented that they did not support deletion of "qualified person" or "qualified engineer," nor the substitution of registered professional engineer.

The Associated General Contractors of California (Ex. 8–18) did not support the use of the term "registered professional engineer."

The Carolina Branch of the Associated General Contractors of America (Ex. 8–19) agreed with the use of a registered professional engineer in special situations, but recommended retention of the term "qualified person," because of the implied experience factor.

Several commenters (Exs. 8–21, 8–22, 8–26, and 8–29) responded to the hearing notice with objections to using the terms "qualified person" or "qualified engineer" for design work, but did not address the use of registered professional engineer. However, these commenters did not state clearly whether their comments were support for the use of a registered professional engineer or an objection to any limiting of design responsibility.

The South Dakota Engineering Society (Ex. 8–24) was in total support of the ACCSH recommendation to use a registered professional engineer.

Southern California Gas Company (Ex. 8–25) commented that the use of a registered professional engineer in lieu of "qualified person" or "qualified engineer" was unnecessary, but provided no rationale for this statement.

The Texas Department of Highway and Public Transportation (Ex. 8–27) recommended that OSHA not require a "registered professional engineer" to perform the work required in the standard, but did recommend "the most competent possible person be used to insure safety in excavation work."

Mr. William E. Patten (Ex. 8–3) did not specifically address this issue, but in his comments suggested design by a qualified engineer for any alternative means of protection.

In addition to the comments received specifically addressing Issue 2, OSHA also received comment on other provisions of the standard which relate to this issue and are discussed here in order to provide a complete discussion of this Issue in one place. The following comments were received on proposed § 1926.650(b)(14), which defined "qualified person."

Granite Construction (Ex. 4–28) agreed with the criticism of the definition of "qualified person," as discussed under Issue 2, and also raised an objection to allowing the competent person to choose among the options allowed in § 1926.652(b) and (c). The commenter noted that this could be dangerous

because there was no limit on the depth of excavation for which this person was permitted to choose or to design protective systems.

The National Institute for Occupational Safety and Health (NIOSH) (Ex. 4–30) recommended tying the qualification of a "qualified person" to the opinion of a registered engineer with required documentation of that opinion. OSHA notes that the Final Rule recognizes this type of arrangement by not specifying who designs a set of plans or tabulated data, but requires that plans or data be approved by a registered professional engineer. The Agency does not require the documentation suggested by NIOSH but notes that the "responsibility" for the design rests with the registered professional engineer.

Exxon Pipeline Company (Ex. 4–53) recommended that OSHA allow the competent person to design less complex protective systems. The Agency notes that in the Final Rule the competent person is permitted to design protective systems under the limitations of the appendices, manufacturer's data, or other tabulated data without an engineer's approval. In addition, the competent person can develop original designs, but these designs must be approved (simply by stamping and signing the design) by the registered professional engineer before use.

Finally, the BCTD and WMACSA (Exs. 4–17 and 4–171) recommended elimination of the term, "qualified person" as they did in their direct response to Issue 2.

After careful consideration of the comments received, OSHA has determined that the term "qualified person" should be dropped from the standard. This decision is based on the evidence in the record which indicates that most of the individuals who fit this broad definition lack the qualifications necessary to do original design work and may often have insufficient incentive to provide adequate protection to employees. The Agency agrees with the many commenters who point out that the proposed definition of "qualified person" was so broad and subjective that almost anyone with construction experience would meet the requirements and, therefore, be permitted to design protective systems for excavations. The Agency's position is supported by commenters, like Johns Hopkins University (Ex. 4–11), who highlighted the frequency of accidents where experienced "qualified persons" dug unprotected excavations which caved in, resulting in unnecessary fatalities and injuries.

The Agency disagrees with those commenters who suggest that experience, per se, qualifies an individual to design protective systems. The principles of soil mechanics are too complex to learn on a trial and error basis. In addition, OSHA notes that many of the commenters that supported design by a "qualified person" conceded that engineers were necessary in some situations, or stated that field-developed designs were verified by engineers (Exs. 4–35, 4–54, 4–78, 4–105, and 8–6).

The Agency wants to emphasize that this decision does not limit the employer's ability to use supervisors who meet the criteria for competent persons to choose protective systems from the numerous other options available. OSHA notes that these persons are permitted to design protective systems using the appendices to Subpart P, manufacturers data, or other tabulated data, in accordance with this Final Rule. However, they may not develop original designs (i.e., those not based on any of the other options), unless the supervisor is also a registered professional engineer or has the design approved by a registered professional engineer.

The Agency also notes that this revision does not mean that an engineer must be on site at every excavation, as suggested by some commenters.

In addition, OSHA has determined that the term "qualified engineer" should be replaced by the term "registered professional engineer" in the final rule. This decision is based on evidence in the record which demonstrates the need for original designs to be developed by a person whose qualifications in this field have been demonstrated and are readily recognizable. The Agency agrees with the commenters who point out the difficulty OSHA would have in establishing criteria, evaluating individuals and certifying these individuals as qualified to develop original designs for protective systems. The commenters also note that such a process would be impractical and a duplication of state licensing boards. OSHA recognizes that the registration process is the only nationwide certification program in place that attests to the qualifications of a person to do the required work. OSHA also recognizes that registered professional engineers are legally liable for their work, work under a code of ethics, and have a license which can be withdrawn for cause. The Agency also notes that the current registration system allows each state to establish the criteria necessary to practice engineering in that state, and would make enforcement by OSHA easier in regards to the qualifications of the person responsible for any design.

The wording of the Final Rule, requiring approval of original designs by "a registered professional engineer" recognizes the industry practice where junior engineers, engineers-in-training, or non-engineers may, in fact, develop the actual design, but the design is verified and approved by a registered professional engineer.

Finally, OSHA agrees with the many commenters who recommended that excavations under foundations, excavations deeper than 20 feet, and excavations where unusual site conditions exist require the expertise of an engineer in all cases. The Agency has revised this final rule to reflect these concerns. Therefore, with respect to the issues, the agency has determined that revision of the standard is justified and promulgates the standard as revised.

Issue 3 of the proposed rule (52 FR 12294) sought to determine if OSHA should require specific visual or manual tests when using proposed appendix A to classify soils.

OSHA received 17 responses to this issue (Exs. 4–3, 4–5, 4–13, 4–17, 4–28, 4–35, 4–37, 4–57, 4–82, 4–88, 4–91, 4–101, 4–102, 4–105, 4–106, 4–109, and 4–115). Although the rationale expressed in these responses differed, almost all commenters agreed that a specific test(s) should not be required. One commenter, Union Electric Co. (Ex. 4–35), observed that mandated testing was unnecessary because most soils can be classified by visual analysis. OSHA disagrees with this observation because of the complexity of soil make-up and the number of conditions that affect soil stability. On the other hand, most commenters agreed that some type of soil testing is necessary, but that the method of testing should be left as an employer prerogative. OSHA agrees that soil testing is necessary, but has determined that mandating a specific test would lock in current procedures and discourage new development. Therefore, with respect to this issue, the Agency promulgates the standard as proposed. A complete discussion of acceptable tests is provided below in the summary and explanation of appendix A.

Issue 4 of the proposed rule (52 FR 12294) solicited public input on § 1926.652(b), which would permit employers to have a steep slope for excavations open less than 72 hours (short term), but which would require flatter slopes for excavations open longer than 72 hours (long term).

OSHA received 16 comments on this issue, and additional input from the ACCSH.

Several commenters (Exs. 4–5, 4–13, 4–28, 4–57, 4–82, 4–102, 4–106 and 4–109) disagreed with the concept. Many of these commenters assumed this provision would create a paperwork burden, and felt any time frame established would be arbitrary. They also pointed out that the effect of time on an excavation depends on the type of soil, and noted that weather, vibration, water, and superimposed loads must also be considered. In addition, these commenters pointed out that there is no technical or engineering basis for establishing any specific time frame to differentiate long term or short term, and that this concept should not be made part of the standard. One of these commenters, the AGC of California (Ex. 4–106), asserted that the proposed provision would be overly restrictive, and supported slope angles presented by R.T. Frankian which, for simple slopes, were somewhat similar to the short term slopes presented by OSHA in the proposal.

Another commenter, Underground Contractors, Inc. (Ex. 4–115), suggested that the passage of time should not be recognized in the standard, but provided no rationale.

One commenter, the Tennessee Valley Authority (Ex. 4–39), argued that only one set of slopes should apply to excavations, the ones that provide the greatest protection regardless of the time the excavation is open, while another commenter (Ex. 4–78) argued that protection should match site conditions, not time.

Another commenter, Lone Star Gas (Ex. 4–105), asserted that time definitely has an effect on the stability of an excavation, noting, however, that 72 hours may not be the appropriate dividing line. The commenter provided a qualified endorsement for a 24 hour cut off, but noted that the effects of the environment should be the basis for calculating time limitations.

Other commenters (Exs. 4–17 and 4–101) noted that the critical time is when the trench is first opened and recommended that "short term" should be considered to be 24 hours or less.

Two commenters (Exs. 4–27 and 4–91) endorsed the proposed handling of short term/long term as a necessary improvement, with one commenter (Ex. 4–91) enthusiastically supporting the 72 hour dividing time.

In addition, the ACCSH (Tr. 8/5/87 p. 520) suggested the time division be reduced to one work shift or eight hours.

After careful consideration of the entire record, OSHA has determined that, while there is no scientific basis to delineate short time exposure, time must be considered to some extent in the regulation because long term stresses are different from short term stresses. The Agency points to documents in the record (Ex. 2–1 p. 2–3 and pp. B–44 and B–47 and Ex. 2–5 pp. 20, 21, 28–30 and 70–71) which support the recognition and use of short term/long term time frames for sloping. One commenter (Ex. 41) submitted several studies to the record which support the use of this practice.

However, because of the great concern expressed by many commenters regarding soil type and environmental factors, the Agency has determined that it is appropriate to limit the use of steeper slopes for short term exposure to Type A soils, as defined in appendix A. These soils have the greatest strength, next to stable rock, and field experience has shown that these soils can stand on a slope steeper than ¾ horizontal:1 vertical (as prescribed in Table B–1 of the Final Rule) for short term exposures to a depth of 12 feet and still provide adequate employee safety.

OSHA disagrees with those commenters who believe this concept would create a paperwork burden. The Agency notes that no recordkeeping burden was required or implied in the proposal. The Agency believes the information needed to verify the amount of time the excavation is open can be readily obtained by questioning employees on site.

While the Agency accepts the argument that no specific time frame has scientific backing, and that selection of a time frame, to some extent, is arbitrary, OSHA believes the amount of time an excavation is open does play an important role in employee protection. The Agency raised this issue in order to determine a reasonable time frame for distinguishing between long term and short term excavations. OSHA also notes that this short term/long term concept must be used with the soil classification system in Appendix A, which recognizes other important conditions that affect soil stability. These other conditions were also noted by many commenters.

OSHA disagrees with the AGC of California (Ex. 4–106) position that a long term/short term concept is overly restrictive. The Agency notes that the slopes proposed by OSHA on that basis were less stringent in many cases than those already required by the State of California. In addition, OSHA notes that the use of long term/short term distinction is only one of the options available to employers under § 1926.652(b). The employer can comply with one of the other options provided, and, therefore, may use different slopes from those listed. The Agency realizes that the allowable slopes and required soil classification system in Appendix A may, in some instances, be conservative, but believes this is necessary since this option is intended for use by field personnel, without benefit of laboratory generated soils analysis.

OSHA has also determined that the time frame for differentiating long term from short term excavations in the case of Type A soil should be reduced to 24 hours. Although there was no clear consensus on a time frame, this period has more support in the record than the proposed 72 hours or the one work shift recommended by the ACCSH. This decision also is in line with the Agency's belief that it is best to have an excavation open for the shortest reasonable amount of time. OSHA believes that a period of time less than 24 hours could be disruptive and would not be appropriate, in light of the other requirements in subpart P, such as § 1926.651(k) which requires daily inspection of the excavation.

Therefore, based on the above discussion OSHA promulgates the standard, as revised, in regard to this issue.

Issue 5 of the proposed rule (52 FR 12295) raised ACCSH suggestions that design specifications for shields be available at the worksite, and that shields should be certified that they can withstand the specified maximum loads. The proposal also asked for information on the effects of such requirements on manufacturers and users, and for information on current industry practice.

OSHA received 14 comments on this issue. Eight commenters opposed a requirement for design specifications to be available on site. Four of these commenters (Exs. 4–82, 4–102, 4–103, and 4–109) argued that design specifications contain proprietary information and should not be available on site. These commenters did recommend that the design maximum load for the shield be displayed on the shield. Two other commenters (Exs. 4–35 and 4–115) recommended that these specifications should not be on site, but should be made available to OSHA upon request within a reasonable amount of time. Another commenter (Ex. 4–54) noted that "paper at the jobsite inhibits attention to productivity and safety." The last commenter (Ex. 4–57) to disagree with the proposed requirement for design specification availability at the worksite also noted that the specifications often contain certain proprietary information and would be of

minimal value on site. The commenter went on to state that what would be more important to have at the site are installation and placement instructions, drawings, allowable load restrictions, weights, lift points and maintenance instructions.

Three commenters (Exs. 4–27, 4–28, and 4–78) supported the suggestion to require shield design specifications to be available at the job site. Two other commenters (Exs. 4–101 and 4–105), in addition to supporting the suggestion, noted that manufactured shields usually have the load requirements stamped on them, and also noted that design specifications are easily obtained from the manufacturers. Finally, one commenter (Ex. 4–14) recommended that design specifications, which indicate the circumstances under which the shield can be used, should be on site to enable a competent person to know how to use the shield properly under changing soil conditions.

OSHA has determined that detailed drawings, which usually contain proprietary information, would be of little use on the job site because the Agency has no way to confirm certain criteria, such as the grade of steel used in a shield. However, as suggested by several commenters, the Agency will require that information necessary for the safe installation, placement, use, and removal of a shield must be on site. OSHA has also determined, based on the above comments and testimony presented at the informal public hearing (Tr. 4/19/88 p. 184), that most manufacturers already provide the above information with their product, and, therefore, such a requirement will not impose a significant burden. Therefore, with respect to this issue, the Agency is promulgating the standard as revised.

Issue 6 of the proposal (52 FR 12295) solicited input on a suggestion to require design specifications (a plan or drawing) and a statement of a support system's limitations to be available at the worksite. OSHA received 10 comments on this issue. Three commenters (Exs. 4–82, 4–102, and 4–109) stated that it would be unreasonable to require design specifications for support systems to be on site, but noted that the requirement should be for the employer to furnish the design specifications to OSHA, given reasonable notice. Two other commenters (Exs. 4–106 and 4–115) objected to the proposal that design specifications for *all* (emphasis added) support systems be maintained at the job site. These commenters noted that under CAL/OSHA, only alternate or special designs must be made available. Another commenter (Ex. 4–105) stated that such a requirement would likely eliminate shop-built protection, and would require an engineer on each job.

On the other hand, two commenters (Exs. 4–17 and 4–101) agreed that specifications necessary for the proper use of the support system should be on site while the system is in use, in order to enable the employer to make modifications to the system if necessary. These commenters also noted that reputable manufacturers already furnish this type of information for their product. This was also confirmed by testimony presented at the informal public hearing (Tr. 4/19/88, p. 184). Another commenter (Ex. 4–28) recommended that design plans and specifications for support systems be available at the job site for any unusual or alternate design.

One other commenter (Ex. 4–37) noted that if the system is designed by an engineer, the requirement would have little effect on the employer, since a set of drawings would be on site anyway.

Based on the record, OSHA has determined that the information necessary for the safe installation, placement, use, and removal of a support system must be available at the work site. Further, the Agency has determined that this information is usually supplied by the manufacturers of these support systems when the systems are delivered to the site or to the user. Therefore, with respect to this issue, the Agency is promulgating the standard as revised.

Issue 7 of the NPRM (52 FR 12295) solicited comments on an ACCSH recommendation that OSHA require some form of warning along the edges of excavations that are five feet or more in depth to warn employees who work adjacent to excavations, but who are not directly involved with the excavation activity, that a fall hazard exists.

The Agency received 17 comments on this issue. Two commenters (Exs. 4–54 and 4–101) supported such a requirement, but supplied no rationale. One of these commenters (Ex. 4–54) indicated that a barrier bank (the spoil pile) was itself an effective means of warning.

Other commenters (Exs. 4–37, 4–49, and 4–105) noted that a requirement for some kind of warning along the edges might be appropriate for some excavations but was impractical for larger (longer) excavations such as pipeline excavations. One commenter (Ex. 4–49) pointed out that most pipelines go through remote areas with little potential for unwarranted access. Another commenter (Ex. 4–37) stated that the surface disturbance resulting from construction provides enough delineation. A third commenter (Ex. 4–105) noted that it is present practice to provide such warnings except for trenches of great length.

Two commenters expressed strong support for such a requirement. The first commenter, BCTD (Ex. 4–17), recommended that this requirement be implemented at multiple contractor worksites because employees not directly involved with the excavation may not be aware of the specific location of the excavation. The second commenter (Ex. 4–39) noted that a warning system not only protects workers not directly involved in the excavation, but should help to maintain the stability of the excavation by keeping mobile equipment away from the edge of the excavation.

On the other hand, many other commenters disagreed with this type of requirement. Several commenters (Exs. 4–5, 4–13, 4–82, 4–102 and 4–109) implied that this type of requirement will not prevent falls into excavations, because most falls are the result of inattention. The commenters also noted that falls occur despite the fact that employees are aware that excavation activity is being undertaken. Another group of commenters (Exs. 4–57 and 4–115) noted that warning barriers would only result in more problems, because they would become additional obstacles in the work environment, and material, such as shoring, would have to be moved around, over or under these obstacles, creating other unspecified hazards.

Finally, several commenters noted that this type of requirement is impractical and unnecessary (Ex. 4–28) because many types of work, such as pipeline excavations, are completed or move from one area to another too fast for barricades to be effective (Ex. 4–91), and their use should be left to the discretion of the employers as site conditions require (Exs. 4–35 and 4–106). Additionally, one commenter (Ex. 4–19) noted that contractors working at one site for any length of time normally provide this type of protection as a matter of course.

OSHA appreciates the input received on this issue. However, the Agency has determined that this subject is more appropriately addressed in its Final Rule revising subpart M, "Safety Standards for Fall Protection in the Construction Industry," (Docket S–206) which is on OSHA's Regulatory calendar for publication in the **Federal Register** later this year. The proposal was published on November 26, 1986 (51 FR 42718).

The revised subpart M will also incorporate the fall protection requirements in existing § 1926.651(t).

Therefore, in respect to this issue, the agency promulgates the standard as proposed.

In Issue 8 of the proposed rule (52 FR 12295) OSHA solicited public comment on the ACCSH recommendation that a written log or record of all required inspections be kept at the job site. OSHA received 16 responses to this issue. An overwhelming majority of the commenters opposed such a requirement. Most of these commenters (Exs. 4–5, 4–13, 4–35, 4–57, 4–82, 4–91, 4–101, 4–102, 4–106, 4–109, and 4–115) stated that the benefit of a record to verify inspection was questionable, and that a record could be falsified. Further, they contended that the time spent by the competent person filling out a record of required inspections would be better spent maintaining and improving worker safety. Two commenters (Ex. 4–28 and 4–78), while disagreeing with the proposed requirement for a written log, noted that if other commenters established an overwhelming need for a written record, then a certification would be adequate. Other commenters, while not directly endorsing the recommended written log, noted that maintaining a log of inspections might not be necessary if the competent person were constantly vigilant (Ex. 4–17), but that keeping records and logs would not add a financial burden because the inspector is already on the job site (Ex. 4–105). Finally, one commenter (Ex. 4–37) suggested that a log be kept of conditions that vary from those for which the system was designed and of any subsequent actions taken to bring the system into compliance.

Based on the above comments, the Agency has determined that a written log or record of inspections is not necessary. OSHA agrees with the commenters who note the questionable value of a record in this situation. The information contained in a log can be obtained by other means, such as communicating with the competent person and with employees on the site, and by reviewing the elements of the protective system being used by the employer. Further, OSHA agrees that the time required to fill out a log could be better spent by the competent person ensuring worker safety. Therefore, in regard to this issue OSHA promulgates the final rule as proposed.

Issue 9 of the NPRM (52 FR 1295) solicited input on whether or not the Agency should require that a "top man" be present to observe work conducted within the excavation, and to watch constantly for signs of danger when employees are in an excavation. This issue also solicited input on the extent to which such a requirement would increase safety, on other duties that could be assigned to the "top man," on the responsibilities the "top man" should have; and on the cost of such a requirement.

OSHA received 20 comments on this issue, including input from the ACCSH (Tr. 8/5/87 p. 477). The ACCSH recommended that a "top person" (as opposed to "top man") be defined as "a person at the top of the excavation constantly in visual and oral contact with the workers in a trench or excavation, and able to recognize and respond to hazardous trenching or excavation conditions." Further discussion by the ACCSH indicated that the "top person" should not necessarily be the competent person required by proposed § 1926.651(k), but rather, could be someone with less experience who is still able to respond to hazardous conditions and effect a rescue. The rationale for this suggestion was that the competent person would be engaged in other activities (Tr. 8/5/87 p. 477–79.)

Three commenters fully supported the use of a "top person." In particular, the Building and Construction Trades Department of the AFL–CIO (BCTD) (Ex. 4–17) noted that a "top person" was essential for all trenches and for all excavations until a permanent protection system was in place. BCTD also commented that reputable contractors already provide a "top person," that the "top person" would logically be the competent person, and that the main responsibility of the "top person" would be the safety of the workers. A second commenter, the Washington Metropolitan Area Construction Safety Association (WMACSA) (Ex. 4–101), indicated that such a requirement would improve safety. WMACSA also noted that the logical "top man" would be the competent person, that the primary responsibility would be worker safety, and that many contractors currently have a "top man." A third commenter, Lone Star Gas (Ex. 4–105), noted that a "top man" is industry practice and serves to decrease the risk of injury. Lone Star also commented that the "top man" should not perform any duties that would prevent the performance of his or her safety function, and that the "top man's" responsibilities are to warn those in the excavation of danger and to remove workers in danger as quickly as possible.

Many other commenters objected, however, to a requirement for a "top person" for every excavation.

Several commenters (Exs. 4–5, 4–13, 4–37, 4–82, 4–88, 4–102, 4–106, and 4–109) noted that it is industry practice to have a "top person" in many situations, but that not every situation requires one. Most of these commenters also indicated that even when needed, a "top person" could perform other duties in many situations without detracting from the safety function. Additionally, three of these commenters (Exs. 4–82, 4–102, and 4–109) pointed out that limiting this person's functions could decrease rather than enhance safety because of boredom and the accompanying lack of attention.

Other commenters (Exs. 4–28, 4–37, 4–54, 4–78, 4–106, and 4–115) opposed this requirement, commenting that it was primarily the foreman's (competent person) responsibility, and a secondary responsibility of other workers, to watch for signs of danger.

Two commenters (Exs. 4–35 and 4–115) also pointed out that the job of a "top person" would be a boring job where concentration would waver, and really would not provide any effective protection or safety.

Two other commenters (Exs. 4–49, and 4–91) supported the need for an observer on excavations five feet or greater in depth. Additionally, one of these commenters (Ex. 4–49) supported the intent of this provision on the condition that the person be able to perform other responsibilities which do not impair the duty to watch for signs of danger. The other commenter (Ex. 4–91) opposed a mandatory "top person" as described in this issue.

After careful consideration of the comments on this issue, OSHA has determined that a requirement for a "top person" for every excavation is not appropriate. The Agency believes that the responsibilities of a "top person" are already adequately assigned to the competent person or his/her designee in the Final Rule. OSHA notes that the majority of the commenters supporting a specific requirement for a "top person" for all excavations agreed that most contractors, in fact, already have a "top person," who is also the competent person.

Issue 10 of the NPRM (52 FR 12295) solicited public input on a suggested fourth option for sloping, which would permit the use of tabulated data in the same manner as such data would be used in option three, which addresses shoring. The intent would be to allow the use of tabulated data, meeting specified requirements, in designing sloping or benching systems in a larger geographic area than the proposed

sloping option three, which is site specific.

The Agency received 13 responses to this issue, with most commenters supporting the addition of a "tabulated data" option for sloping.

Two commenters, (Exs. 4–37 and 4–91), disagreed with the addition of another option for sloping. The National Utility Contractors Association (NUCA) (Ex. 4–91) commented that this option would add confusion to the inspection process, and that the proposal already provided enough latitude for the contractor to work outside the standard. In addition, Pacific Gas Transmission (PGT) (Ex. 4–37) commented that this option would not be appropriate given the variety of soil conditions in larger geographic areas. PGT also noted that seismic activity should be considered in design.

However, most commenters supported this suggestion (Exs. 4–28, 4–49, 4–78, and 4–101). Several other commenters (Exs. 4–82, 4–102, 4–106, 4–109, and 4–115), in addition to supporting a "tabulated data" option for sloping, noted that this type of data is already available in California. These commenters also recommended that, if the data meets the prescribed requirements in the standard, the only other restriction should be that the use is limited to the soil classifications and geographic areas specified. Another commenter (Ex. 4–105) suggested that restrictions should apply in areas of previous excavation and backfill, and where excavations are close to structures. One other commenter (Ex. 4–17) noted that in addition to the criteria listed in the issue, any tabulated data used for sloping should have either political or professional stature in the locality where it is being used.

After careful consideration of the comments, OSHA has determined that a "tabulated data" option for sloping is appropriate. The Agency believes that this addition will not add confusion to the inspection process, because an employer using this option would be required to provide the tabulated data, including instructions for the safe use of the data, to the inspector during the inspection. OSHA also notes that soil variations in larger geographic areas would be adequately addressed by the standard, since this sloping option would be required to be based on a recognized soil classification system which takes into account such variations. The Agency declines to require consideration of seismic activity, because the Agency has no data on the subject and the commenter did not submit any supporting data.

Issue 11 of the proposal (52 FR 12295) solicited comment on allowing employees to remain inside shields during repositioning of the shields. Proposed § 1926.652(g)(1)(iv) prohibits employees from being inside shields when the shields are being installed, removed, or relocated.

OSHA received 14 responses to this issue.

Twelve of the commenters (Exs. 4–5, 4–13, 4–17, 4–28, 4–78, 4–82, 4–91, 4–102, 4–105, 4–106, 4–109, and 4–115) endorsed permitting workers to remain in shields during repositioning. Two of these commenters, BCTD and ABC (Exs. 4–17 and 4–78), further stated that this practice is acceptable if the shield is only moved horizontally and is not lifted. Most of the other commenters stated that the increased risk of falls that would accompany the repeated exit and re-entry of a shield would make it safer to remain in the shield.

Two other commenters (Exs. 4–39 and 4–101) recommended retaining the prohibition on employees remaining in shields being repositioned, but supplied no rationale.

Based on the comments in the record, OSHA has determined that employees can remain safely inside a shield being repositioned, provided the movement of the shield is horizontal and the shield is not lifted. Additionally, the Agency agrees that repeated exiting and re-entry will increase the fall hazard to employees.

Therefore, OSHA has revised proposed § 1926.652(g)(1)(iv) to permit employees to remain inside shields being repositioned provided movement is horizontal and the shield is not lifted.

Issue 12 of the NPRM (52 FR 12295) solicited comment on a suggestion that hardpan and caliche be moved from a "Type A" soil classification to a "stable rock" classification.

OSHA received 13 responses to this issue. Most commenters supported this suggestion for a variety of reasons.

Several commenters (Exs. 4–5, 4–13, 4–57, 4–105, and 4–115) supported this change for at least some depth beyond five feet, citing a cost benefit. Other commenters (Exs. 4–37, 4–82, 4–102, 4–106, and 4–109) supported the suggestion, but noted that the hardpan or caliche must be consistent, uniform, and continuous for the full depth of the excavation; it must also be dry; and the depth of the excavation must be limited to 12 to 15 feet in depth. One other commenter (Ex. 4–35) expressed support, but provided no rationale for the support.

On the other hand, one commenter (Ex. 4–17) noted that these terms have too diverse a range of properties, and have a different meaning in different areas of the country. The commenter recommended allowing hardpan and caliche to be classified as stable rock locally, in accordance with the requirements of the standard. Another commenter (Ex. 4–101) made a similar recommendation.

After careful consideration of the comments, OSHA has determined that upgrading the classification of hardpan and caliche from "Type A" soil to stable rock, on a national basis, is not appropriate. The Agency notes that much of the support for this upgrade is tempered with recommended limitations. OSHA agrees with the comments that these terms have a wide range of meanings in different areas of the country. The Agency, however, does not preclude such a reclassification if done on a regional or site-specific basis, provided that the requirements of the standard are met. Specifically, this would require approval of a registered professional engineer, as required for the use of other tabulated data or site-specific designs. Appendix A does not permit this reclassification.

Therefore, in regard to this issue, OSHA promulgates the Final Rule as proposed.

Issue 13 of the NPRM (52 FR 12295) solicited comment on whether or not, in addition to § 1926.652(f), the Agency should provide more specific coverage for bell bottom pier holes under a separate section of subpart P, and if so, what a separate new section should address.

OSHA received nine comments on this issue. Three commenters (Exs. 4–82, 4–102, and 4–109) opposed having a separate section addressing bell bottom pier holes. Another commenter (Ex. 4–115) noted that bell bottom pier holes should not be included in this standard. On the other hand, several commenters (Exs. 4–17, 4–72, 4–91, 4–101, and 4–106) agreed that bell bottom pier holes should be addressed under a separate section of this standard. Only one of those commenters (Ex. 4–72) provided any input as to what should be addressed in a separate section.

Based on the comments received, the Agency believes a separate section covering bell bottom pier holes might be appropriate in the future, but does not have sufficient data and information at this time to propose or promulgate such regulations at present. Therefore, in regard to this issue the Agency promulgates the Final Rule, as proposed.

Issue 14 of the NPRM (52 FR 12295) requested public comment on a suggestion that OSHA allow the use of

established regional practices for the construction of protective systems. The Agency also solicited comment on the criteria to be used to ensure that these practices are effective.

OSHA received 14 comments on this issue, with most commenters supporting OSHA's recognition of regional practices for shoring or sloping.

Two commenters opposed the suggestion. One commenter (Ex. 4–91), while recognizing the importance of regional practices, recommended that these practices be subject to the existing variance procedure. The other commenter (Ex. 4–37) opposed the use of localized standards because they could result in non-uniform standards and practices, which could lead to on site conflict and misunderstanding.

Several commenters (Exs. 4–28, 4–35, 4–37, 4–78, and 4–101) expressed support for recognition of regional practices, but provided no criteria for evaluating these practices. Other commenters (Exs. 4–82, 4–102, 4–106, and 4–109) supported recognition of regional practices and suggested that evaluation criteria should include approval by local authorities and a proven safety record. However, they opposed as unrealistic the OSHA suggested requirement of five years of successful use without failure. Another commenter (Ex. 4–105) supported the suggestion, but noted that approval by local authorities may be difficult. One commenter (Ex. 4–115) supported the suggestion and agreed that approval of a local authority should be an evaluation criteria, but recommended that the authority be at a state or regional level. Another commenter (Ex. 4–17) agreed with the use of regional practices, noting that this is more likely to lead to voluntary compliance. However, the commenter also noted the difficulty of evaluating regional practices even if approved by a political entity, and suggested that these regional practices have the support of engineering analysis followed by a trial period.

After careful consideration of the comments, OSHA has determined that information on and evidence of recognition of regional practices should be considered to be "other tabulated data" on the practices in question, and, therefore, must meet the prescribed criteria required in the standard in order to be acceptable for use.

OSHA disagrees with the comment that these local practices should be subject to the variance procedure before they are recognized. The Agency notes that the criteria for "other tabulated data" will provide sufficient assurance that these regional practices will protect workers. The Agency also disagrees with the comment that non-uniform standards and practices could lead to on site conflict and misunderstanding. OSHA has no evidence which shows the recognition of other local standards would cause any problems or lessen employee protection. In fact, comment on this issue indicates that compliance would be more likely if OSHA permits the use of local standards and practices with which employees and employers are already familiar.

Finally, OSHA has determined that the most expeditious way to recognize these local standards and practices is to evaluate them using the same criteria required in the standard for "other tabulated data," because that criteria will ensure adequate employee protection.

Issue 15 of the NPRM (52 FR 12295) solicited comment on allowing a greater degree of employer flexibility in the design of protective systems. In addition, OSHA requested input on the type of information necessary to ensure design adequacy.

OSHA received 13 comments on this issue, and all of the commenters expressed support for the flexibility of the proposed amendment. Several commenters (Exs. 4–5, 4–13, 4–57, 4–82, 4–102, and 4–109) noted that some employers will be irresponsible no matter what the rules are. Four commenters (Exs. 4–82, 4–102, 4–106, and 4–109) also recommended that OSHA not specify factors to be considered in a design, but require instead that the designs be in accordance with accepted engineering practice.

Other commenters, in addition to supporting the flexibility allowed by the proposal, suggested several factors which should be included in the design of protective systems, in addition to soil tests and results, intended or expected load conditions, environmental considerations, and design limitations listed by OSHA in the proposal. These additional factors include the extent of vibration and depth of excavation (Ex. 4–105); surcharge, depth, and vibration (Ex. 4–17); and ground water elevations, materials specification, required monitoring devices, and dewatering requirements (Ex. 4–37). Another commenter (Ex. 4–28) suggested that such designs be made by a qualified engineer, using the criteria listed in the issue, and that such designs be available at the job site. The commenter also recommended that OSHA not recognize standard practices for trenches deeper than 20 feet.

Two commenters (Exs. 4–17 and 4–101) recommended dropping "qualified persons" from the standard. One of the commenters (Ex. 4–17) recommended the use of a registered professional engineer while the other (Ex. 4–101) used the term "qualified engineer" in its comment. Both recommended that OSHA require the same design specifications that are required for manufactured systems.

The last commenter (Ex. 4–115) supported the flexibility of the proposal and noted that it could eventually save millions of dollars.

After careful consideration of the comments received, OSHA has determined that employers should have some flexibility in choosing a protective system for employees, but notes that, as discussed under Issue 2, original design will now require the approval of a registered professional engineer. The Agency has also determined that specific information should be included on the design, in order to provide a minimum degree of safety, and additional guidance should be provided by the system designer to employers concerning the use proper of the design.

Therefore, in regard to this issue, OSHA promulgates the standard as revised.

*Section 1926.650 Scope, Application and Definitions Applicable to this Subpart*

Section 1926.650(a) states that this subpart applies to all open excavations made in earth surfaces and that excavations are defined to include trenches. Whenever the word "excavation" is used in the final standard, it applies to all excavations, including those also falling within the definition of a trench.

In the preamble of the proposed rule OSHA included a statement intended to clarify the Agency's jurisdiction with regard to excavations which fall under the authority of other Federal agencies. The statement noted that OSHA jurisdiction does not apply to working conditions which fall under the statutory authority of other Federal agencies to prescribe or enforce occupational safety or health regulations, if that authority is being exercised. This statement was directed primarily at excavations (surface mines) covered by the Mine Safety and Health Administration (MSHA), because MSHA does prescribe and enforce comprehensive regulations intended to ensure worker safety and health.

Almost half of the total number of comments received during the comment period were sent by companies involved in excavations related to natural gas pipelines. About 75 percent of these comments (e.g., Exs. 4–6, 4–8, and 4–14) expressed concern with two of the proposed paragraphs, § 1926.651(g)(1)(iii), hazardous

atmospheres, and § 1926.651(g)(2)(i), emergency rescue equipment. In general, these commenters stated that the proposed hazardous atmospheres provision was preempted by an existing Office of Pipeline Safety (OPS) (of the Department of Transportation) regulation which directly addresses the same subject. In addition, these commenters also stated that the proposed regulation for emergency rescue equipment was not appropriate for situations dealing with the repair or replacement of natural gas pipelines, since these were routine operations performed by trained personnel and not "emergencies" as understood in normal construction operations.

Other commenters however, asserted that the OSHA excavation regulations are preempted in their entirety by OPS regulations, even though those regulations provide very little guidance in the area of employee safety. OSHA raised this subject as an issue in the hearing notice (53 FR 5280) and received several comments (Exs. 8–11, 8–12, 8–13 and 8–17) and hearing testimony (Tr. 8/19/88 pp. 84–105) in response.

Whether an OSHA standard is preempted by a regulation of another agency, such as OPS, will depend on the nature and scope of that regulation, and the degree to which it regulates a working condition. For example, in *Columbia Gas of Pennsylvania, Inc.* v. *Marshall*, 636 F.2d 913 (3rd Cir., 1980), the U.S. Court of Appeals for the Third Circuit determined that existing paragraph (v) of § 1926.651, which required atmospheric testing in a trench where gaseous conditions are possible, was preempted under section 4(b)(1) of the OSH Act by an OPS regulation (49 CFR 192.751), which, in the Court's words, "envisions the working conditions faced by petitioner's employees" (636 F.2d at 916) in the trench. Where another Agency issues and enforces regulations covering a particular working condition involving employee safety, OSHA cannot enforce its own standard which would otherwise cover that working condition. However, the other agency's regulation will be preemptive of OSHA only insofar as it constitutes an exercise of statutory authority over employee safety and health. It should be noted that although OSHA does not concur with much of the court's rationale on the scope of preemption in Columbia Gas, the Agency acknowledges that current OPS regulations may well have a preemptive effect over some provisions of this final OSHA standard on excavations.

In considering the appropriate treatment of the preemption question, however, it must also be recognized that other agencies such as OPS may choose to revise or even revoke their regulations, and such actions would clearly affect the scope of any preemption. Were OPS to revoke a regulation which preempts an OSHA standard, OSHA authority would no longer be preempted with regard to the specific working condition. For these reasons, OSHA does not believe it appropriate to address preemption directly in the text of this final excavation standard. OSHA believes that preemption is more appropriately addressed in the enforcement context, in which specific claims of preemption can be evaluated and decided.

Section 1926.650(b) lists and defines all major words used in the Final Rule. Many of the definitions are the same as those in the existing standard and the proposed revision. Others have been revised based on the record, and these changes will be discussed below as appropriate.

Section 1926.650(b) defines "accepted engineering practices" as "those requirements which are compatible with standards of practice required by a registered professional engineer."

The existing definition, found in § 1926.653(a), has been in use since the standard was first promulgated in 1971, and reads as follows: "Those requirements or practices which are compatible with standards required by a registered architect, a registered professional engineer, or other duly licensed or recognized authority."

That definition was revised in the proposal to clarify its meaning, at the suggestion of the ACCSH, and also as suggested in the industry sponsored workshops (Ex. 2–26) discussed above. The proposed definition read as follows: "Those requirements which are compatible with standards of practice required by a registered professional engineer or other duly-licensed or recognized authority."

Prior to the publication of the proposed revision, OSHA received other suggestions concerning this definition. These included: dropping the words "other duly-licensed or recognized authority" because they are unclear and imply something broader and less demanding than the standards required by engineers; limiting "accepted engineering practices" to the standards of practice required by a registered professional engineer, not just compatible with those standards of practice; and defining accepted engineering practices as those described in published literature, such as a textbook.

OSHA received six comments on this definition and on the suggestions set forth above. Four commenters (Exs. 4–82, 4–102, 4–106, and 4–109) recommended retaining the words "compatible with" in the definition, and objected to defining accepted engineering practices as those described in published literature, because that source is ambiguous. Two commenters, Granite Construction and the Associated General Contractors (AGC) of California (Exs. 4–28 and 4–106), agreed with the suggestion to drop the words "or other duly-licensed or recognized authority" because of the ambiguity of the terms. Finally, the National Institute for Occupational Safety and Health (Ex. 4–30) suggested that OSHA provide examples of "other duly licensed or recognized authority," for clarification purposes.

Based on the above discussion and the Agency's desire to provide clear guidance to employers, OSHA is revising the definition to remove the phrase "or other duly licensed or recognized authority," which is ambiguous and confusing. However, the Agency is not adopting the suggestion to define these practices as those described in published literature because, as discussed above, doing so would add further ambiguity.

Section 1926.650(b) defines "aluminum hydraulic shoring" as "a pre-engineered shoring system comprised of aluminum hydraulic cylinders (crossbraces) used in conjunction with vertical rails (uprights) or horizontal rails (walers). Such a system is designed specifically to support the sidewalls of an excavation and prevent cave-ins." This new definition is included to clarify the provisions of the new Appendix D (Aluminum Hydraulic Shoring for Trenches) discussed in detail later in this preamble.

Section 1926.650(b) defines "bell-bottom pier hole" as "a type of shaft or footing excavation, the bottom of which is made larger than the cross section above to form a belled shape." The definition for this term replaces the definition for a similar term, "belled excavation" found in existing § 1926.653(d). Although defined, the term "belled excavation" is not used in the existing standards. Instead, the term "bell-bottom pier hole" is used in existing § 1926.652(f). OSHA proposed a new definition of "bell-bottom pier hole" to replace the term "belled excavations", in order to make the standard consistent.

The proposal defined "bell-bottom pier hole" as "a type of shaft or footing excavation, a portion of which is made larger than the cross section above to form a belled shape." OSHA received three comments on this definition. CAL/OSHA and the Associated Builders and Contractors Inc. (ABC) (Exs. 4–4 and 4–78) suggested the definition should read "the bottom of which" not "a portion of which", since that more accurately describes the situation. The other commenter, Talbert Corporation (Ex. 4–72), suggested a completely revised definition in conjunction with a new section on excavation of pier holes. The commenter's suggestions are discussed in detail under Issue 13 abcve. OSHA has determined that the amendment suggested by CAL/OSHA and ABC presents a more accurate description of the defined conditions.

Section 1926.650(b) defines "benching" as "a method of protecting employees from cave-ins by excavating the sides of an excavation to form one or a series of horizontal levels or steps, usually with vertical or near-vertical surfaces between levels." This term is not used in the existing standard and therefore was not previously defined. The definition in the final rule is virtually identical to the proposal, except that the word "from" has been substituted for "against," based on a general comment made by the ACCSH (Tr. 8/5/87, p. 448). No other comments were received on this definition.

Section 1926.650(b) defines "cave-in" as "the separation of a mass of soil or rock material from the side of an excavation, or the loss of soil from under a trench shield or support system, and its sudden movement into the excavation, either by falling or sliding, in sufficient quantity so that it could entrap, bury, or otherwise injure and immobilize a person." The existing standard did not use or define the term "cave-in," but used the terms "moving ground" and "hazardous ground movement" instead. However, neither of these terms was defined in the existing standard. In order to eliminate this deficiency and resolve the confusion as to what these terms mean, OSHA proposed to eliminate these two terms and replace them with a definition of "cave-in," which would accurately convey the intended concept of the hazard by describing the mechanism of the hazard and its results. The proposed definition stated that cave-in means, "The separation of a mass of soil or rock material from the side of the excavation and its sudden movement into the excavation, either by falling or sliding, in sufficient quantity so that it could entrap, bury, or otherwise injure and immobilize a person."

OSHA received two comments and an ACCSH recommendation (Tr. 8/5/87, pp. 449–450) on this definition. Both the ACCSH and the Building and Construction Trades Department of the AFL–CIO (Ex. 4–17) noted that the definition did not cover the loss of soil from under a shield or support system. The Agency agrees that the hazard noted by the commenters needs to be addressed and has revised the final rule to reflect this input. The Carolinas Branch of the Associated General Contractors of America (CBAGC) (Ex. 4–54) supported the proposed definition of cave-in, but recommended that the term "hazardous moving ground" be retained and properly defined. However, CBAGC did not suggest a definition for "hazardous moving ground" and did not explain the rationale for recommending the inclusion of another term which has a similar if not identical meaning to "cave-in." Therefore, with regard to this recommendation, the Agency declines to act.

Based on the above discussion, OSHA promulgates this definition as revised.

Section 1926.650(b) defines "competent person." This definition is identical to the definition in § 1926.32(f) of subpart C of the current Construction Safety and Health Standards. The term is used throughout existing subpart P, but was not defined within the subpart, and there were no references to the existing definition in subpart C. In the proposal, OSHA added the definition to subpart P to help those using the standard. In addition, an explanatory note was added at the end of the definition in order to clarify the Agency's intent that the "competent person can act as the employer's designee for the purpose of choosing a protective system from the options provided in § 1926.652 (b) and (c) below, but cannot take an original design responsibility allowed by § 1926.652 (b)(3), (c)(3) or (c)(4), unless otherwise qualified."

Although the definition of "competent person" in § 1926.650 has not been changed from the proposal and is the same as that in existing § 1926.32, it is important to note that what constitutes a "competent person" depends on the context in which the term is used. In order to be a "competent person" for the purposes of this standard one must have had specific training in, and be knowledgeable about, soils analysis, the use of protective systems, and the requirements of this standard. One who does not have such training or knowledge cannot possibly be capable of identifying existing and predictable hazards in excavation work or taking prompt corrective measures.

The Agency received only one comment on the actual definition. The Michigan Department of Labor (Ex. 4–46) recommended dropping the term from the standard and making a reference to either "qualified person or qualified engineer." OSHA declines to act on this suggestion. The "competent person," as defined, is the appropriate person to use whenever an assessment of working conditions must be made with respect to safety. By definition, a competent person is capable of recognizing hazards and has the authority to correct them. By contrast, a "qualified" person or engineer, as defined in § 1926.32(l) might have more technical expertise, but would not necessarily have expertise in hazard recognition or the authority to correct identified hazards.

OSHA did receive input from the ACCSH (Tr. 8/5/87, p. 450) concerning the explanatory note at the end of the definition. The ACCSH recommended deleting "or otherwise qualified" from the note because it is ambiguous and there is no other way to be qualified to develop original designs unless the person is a registered professional engineer. The Agency recognizes the potential confusion that could result if the note remained, and has decided to delete the explanatory note from the Final Rule.

Section 1926.650(b) defines "cross braces" as "the horizontal members of a shoring system installed perpendicular to the sides of the excavation, the ends of which bear against either uprights or wales." This definition is identical to the proposed definition, and replaces the existing definition "braces (trench)." In the proposal, the term "stringers" was dropped from the current definitions and replaced with the term "wales." The existing standard defines "wales" and "stringers" identically as "the horizontal members of a shoring system whose sides bear against the uprights or earth." OSHA believes use of the term "wales," which is more consistent with industry terminology, would improve the definition of "cross braces."

The Agency received no comment on this definition, and therefore, promulgates this definition as proposed.

Section 1926.650(b) defines "excavation" as "any man-made cut, cavity, trench, or depression in an earth surface, formed by earth removal." The existing definition in § 1926.653(f) defines "excavation" as "any man-made cavity or depression In the earth's surface including its sides, walls, or

faces, formed by earth removal and producing unsupported earth conditions by reason of the excavation. If installed forms or similar structures reduce the depth-to-width relationship, an excavation may become a trench." In the proposal, the definition was revised to read "any man-made cut, cavity, trench, or depression in an earth surface, formed by earth removal, and producing unsupported earth conditions (sides, faces)."

OSHA received two comments (Exs. 4–17 and 4–91) on the definition, and a recommendation from the ACCSH (Tr. 8/5/87, p. 451–52). All the commenters recommended removing "and producing unsupported earth conditions (sides, faces)," because the phrase is confusing and is not necessary to the definition. The Agency agrees that this phrase could cause confusion and, therefore, promulgates this definition as revised.

Section 1926.650(b) defines "faces" or "sides" as "the vertical or inclined earth surfaces formed as a result of excavation work." This definition and the proposed definition are identical to existing § 1926.653(k), except that the term "walls" was dropped from the standard. The Agency received no comments on this definition and therefore promulgates it as proposed.

Section 1926.650(b) defines "failure" as "the breakage, displacement, or permanent deformation of a structural member or connection so as to reduce its structural integrity and its supportive capabilities." This definition is intended to apply to protective systems and to the members and connections of protective systems, where applicable. Use of the concept of "failure" introduces a measure for the performance of protective systems, their members, and their connections. Such a measure is not present in the existing standard. This concept will help clarify the intent of the standard and the duty of employers to provide adequate protective systems.

There is no definition of failure in the current standard. In the NPRM, OSHA proposed to define "failure" as "the breakage, displacement, or permanent deformation of a structural member or connection as to affect its supportive capabilities." The Agency received two comments on this definition. The Building and Construction Trades Department of the AFL–CIO (Ex. 4–17) merely noted that this was a narrow structural definition. However, CAL/OSHA (Ex. 4–4) suggested revising the definition to read "so as to *reduce* its *structural integrity* and its supportive capabilities" (emphasis added). The commenter felt the revision was necessary to explain more fully what constitutes failure. The Agency believes this revision will help clarify the regulatory intent and therefore promulgates this definition as revised.

Section 1926.650(b) defines "hazardous atmosphere" as "an atmosphere which by reason of being explosive, flammable, poisonous, corrosive, oxidizing, irritating, oxygen deficient, toxic, or otherwise harmful, may cause death, illness, or injury." This definition is identical to the proposed definition, which was taken, with some modification, from the definition of "hazardous substance" in existing § 1926.32(k).

OSHA received seven comments on this definition (Exs. 4–21, 4–23, 4–31, 4–40, 4–42, 4–78, and 4–86). All commenters recommended removing the word "irritating" from the definition because irritating and hazardous are different. The Agency disagrees with these commenters because irritating substances can incapacitate employees to a point that would hamper escapeduring an emergency, or cause employees to rush jobs, thereby increasing the likelihood of mistakes and accidents. For example, OSHA notes that it is not uncommon to encounter hydrogen sulfide in excavations. This substance is anirritant at very low concentrations, deadens the sense of smell at or below 100 parts per million, and can be lethal in a very short time at concentrations of 400 parts per million or less. Therefore, OSHA declines to make the requested revisions and promulgates this definition as proposed.

Section 1926.650(b) defines "kickout" as "the accidental release or failure of a cross brace." This definition is identical to the proposed definition, which was taken from existing § 1926.653(i) with some modification. This definition was changed by substituting the new term "cross brace" for the current term "brace," and by dropping reference to the term "shore." The first change was made for purposes of consistency in the use of terms. The second change was made in order to clarify the definition. The term "shore," as used in the current definition of "kickout," is not defined. However, in accordance with accepted industry terminology, a "shore" is considered to be a vertical member, such as a post, or as defined in the current standard, an "upright." It is not OSHA's intention, however, to define "kickout" as failure of any vertical member. Therefore, use of the term "shore" was dropped in the proposed revisions of "kickout."

OSHA received no comment on this proposed revision and, therefore, promulgates this definition as proposed.

Section 1926.650(b) defines "protective system" as "a method of protecting employees from cave-ins, from material that could fall or roll from an excavation face or into an excavation, or from the collapse of adjacent structures. Protective systems include support systems, sloping and benching systems, shield systems, and other systems that provide the necessary protection." This term is not defined in the existing standard. References were made throughout the proposal to "protective systems." The approach taken in the proposed standard was to classify, under the term "protective system," all systems and methods of protecting employees from the hazards set forth in the definition.

OSHA received two comments (Exs. 4–17 and 4–91) and input from the ACCSH (Tr. 8/5/87 p. 456) recommending that "against cave-ins" be changed to "from cave-ins." The Agency agrees with this change and, therefore, promulgates this definition as revised.

Proposed § 1926.650(b)(13), which defined "qualified engineer" and proposed § 1926.650(b)(14), defining "qualified person," have both been deleted from the final rule. The rationale for these deletions were discussed in detail above, under Issue 2. Although the Agency received other comments on this definition, the points raised are more pertinent to other parts of the standard and will be discussed in the appropriate section of this preamble below.

Section 1926.650(b) of the Final Rule defines "ramp" as "an inclined walking or working surface that is used to gain access to one point from another, and is constructed from earth or from structural materials such as steel or wood." This definition is basically identical to proposed § 1926.650(b)(15) except for an editorial revision, moving "that is" from before "constructed" to before "used." The Agency received no comment on this definition and, therefore, promulgates this definition as revised.

Section 1926.650(b) of this Final Rule defines "registered professional engineer" as "a person who is registered as a professional engineer in the state where the work is to be performed. However, a professional engineer, registered in any state is deemed to be a 'registered professional engineer' within the meaning of this standard when approving designs for 'manufactured protective systems' or 'tabulated data' to be used in interstate commerce."

This definition is similar to the definition recommended by the ACCSH

(Tr. 8/5/87 p. 466) which was also proposed in the Notice of Informal Public Hearing (53 FR 5281). However, OSHA is deleting language from that definition which becomes unnecessary because the Agency intends to rely on state registration of professional engineers to demonstrate that the person approving designs is, in fact, qualified. In addition, the Agency is providing an exception to the requirement that a registered professional engineer within the meaning of this standard be licensed in the state in which work is being performed. A professional engineer registered in any state (as defined in section 3(7) of the OSH Act) who designs support systems, shield systems, or other protective systems that are to be manufactured and used in interstate commerce, or who prepared "tabulated data" to be used in interstate commerce, is deemed to be a "registered professional engineer" within the meaning of this standard. To limit such work to engineers licensed in the state in which the work is being performed would unduly burden the manufacturers of protective systems and may be counterproductive to employee safety. Moreover, the possibility of product liability actions if manufactured systems fail should assure that "manufactured protective devices" and "tabulated data" of general applicability will be designed prudently. The incentive to design manufactured systems safely to avoid such lawsuits is an adequate substitute for the incentive of an in-state engineer to avoid risking his or her professional license.

Section 1926.650(b) defines "sheeting" as "the members of a shoring system that retain the earth in position, and in turn are supported by other members of the shoring system." This definition contains some wording from the current definition of "sheet pile" (§ 1926.653(i)). The definition for "sheet pile" has been dropped since the term is not used in the final standard. "Sheeting" is a broader term. It includes all special types of sheeting, including sheet piles, where the purpose is to retain earth in position.

In the proposal, § 1926.650(b)(16) defined "sheeting" as "the members of a shoring system such as dimensional lumber uprights, plywood, or other materials that are driven or placed in contact with the earth, usually in a vertical position, for the purpose of retaining the earth in position and in turn being supported by other members of the shoring system."

OSHA received three comments on this definition and input from the ACCSH. Two commenters (Exs. 4–17 and 4–91) and the ACCSH (Tr. 8/5/87 p. 741) recommended deletion of "such as dimensional lumber uprights * * * for the purpose of * * *" The only other commenter (Ex. 4–111) noted that the standard did not include directions on the use of plywood, but made no suggestion as to what those directions should be.

The Agency has determined that the recommended deletion is appropriate, as the examples cited could give the false impression that only wood was acceptable as sheeting. The proposed definition contained the phrase "or other materials," in recognition of other equally effective materials, such as steel sheeting, but the Agency understands that the definition, as phrased, could be misinterpreted, and has made the recommended deletion.

In addition, the Agency recognizes that the standard does not include directions for the use of plywood, but notes that the use of tabulated data for protective systems which utilize plywood sheeting, or a design prepared by a registered professional engineer utilizing plywood sheeting, is acceptable under the standard. Additionally, OSHA does not believe it is necessary to provide directions for all variations of protective system design.

Therefore, based on the above discussion the Agency promulgates this definition as revised.

Section 1926.650(b) of the Final Rule defines "shield" as follows:

> A structure that is able to withstand the forces imposed on it by a cave-in and thereby protect employees within the structure. Shields can be permanent structures or can be designed to be portable and moved along as work progresses. Additionally, shields can be either premanufactured or job built in accordance with § 1926.652(c)(3) or (c)(4). Shields used in trenches are usually referred to as "trench boxes" or "trench shields."

The definition replaces existing § 1926.653(p) which defines "trench shield" as "a shoring system composed of steel plates and bracing, welded or bolted together, which support the walls of a trench from the ground level to the trench bottom and which can be moved along as work progresses," and it replaces the proposed definition § 1926.650(b)(17) which defined "shield" as:

> A structure that normally will not prevent a cave-in, but is able to withstand the forces imposed on it by a cave-in and thereby protect employees within the structure. Shields can be permanent or can be designed to be portable and moved along as work progresses. Additionally, shields can be either premanufactured or job-built, in accordance with § 1926.652 (c)(3) or (c)(4). Shields used in trenches are usually referred to as "trench boxes" or "trench shields."

The concept of a shield, as used in both the proposed and final standards, is different from the concept of a shield as defined in the existing standard. The major difference however, is the manner in which shields are defined with respect to how they provide protection. Unlike the current standard, the proposed and final standards do not refer to shields as devices which provide protection to employees by supporting the sides of an excavation and thereby preventing cave-ins. Instead shields generally do not prevent cave-ins, but, rather, protect employees from cave-ins that do occur. They provide a limited but safe, sheltered space in which employees work. In addition, the new definitions do not place any limits on the material from which a shield may be constructed.

Shields are one of several types of protective systems that may be used to guard employees from cave-ins and other hazards. Some shields are designed to be expandable. Once in place they can be altered such that their faces are pressed against and actually begin to support the sides of the excavation. In this configuration, depending on the degree of support provided, such a device may also be considered a support system.

OSHA received three comments and input from the ACCSH on this definition. Two commenters (Exs. 4–17 and 4–91) and the ACCSH (Tr. 8/5/87 p.474) recommended deletion of the phrase "normally will not prevent a cave-in but" because they felt the language was gratuitous and misleading. The third commenter (Ex. 4–111) suggested that the definition should read "not designed to prevent a cave-in." The Agency disagrees with the suggestion that shields are not designed to prevent a cave-in, and notes that some shields, in fact, are designed to be expandable, and can support the sides of excavations. On the other hand, the Agency agrees with the ACCSH and the other two commenters that the language noted above could be misleading and unnecessary and therefore, deleted this phrase. However, the Agency declines to delete the sentence stating that a shield could be either premanufactured or job-built, as recommended by ACCSH (Tr. 8/5/87 p. 474) and two commenters (Exs. 4–17 and 4–91). OSHA assumes the commenters opposed to this part of the definition interpreted this sentence as giving total discretion to employers in regard to job-built shields. However, the Agency's regulatory intent is that job-built shields must be built in

accordance with the options provided in § 1926.652(c)(3) and (c)(4). The Final Rule has been revised to clarify this point.

Section 1926.650(b) of the Final Rule defines "shoring" (shoring system) as "a structure such as a metal hydraulic, mechanical, or timber shoring system that supports the sides of an excavation and which is designed to prevent cave-ins." This term is not defined in the existing standard, even though it is extensively used. The final definition is almost identical to the proposed definition in § 1926.650(b)(19), except that "metal hydraulic" shoring is included in the Final Rule, as recommended by the only commenter (Ex. 4–114). OSHA agrees that "metal hydraulic" shoring is used extensively and should be included in the definition as an example.

Section 1926.650(b) of the Final Rule defines "sides" by referring the reader to the definition of "faces."

Section 1926.650(b) of the Final Rule defines "sloping" (sloping system) as "a method of protecting employees from cave-ins by excavating to form sides of an excavation that are inclined away from the excavations as to prevent cave-ins. The angle of incline required to prevent a cave-in varies with differences in such factors as the soil type, environmental conditions of exposure, and application of surcharge loads." This definition is virtually identical to the proposed definition, except that "against cave-ins" was changed to "from cave-ins" as recommended by the ACCSH.

The definition of "slope" found in existing § 1926.653(1) was not used in the proposal because the concept in that definition was not applicable in the proposed standard. The existing definition states that "slope" means "the angle with the horizontal at which a particular earth material will stand indefinitely without movement."

The proposed and final definitions of "sloping" both address a broader concept of employee protection by referring to "systems" or "methods" of protection which prevent cave-ins. The definitions recognize that the slope or multiple slopes used in a sloping system can vary with the soil types involved and site conditions.

OSHA received one comment (Ex. 4–46) on this definition, other than the editorial comment by the ACCSH. The one commenter recommended that "sloping" should be called "angle of repose" and that OSHA should include a definition for "underpinning." OSHA disagrees with the suggestion to use the term "angle of repose" for the reasons discussed above in the section entitled "Problems with the Existing Standard." The Agency also declines to define the term "underpinning," because the Agency believes the term is already readily understood by the construction industry.

Section 1926.650(b) of the Final Rule defines "stable rock" as natural solid mineral material that can be excavated with vertical sides and will remain intact while exposed. Unstable rock is considered to be stable when the rock material on the side or sides of the excavation is secured against caving-in or movement by rock bolts or by another protective system that has been designed by a registered professional engineer.

The proposed definition of "stable rock," in paragraph (b)(21), was similar except that it did not use the phrase "natural solid mineral material" and the second sentence of the definition was an explanatory note; and design by a "qualified engineer or a qualified person" was permitted. There was no definition for rock or rock conditions in the existing standard. Reference was made to rock in the existing standard in the footnotes to Table P–2, "Trench Shoring—Minimum Requirements." The footnotes stated that "Shoring is not required in solid rock, hard shale, or hard slag."

It is recognized in the industry that excavations in rock normally do not present a cave-in hazard because of the inherent stability of rock, and the ability of rock to carry loads. However, rock varies to a great extent in its ability to remain intact while exposed, just as soil does. There are conditions that are found in some rock formations, such as fractures and seams of less stable material, that can present serious hazards. When such conditions are encountered in rock, such as shale which contains layers of clay, the rock cannot be considered stable.

The proposed definition for "stable rock" was developed from the definition that was proposed by the National Bureau of Standards (NBS) at the above discussed workshops. Originally, NBS used the term "unfractured rock," instead of "stable rock." However, many comments were made that it is impossible to excavate any rock without fracturing it in some way. The Construction Advisory Committee suggested that the definition be changed to "stable rock" (Ex. 2–8, p. 356). This recommendation was incorporated into the NBS definition.

Unstable rock, i.e. rock that cannot be excavated with vertical sides and remain intact while exposed, can be made stable if a proper system is used to support the excavation side. A note to this effect was placed at the end of the proposed definition of "stable rock" to alert the user to this possibility. Finally, OSHA has adopted the ASTM term "natural solid mineral matter" to define rock for clarity.

OSHA received two comments (Exs. 4–17 and 4–111) and input from the ACCSH (Tr. 8/5/87 p. 475), concerning the term "qualified person" in the proposed definition. All three commenters recommended deletion of "qualified person." One commenter (Ex. 4–17) and the ACCSH recommended changing "qualified engineer" to registered professional engineer, similar to the recommendations received on Issue 2, discussed above.

An editorial change has been made to incorporate the proposed explanatory note into the second sentence of the final definition.

Therefore, based on the record, OSHA promulgates this definition as revised.

Section 1926.650(b) of the Final Rule defines "structural ramp" as "a ramp built of steel or wood, usually for vehicle access. Ramps made of soil or rock are not considered structural ramps."

Proposed paragraph (b)(22) defined "structural ramps" as "ramps built of material other than soil or rock." The Agency received one comment (Ex. 4–106) which suggested the definition should be expanded to describe clearly a ramp of steel or wood for vehicle access. Since this is in line with the Agency's regulatory intent, the Agency agrees to amend the definition to express more clearly what OSHA considers to be a structural ramp.

Section 1926.650(b) defines "support system" as "a structure such as underpinning, bracing, or shoring, which provides support to an adjacent structure, underground installation, or the sides of an excavation." The proposed definition, paragraph (b)(23), is identical to this final definition. There is no definition of support system in the existing standard. However, examples of supporting systems are given in existing § 1926.651(f), such as "supporting system; i.e., piling, cribbing, shoring, etc., * * *" Theconcept of a support system as used in the proposed standard remained the same as in the existing standard. The definition was included to provide a more clearly defined concept.

A "support system" is one type of protective system. It should be noted that a "shoring system" is a type of support system. Support systems are more broadly defined than shoring systems to include structures that support adjacent structures or

underground facilities, whereas shoring systems are defined as systems that support the sides of an excavation.

The Agency received no comments on this definition. Therefore, the Agency promulgates this definition as proposed.

Section 1926.650(b) of the Final Rule defines "tabulated data" as "tables and charts approved by a registered professional engineer, and used to design and construct a protective system."

The definition of tabulated data in paragraph (b)(24) of the proposal did not recognize the use of local practices, and required preparation by a "qualified person" or "qualified engineer." The changes made to the Final Rule are based on the discussion of Issue 2 (qualified person/qualified engineer) and Issue 14 (regional practices). In addition, OSHA received two comments (Exs. 4–17 and 4–111) and input from the ACCSH (Tr. 8/5/87 pp. 475–76). All of these commenters recommended dropping "qualified person," and two commenters (Ex. 4–17 and the ACCSH) supported changing "qualified engineer" to "registered professional engineer."

The Agency believes that most tabulated data provides the flexibility necessary to make minor adjustments to the protective system without requiring the approval of an engineer provided those changes do not exceed the designlimitations of the data. The OSHA Tables in Appendix C, for example, provide flexibility by permitting two or more shoring configurations, in most case, for given site conditions. This allows the employer to choose the configuration that best fits the particular circumstances. Flexibility also is provided in that the spacing prescribed by some tabulated data is normally the maximum spacing permitted. Of course, an employer can always decrease the spacing of members and still be in compliance. For example an employer, using a configuration that allows a maximum horizontal spacing of six feet for uprights, could encounter a situation where the positioning of an upright at a six foot interval is not feasible due to an obstruction. In this situation, the employer could decrease the spacing for that upright or set of uprights whatever is necessary to address the situation. This type of change is within the limitations of the tabulated data, and would not require approval of a registered professional engineer. If, on the other hand, the employer wanted to increase the spacing to 6½ feet or more, that change would exceed the design limitations of the data and would require approval by a registered professional engineer. The approval is necessary to ensure that, in the event of a cave-in, the capacity of individual components would not be exceeded resulting in a failure of the system.

Section 1926.650(b) of the Final Rule defines "trench" (trench excavation) as "a narrow excavation (in relation to its length) made below the surface of the ground. In general, the depth is greater than the width, but the width of a trench (measured at the bottom) is not greater than 15 feet (4.6 m). If forms or other structures are installed or constructed in an excavation so as to reduce the dimension measured from the forms or structure to the side of the excavation to 15 feet (4.6 m) or less (measured at the bottom of the excavation), the excavation is also considered to be a "trench."

This definition is virtually identical to the definition proposed in § 1926.650(b)(25) except that the explanatory note has been incorporated into the text of the definition. This definition remains basically unchanged from the current definition in existing § 1926.653(n). The changes that have been made are for the purpose of clarifying the definition. For example, the words "trench excavation" have been added to indicate more clearly that trenches are considered to be excavations.

A note was added to the end of the definition of the word "trench" in the proposal. The substance of the note came from the second part of the existing definition of "excavation" found in existing § 1926.653(f) and addresses depth-to-width relationships in trenches. The wording was revised to indicate more clearly how a portion of a large excavation can become a trench, for purposes of the proposed standard, as a result of creating a relatively narrow space between the side of an excavation and a structure that has been constructed in the excavation.

The proposal and the Final Rule are formatted to indicate that most of the provisions of the standards apply to all types of excavations. However, some of the provisions of subpart P apply only to excavations that are trenches. Forexample, § 1926.651(c)(2) sets forth special requirements for means of access and egress in trenches, and § 1926.652(c)(1) sets forth the option of using Appendices A and C for determining the configuration of timber shoring in trenches. Those provisions in the proposal, and now the Final Rule, that apply only to trenches are clearly indicated by use of the word "trench" within the provision.

The only input OSHA received on this point was an ACCSH recommendation (Tr. 8/5/87 p. 480–482) to state specifically that the terms "trench" and "excavation" are interchangeable. The Agency declines to adopt this recommendation because those provisions which apply or are appropriate only for trenches cannot be clearly defined if the two terms are used interchangeably. Blurring this distinction would introduce uncertainty into the standard and would not provide clear guidance to employers as to what provisions apply.

Section 1926.650(b) defines "trench box" and "trench shield" and refers the reader to the definition of "shield." OSHA received no comment on these definitions and promulgates these definitions as proposed.

Section 1926.650(b) of the Final Rule defines "uprights" as "the vertical members of a trench shoring system placed in contact with the earth and usually positioned so that individual members do not contact each other. Uprights placed so that individual members are closely spaced, in contact with or interconnected to each other, are often called sheeting." This definition is virtually identical to the proposed definition in § 1926.650(b)(28), except that the explanatory note has been incorporated into the text of the definition.

This definition revises the definition in existing § 1926.653(r). The definition was changed in the proposal to be more consistent with definitions of other shoring system members that were in the proposed standard, and to expand the concept of the term.

The term "uprights," as used in the proposed standard, referred only to vertical members used in trench shoring systems. Such uprights are usually spaced some distance apart when in position. Normally uprights are referred to as "sheeting" when they are very closely spaced, in contact with adjacent uprights, or interconnected. This definition of "uprights" is intended to clarify the application of the proposal in each of these positions.

Section 1926.650(b) of the Final Rule defines "wales" as "horizontal members of a shoring system placed parallel to the excavation face whose sides bear against the vertical members of the shoring system or earth." This definition is identical to the proposed definition in paragraph (b)(29).

Section 1926.653(s) of the current standard refers the reader to existing § 1926.653(m) for the definition of "wales." That paragraph states that "stringers" (wales) are "the horizontal members of a shoring system whose sides bear against the uprights or earth." However, the term "stringers" is also referred to in existing § 1926.650(d) as

the supports for plank steps, which is inconsistent with its definition.

OSHA addressed this problem by dropping use of the word "stringers." In the proposal, only the term "wales" was defined and used to refer to the horizontal members of a shoring system. The term "stringers" did not appear in the proposal nor does it appear in the Final Rule.

OSHA received no comment on the definition and, therefore, promulgates this definition as proposed.

For reasons to be discussed below, the following terms which are contained in the current standard are not used, and therefore need not be defined in the Final Rule: § 1926.653(b) "Angle of repose"; § 1926.653(c) "Bank"; § 1926.653(h) "Hard, compact soil"; § 1926.653(j) "Sheet pile"; § 1926.653(l) "Slope"; § 1926.653(m) "Stringers"; § 1926.653(o) "Trench jack"; § 1926.653(q) "Unstable soil"; and § 1926.653(t) "Walls."

The term "angle of repose," as defined in the existing standard, is not consistent with its use in the civil engineering field. The existing definition in § 1926.653(b) defines "angle of repose" as "the greatest angle above the horizontal plane at which a material will lie without sliding." The specific standards in existing § 1926.651(e), § 1926.651(g) and § 1926.651(h) speak of determining the "angle of repose," "excavating to the angle of repose," and flattening the "angle of repose," all of which suggest that a single "angle of repose" can be determined for any particular soil. However, in the American Society for Testing and Materials Standard D653–67, "Standard Definitions of Terms and Symbols Relating to Soil and Rock Mechanics," "angle of repose" is defined as follows:

> Angle between the horizontal and maximum slope that a soil assumes through natural processes. For dry granular soils the effect of height is negligible; for cohesive soils the effect of height of slope is so great that the "angle of repose" is meaningless.

What this essentially means is that there is no one "angle of repose" for a given type of soil, for in practice, most soils encountered have some degree of cohesion. In addition, while the "angle of repose" for granular soils is unaffected by the height of the cut, it does change in response to soil density, and in changes to environmental conditions or exposure.

The concept of "angle of repose," as used in the current standard, differs from that accepted by the civil engineering community and has led to confusion as to the meaning and intent of the standard. To eliminate this confusion, OSHA believes that use of the term "angle of repose" should not be continued. Therefore, it was not used in the proposed standard and it is not used in the final standard.

The term "bank" is defined in existing § 1926.653(c) as "a mass of soil rising above a digging level." The definition is not entirely clear in its meaning because the use of the term "digging level." The OSHRC has interpreted the term "digging level" to mean "the level at which digging is commenced" (2 BNA OSHC 1130). Under this interpretation, the sides of trenches would not be considered "banks" because the sides of trenches would be below "the digging level" rather than above it. However, the wording of existing § 1926.652(a) suggests that sides of trenches be included in the meaning of the term "bank." For example, existing § 1926.652 states:

"Banks more than five feet high shall be shored, laid back to a stable slope, or some other equivalent means of protection shall be provided where employees may be exposed to moving ground or cave-ins." The OSHRC interpretation does not conflict with the above wording. However, § 1926.652 goes on to state: "Trenches less than five feet in depth shall also be effectively protected * * *." Thus, the OSHRC interpretation is a contradiction to the wording of existing § 1926.652(a). In addition, existing § 1926.652(a) makes the statement: "Refer to Table P–1 as a guide in sloping of banks." Table P–1 is titled "approximate Angle of Repose for Sloping of Sides of Excavations." Thus, "banks" and "sides" are again equated.

OSHA is eliminating the use of the term "bank" to eliminate the problems discussed above.

The terms "hard, compact soil" and "unstable soil" were used in the existing standard to describe particular soil conditions. These terms were not used in the proposal,and are not found in the Final Rule. All soil conditions will now be defined in a completely new soil classification system which does not use the terms "hard, compact soil" or "unstable soil." (See discussion of appendix A, Soil Classification, below.)

The reasons for eliminating the definitions for "sheet pile," "slope," and "walls" have been discussed above.

The term "trench jack" was also not used in the proposed standard or in the Final Rule and needs not to be defined.

*Section 1926.651 General Requirements*

Section 1926.651 of the Final Rule contains requirements for the protection of employees against several different types of hazards of excavation-related work. The section is arranged with eleven major paragraphs, most of which are revisions of the current requirements in existing §§ 1926.650, 1926.651, and 1926.652. Changes have been made to clarify ambiguous language and eliminate redundant requirements. Some paragraphs have been reformatted to improve ease of understanding. Other revisions have been made to clarify OSHA's intentions as to the scope and application of current provisions. New requirements have been added to protect employees against known hazards where gaps in coverage currently exist.

Section 1926.651(a), "surface encumbrances," requires that "all surface encumbrances that are located so as to create a hazard to employees shall be removed or supported, as necessary, to safeguard employees." This provision is similar to the proposed provisions which required that "Trees, boulders, and other surface encumbrances that are located so as to create a hazard to employees shall be made safe or removed." The proposal noted the hazard presented by surface encumbrances, including trees and boulders, primarily arises if excavation operations undermine or otherwise cause such encumbrances to become unstable and fall or collapse onto employees. Surface encumbrances can also impede smooth traffic flow on excavation sites. The wording of the proposed requirement is essentially the same as in existing requirement § 1926.651(b).

The requirement applies to all employees involved in construction activities at the worksite. The existing paragraph includes the wording "involved in excavation work or in the vicinity thereof at any time during operations." OSHA proposed to drop this additional wording as it is redundant.

The requirement that surface encumbrances be removed or made safe "before excavating is begun" did not appear in the proposal. In many instances, it is not feasible to remove all surface encumbrances from a site before excavating is begun simply because the site is too large. The proposal required such removal but implied that this action would be taken as the surface encumbrances are encountered.

OSHA received two comments (Exs. 4–4 and 4–46), and input from the ACCSH (Tr. 8/5/87 p. 482) on this provision. The ACCSH recommended eliminating the words "trees, boulders, and other" and replacing these examples with "all." One commenter, CAL/OSHA (Ex.4–4), suggested adding

"spoil pile" to the list of surface encumbrances. The other commenter, the Michigan Department of Labor (Ex. 4–46), recommended clarifying the phrase "shall be made safe" because it is ambiguous. The Agency has determined that the ACCSH recommendation best expresses OSHA's regulatory intent and also addresses the concern expressed by one commenter. In addition, the Agency has clarified the meaning of "shall be made safe" by defining what actions the employer must take. Therefore, based on the comments received OSHA promulgates § 1926.651(a), as revised.

Section 1926.651(b) of the Final Rule specifies requirements for dealing with existing utility and other underground installations that may be encountered during excavation operations. Underground installations include all types of utility lines either in service or abandoned. They also include foundations and underground storage tanks of all kinds.

Employees may be exposed to serious hazards as a result of damage to underground installations. Flooding, shock, asphyxiation, electrocution, fire, explosion, and collapse of undermined installations are some of the hazards that result when underground installations are damaged. These hazards can be eliminated if the locations of underground installations are properly identified prior to excavation, and if such installations are properly supported or protected when excavation takes place near them.

Paragraph (b)(1) of the Final Rule requires that "The estimated location of utility installations, such as sewer, telephone, fuel, electric, water lines, or any other underground installations that reasonably may be expected to be encountered during excavation work, shall be determined prior to opening an excavation." This requirement is identical to the proposal. The proposal differed from the existing standard, § 1926.651(a), which required only that an effort be made to determine whether such installations will be encountered and, if so, where such underground installations are located.

At the suggestion of the ACCSH (Ex. 2–8, p. 358), the proposal was made more stringent than the existing rule by requiring the employer to determine the estimated location, at a minimum. OSHA believes that the revision is needed to prevent many of the accidents resulting from damage to underground installations. The proposed language was intended to insure that the effort to locate existing installations is carried to the point where, at the very minimum, an estimated location is determined.

OSHA recognizes that the existence of underground installations is not always readily apparent. However, in many locations there are features which would indicate the presence of underground installations. An example of this would be that in a housing subdivision where there are no utility poles, it could reasonably be assumed that certain utilities are underground in this situation. The proposal also recognized those situations in which underground installations are not known to exist beforehand, but can be determined through the exercise of reasonable diligence prior to excavating.

OSHA received one comment (Ex. 4–91) on this provision which supported the proposed language. OSHA also received ACCSH input (Tr. 8/5/87 pp. 483–486) which recommended removing the word "estimated" from the provision. The Agency declines to make this change, noting that it is not always possible to get an exact location of an underground utility installation prior to opening an excavation. The Agency believes that a reasonable determination of the estimated location, combined with notification of the affected utility, and a cautious determination of the exact location of the utility line when excavation approaches the estimated location, will provide adequate employee protection.

Therefore, OSHA promulgates § 1926.651(b)(1), as proposed.

Section 1926.651(b)(2) of the Final Rule requires that "Utility companies or owners shall be contacted within established or customary local response times, advised of proposed work, and asked to establish the location of the utility underground installations prior to the start of actual excavation. When utility companies or owners cannot respond to a request to locate underground utility installations within twenty-four hours (unless a longer period is required by state or local law), or cannot establish the exact location of these installations the employer may proceed, provided the employer does so with caution, and provided detection equipment or other acceptable means to locate utility installations are used."

This provision is similar to the proposal, but has been amended to clarify OSHA's regulatory intent and to address comments concerning coverage, as discussed below. The proposed provision was unchanged from the existing standard, which required, in § 1926.651(a) that "utility companies shall be contacted and advised of proposed work prior to the start of actual excavation."

OSHA received three comments and input from the ACCSH on the proposed provision. One commenter (Ex. 4–28) noted that not all underground installations are owned and operated by utility companies. OSHA agrees and has amended the final rule to reflect this point.

The ACCSH had an extensive discussion (Tr. 8/5/87 pp. 486–494) on a requirement recommended to the full committee by an ACCSH study group. This requirement would prohibit the start of an excavation until the utility company marked the exact location and depth of their underground installations. During the discussion, several participants noted the difficulty of determining the exact location of underground installations, and they related instances where detecting equipment was put on the bucket of a backhoe to locate installations that even the owners could not pinpoint. Other participants recommended differentiating between types of installation (water lines versus high voltage electrical lines) or between an excavation operation and an uncovering operation (used to locate utilities).

OSHA also received one comment from the Public Service Electric and Gas Co. (Ex. 4–89) noting the existence of "one call" programs and attesting to their effectiveness. Another commenter, NUCA (Ex. 4–91), supported the proposed provision but disagreed with any prohibition on starting work until the installation has been marked.

OSHA recognizes that some utility installations are privately owned, and has amended the Final Rule to reflect this point. The Agency also recognizes that the provision, as proposed, did not clearly require the employer to request all utility companies to establish the location of their underground utility installations. In order to clarify OSHA's regulatory intent, the Final Rule has been amended to state clearly that the employer must request the utility owner to locate the installations.

OSHA recognizes that in some cases the utility company cannot respond to contractor requests in a timely manner. The Agency notes that most "one call" or "Miss Utility" programs require a prescribed lead time, usually 24 to 48 hours prior to excavation. However, in areas with heavy construction activity, the utility company resources may not be able to respond as rapidly as desired. OSHA also notes that, for a number of reasons, the installation owner may not be able to provide an exact location. In each of these cases the employer might have to begin the work before the exact location is established. OSHA believes that, in those instances, the employer should be able to proceed with the

excavation work, provided the employer locates these utility installations using caution and using detection equipment or other acceptable means.

In the Final Rule OSHA has specified that if a utility company or owner cannot respond to a request to locate underground utility installations within twenty-four hours (unless a longer period is required by state or local law), or cannot establish the exact location of these installations, the employer may proceed, provided certain precautions are taken. The specification of waiting period has been added to the Final Rule because it is not OSHA's intent to allow an employer to proceed with excavation work absent a concerted effort to have the utility determine the exact location of its installations.

The Agency recognizes that a prohibition on starting an excavation until utility installations are located may not be practical, but believes the suggestion put forward at the ACCSH meeting, permitting the use of an uncovering operation to locate these utilities, is the correct approach in the circumstance discussed above.

OSHA believes most utility owners respond to contractor requests to locate their utility's underground installations in the interest of maintaining service to their customers, and notes the increasing use of "one call" programs to respond to these contractor requests. However, in those circumstances where the utility cannot respond or cannot identify an exact location, the Agency believes it is appropriate to prescribe a course of action for the contractor to follow.

Therefore, based on the above discussion OSHA promulgates § 1926.651(b)(2) as revised.

Paragraph § 1926.651(b)(3) of the Final Rule requires that as the excavation approaches the estimated location of underground installations, the exact location must be determined by safe and acceptable means. This requirement is similar to the proposal, which was taken unchanged from the existing standard.

OSHA received two comments (Exs. 4–17 and 4–111) and input from the ACCSH (Tr. 8/5/87 p. 492) on this provision. All commenters recommended dropping "such as probing with hand-held tools" from the proposed provision, because this could create a hazard to employees by damaging the installation or its insulation.

The Agency agrees with these comments and, therefore, promulgates § 1926.651(b)(3) as revised.

Section 1926.651(b)(4) of the Final Rule requires that "While the excavation is open, underground installations shall be protected, supported, or removed as necessary to safeguard employees."

This language is almost identical to the proposed requirement, which was intended to prevent employee injuries resulting from damage to exposed installations, contact with energized lines, the collapse of unsupported installations, and other similar hazards. The existing standard requires only that installations be properly supported, and as such is insufficient to protect employees adequately because the type of installation, its location with regard to the excavation, or other site conditions could render this type of protection infeasible or ineffective. Removal or protection of exposed installations can, at times, be more appropriate ways of protecting employees.

OSHA received one comment (Ex. 4–25) on this provision. The commenter expressed concern that use of the term "removed" presupposes or technically requires damage to the facility. The commenter suggested amending the provision to list "protected" first in the sequences, and that "altered in a manner acceptable to the facility owner" be used in place of "removed."

In response, OSHA has changed the sequence of options, because the Agency has no preference for how employees are protected in these circumstances, as long as the protection is adequate to ensure the safety of the employees. OSHA emphasizes that "protected" is intended to safeguard employees, not to "protect" the facility from damage. If both concerns can be addressed at the same time, so much the better, but employee protection is the primary concern.

The Agency declines to revise the provision to limit employee protection to what is acceptable to the facility owner. OSHA notes that removal or alteration of an underground installation may be necessary to provide employee protection, and this may not be considered acceptable by a facility owner. Such situations will have to be resolved between the employer and the owner, but, as discussed above, employee protection is the primary concern.

Therefore, based on the above discussion OSHA promulgates paragraph (b)(4) as revised.

Section 1926.651(c) of this Final Rule sets forth the requirements for access to and egress from excavations. Similar requirements are found throughout the existing standard in §§ 1926.650 (b), (c), and (d), 1926.651(x), and 1926.652(h). These requirements address hazards resulting from inadequate design and construction of ramps and runways and from inadequate placement of exits in trenches.

Paragraph (c)(1) specifies five general requirements for the design and construction of ramps and runways. The first of these, under paragraph (c)(1)(i), states that "Structural ramps that are used solely by employees as a means of access or egress from excavations shall be designed by a competent person. Structural ramps used for access or egress of equipment shall be designed by a competent person qualified in structural design, and shall be constructed in accordance with the design."

This provision differs substantially from the proposal, which did not differentiate between ramps used solely for employee access and ramps used for equipment. The proposed paragraph was intended to address the hazard of structural ramps collapsing under heavy vehicle or personnel load conditions because of underdesigned members or connections. In some large excavations, ramps of steel or wood are provided for vehicle access and egress. More frequently, however, earthen ramps are used. These earthen ramps are created out of material that is left in place as the excavation is made. For this reason, the word "structural" was added to clarify when design of particular ramps by a qualified individual would be necessary. In addition, the existing provision, § 1926.651(x), required ramps to be designed and constructed by a qualified person in accordances with accepted engineering practices.

However, the actual construction of ramps is usually not spoken of in terms of engineering practices. Therefore, OSHA proposed to revise the existing language to maintain this distinction. The proposed language required that structural ramps be "constructed in accordance with their design" instead of in accordance with accepted engineering practice. As noted, the proposed rule required ramps to be designed by a "qualified person, a qualified engineer or a person under the direction of a qualified engineer."

In the proposal, the current requirement for design by a "qualified person" was changed so that the language used would be consistent with other language and requirements in the proposal. OSHA requested comment and data on whether or not structural ramps used by a limited number of employees (five or fewer) should be required to be designed by a qualified individual or, alternatively, should structural ramps be a certain height

before design by a qualified individual is required?

OSHA received six comments and input from the ACCSH on this provision.

One commenter (Ex. 4–78) stated that earthen ramps should be allowed, and indicated that these would be prohibited by this provision. OSHA disagrees with this interpretation of the rule, noting that the provision applies to structural ramps only. Earthen ramps normally consist of dirt left in place during excavation, and are not required to be "designed." However, among other things, the competent person would be required to inspect these ramps to check for any hazards, as required by § 1926.651(k).

The ACCSH (Tr. 8/5/87 p.494) suggested requiring only that a "competent person," rather than a "qualified person," design structural ramps used solely by employees as a means of access or egress. Along the same lines, several of the commenters (Exs. 4–82, 4–102, 4–106, and 4–109) recommended that only ramps used for vehicle access and egress need to be designed by a qualified individual. Three commenters (Exs. 4–82, 4–102, and 4–109) recommended that design should not be required at all unless ramps are over 10 feet in height, but supplied no rationale for this recommendation. Another commenter (Ex. 4–111) recommended deleting "qualified person" from the proposed language. The sixth commenter (Ex. 4–91) recommended that the phrase "designed to prevent slipping or tripping" be added to the rule. That commenter did not specify who would develop the design.

Based on these comments, the Agency raised an issue in the hearing notice (53 FR 5281) concerning design of structural ramps. The Agency received 11 responses to this issue. Six commenters (Exs. 8–6, 8–14, 8–16, 8–18, 8–25, and 8–27) agreed with the recommendation that competent persons be allowed to design structural ramps used solely by employees. One commenter (Ex. 8–7) opposed any requirement for design unless the ramp was over 10 feet high and used for equipment. This commenter did not provide any rationale for this recommendation. Several other commenters (Exs. 8–21, 8–22, 8–26, and 8–29) objected to the use of a competent person to design structural ramps for the sole use of employees, but were unclear as to whether their objection was to having the competent person design these ramps, or whether they objected to a requirement for any design at all.

After careful consideration of the record, OSHA has determined that the proposed paragraph should be amended to address separately those structural ramps used only for employee access and those structural ramps used for vehicle and equipment access. However, the Agency declines to act on the recommendation to require the design of a ramp only if it is to be over 10 feet high. The Agency has no basis to impose a 10 foot limit since the commenters did not supply any rationale, and there are no technical reasons of which OSHA is aware that support this arbitrary limit. Therefore, OSHA promulgates § 1926.651(c)(1)(i) as revised.

Paragraphs (c)(1) (ii) through (v) of § 1926.651 address the hazards of slips, trips and falls, and replace the requirements in existing § 1926.650 (b), (c), and (d).

Paragraph (c)(1)(ii) of the Final Rule requires that "Ramps and runways constructed of two or more structural members shall have the structural members securely connected together to prevent displacement." This provision is virtually identical to the proposed rule except that the term "structural members" has replaced the term "planks" at the suggestion of the ACCSH (Tr. 8/5/87, p. 495). The Agency agrees with this recommendation because it recognizes that material other than wooden planks can serve as ramps and runways. OSHA also believes that this change will express more clearly its regulatory intent that ramps or runways constructed of two or more "members" must have these "members" securely connected together, regardless of what material these members are made.

OSHA received no other substantive comments on this provision. Therefore, based on the above discussion, OSHA promulgates § 1926.651(c)(1)(ii) as amended.

Paragraph (c)(1)(iii) of the final rule requires that "Structural members used for ramps and runways shall be of uniform thickness." This provision is virtually identical to the proposed rule, except that the term "structural members" has replaced the term "planks" at the suggestion of the ACCSH (Tr. 8/5/87, p. 495). The Agency rationale for making this change is the same as discussed above for paragraph (c)(1)(ii). The Agency received no other substantive comments on this provision. Therefore, OSHA promulgates § 1926.651(c)(1)(iii), as revised.

Section 1926.651(c)(1)(iv) of the Final Rule requires "cleats or other appropriate means used to connect runway structural members shall be attached to the bottom of the runway or shall be attached in a manner to prevent tripping." This provision is similar to the proposed rule except that "planks" has been replaced with "structural members," as discussed above, and the phrase "or other appropriate means" has been added. OSHA added the new language in recognition of other acceptable means of securing both wooden structural members and structural members made of other materials. For example, metal structural members could be bolted or clamped together to prevent separation. In addition, the Agency has deleted the phrase "or be beveled," as discussed below.

OSHA received one comment on the issue of cleats. That commenter (Ex. 72) stated that attaching cleats and beveling cleats would require additional labor, and noted that the nails used to secure the cleats to the bottom would penetrate the plank and would have to be bent over, thereby creating a tripping hazard. The commenter also argued that beveled cleats (on the top of a runway) do not provide traction and noted that he was unaware of any tripping injury caused by unbeveled cleats.

OSHA recognizes that nails used to secure cleats to the bottom of the runway could penetrate the top surface of the plank and would have to be bent over. OSHA also notes that nails that are bent over and hammered flush would not cause the problem anticipated by the commenter.

In addition, upon reevaluation of the issue of "beveled" cleats, the Agency agrees with the commenter, and is dropping the requirement for "beveled cleats" from both this provision and § 1926.651(c)(1)(v) of the final rule. This decision is in line with the existing § 1926.650(d) which requires only the use of "cleats."

Therefore, based on the above discussion, OSHA promulgates paragraph (c)(1)(iv) as revised.

Section 1926.651(c)(1)(v) of the Final Rule requires "Structural ramps used in lieu of steps shall be provided with cleats or other surface treatments on the top surface to prevent slipping." This provision is similar to the proposed rule except that it specifies "structural ramps" and recognizes the use of other surface treatments to prevent slipping. These changes were recommended by a majority of the 11 commenters on this provision (Exs. 4–21, 4–23, 4–30, 4–31, 4–40, 4–42, 4–54, 4–78, and 4–86). One commenter (Ex. 4–111) merely noted that the provision related to structural ramps. Another commenter (Ex. 4–72) suggested "beveled" be deleted for the same reasons as discussed above relating to paragraph (c)(1)(iv).

The Agency agrees with the majority of the commenters that it is appropriate to specify "structural ramp" in the context of this provision and to recognize other equally effective means

of preventing slipping. In addition, the Agency is dropping "beveled," as discussed above under § 1926.651(c)(1)(iv). Therefore, based on the above discussion, OSHA promulgates § 1926.651(c)(1)(v) as amended.

Section 1926.651(c)(2) of the Final Rule requires that "A stairway, ladder, ramp, or other safe means of egress shall be located in trench excavations that are four feet (1.22 m) or more in depth, so as to require no more than 25 feet (7.62 m) of lateral travel for employees." This provision is virtually identical to the proposed rule except that the explanatory note allowing a negotiable slope to be used as a means of egress has been deleted. This provision is similar to existing § 1926.652(h) except that the final rule recognizes ramps and other safe means of egress.

OSHA received five comments on the proposed rule, and input from the ACCSH. The ACCSH (Tr. 8/5/87, pp. 495–496) suggested deleting the explanatory note and the word "trench" from the definition, so as to require this protection for all excavations. Two commenters (Exs. 4–17 and 4–91) also recommended deleting the explanatory note because the term "negotiable slope" is too subjective. Another commenter (Ex. 4–30) suggested that OSHA define "negotiable slope," and pointed out that its personnel have observed employees using sloped areas as access to trenches with the assistance of knotted rope lines. This commenter also noted that a knotted rope line would not provide "adequate and rapid escape for more than one employee" in case of an emergency.

One commenter (Ex. 4–46) agreed with the ACCSH recommendation for inclusion of all excavations in this provision, but provided no rationale for the comment.

Another commenter (Ex. 4–53) objected to the provision in its entirety. This commenter stated that its employees do the bulk of their work on the bank, and that they do not traverse trenches at 25-foot intervals. It also raised the issue of increased compliance costs that would result if required to provide crossings every 25 feet.

After careful consideration of the record, OSHA has determined that a safe means of egress every 25 feet is necessary in trench excavations, but not in every excavation. The Agency notes that egress during an emergency in a large excavation does not pose the same problem as it would in the confines of a trench excavation.

The Agency has also determined that the explanatory note, intended to provide additional guidance, could be misinterpreted to permit the situation described by one of the commenters (Ex. 4–30) above. That is not the Agency's intent, and in order to prevent any confusion as to what is necessary to protect employees, OSHA is deleting the explanatory note from this Final Rule.

OSHA disagrees with the commenter (Ex. 4–53) who objected to this provision in its entirety, and notes that the commenter apparently misunderstood the provision. OSHA points out that this requirement is intended to provide employees working down in a trench with a safe means of escape from the trench in case of an emergency. The provision does not require a safe means of crossing (traversing) a trench at 25-foot intervals. Therefore, if the work is done outside of a trench, as stated by the commenter, and no employees are required to enter the trench (i.e., there is no exposure to cave-in hazards), this provision would not apply.

Section 1926.651(d) of the Final Rule requires that "employees exposed to public vehicular traffic shall be provided with, and shall wear, warning vests or other suitable garments marked with or made of reflectorized or high visibility material." This is virtually identical to the proposed provision, except that the word "public" has been added to clarify OSHA regulatory intent.

The proposed requirement differed from the existing requirement in § 1926.650(f). The proposal required employees to "wear" vests, whereas the current standard states the "Employees * * * shall be instructed to wear * * *" The words "be instructed to" were deleted. This change, carried over into the Final Rule, is necessary to clarify the intent of the standard.

Employees, particularly those involved in trenching work, frequently work where vehicular traffic flow is maintained in close proximity to the excavation operations. Employees may be assigned to direct traffic flow adjacent to construction sites. These employees are exposed to the hazard of being struck by such vehicles. This hazard is increased during dark or near-dark periods of the day. The provisions of this paragraph are intended to reduce this hazard.

OSHA received 13 comments on this provision. Four commenters (Exs. 4–82, 4–102, 4–106, and 4–109) argued that this provision is not appropriately located in subpart P and should be addressed in another subpart. OSHA disagrees with these commenters and notes that the specific hazards addressed by the provision are not covered adequately in another subpart. (OSHA notes that § 1926.201(a)(4), for example, only applies to flag persons.) Eight commenters (Exs. 4–21, 4–23, 4–31, 4–40, 4–42, 4–54, 4–72, and 4–86) recommended adding the word "public" to clarify the intent of the provision. OSHA recognizes that the provision, as proposed, could be misinterpreted to require all on-site employees to wear warning vests, because of exposure to on-site construction vehicular traffic. This is not OSHA's intent and, therefore, the agency is revising the provision to specifically state "public vehicular traffic."

Another commenter (Ex. 4–28) suggested revising the provision to require warning vests for all employees on foot exposed to mobile equipment or motor vehicle traffic. OSHA recognizes that almost every employee on a construction site is exposed to mobile equipment or on-site vehicular traffic at some time during the day, but does not believe all employees at a site should be required to wear warning vests. The Agency is concerned that employees be highly visible to public vehicular traffic which can be of relatively high speed and where the drivers are not aware of the presence of construction employees. These are not conditions which are common with construction traffic.

Therefore, based on the above discussion, OSHA promulgates § 1926.651(d), as amended.

Section 1926.651(e) of the final rule requires that "No employee shall be permitted underneath loads handled by lifting or digging equipment. Employees shall be required to stand away from any vehicle being loaded or unloaded to avoid being struck by any spillage or falling material. Operators may remain in the cabs of vehicles being loaded or unloaded when the vehicles are equipped, in accordance with § 1926.601(b)(6), to provide adequate protection for the operator during loading and unloading operations."

This requirement is virtually identical to the proposal, except that an explanatory note used in the proposal has been added directly to the provision. In addition, the basis for an operator exemption from this provision has been included to provide additional guidance to employers.

The proposed requirements were basically unchanged from the existing requirements in § 1926.650(h), except the words "power shovels, derricks, or hoists" were changed to "lifting or digging equipment." This change was made to make the requirements apply to all kinds of lifting or digging machines rather than be limited to those listed in the existing standard. In this way, backhoes and other such equipment are clearly included in these requirements.

In addition, the words "or unload" were added to the proposed provision. OSHA believes that the hazard to employees from loads falling during unloading is just as great as during loading.

A note within proposed paragraph (e) indicated that operators of vehicles may remain in cabs that provide adequate protection from falling loads during loading and unloading operations.

The Agency received 15 comments on this provision, including input from the ACCSH.

The ACCSH (Tr. 8/5/87, pp. 496–497) recommended deleting the explanatory note because it could cause problems, and because the hazard is covered elsewhere. OSHA declines to act on this recommendation because the note was intended to provide additional guidance to employers by making it clear that operators of vehicles meeting the requirements of § 1926.601(b)(6) may remain in the cab of those vehicles.

Two commenters (Exs. 4–17 and 4–91) suggested changing "equipped" to "designed." The Agency declines to act on this suggestion as the Agency believes that a requirement for "design" would not ensure that the cabs are unmodified. Another commenter (Ex. 4–46) suggested that the operator not be allowed in the cab of these vehicles. However, OSHA believes a requirement that the vehicles be equipped in accordance with existing § 1926.601(b)(6) provides the necessary safeguards.

Four commenters (Exs. 4–82, 4–102, 4–106, and 4–109) argued that this provision did not belong in subpart P because it is not appropriate in the excavation standard. Other commenters (Exs. 4–21, 4–23, 4–31, 4–40, 4–42, 4–72, and 4–86) recommended revising this provision so it applies only to loads of excavated materials handled by digging equipment, noting that slung loads (material, pipe, etc.) must be guided into the excavation by employees who may be underneath the load at some point. The Agency recognizes that "slung loads" may have to be guided into excavations by employees, but does not accept the argument that employees must be under the load at some point. OSHA notes that this type of load could be guided from a safe position. In those instances where a load, such as pipe, must be positioned as closely as possible to its final location, the load can be lowered into the excavation to a height where it is not suspended over any employee. From there it can be guided into its final place by an employee without the danger of the load falling and injuring that employee. OSHA, therefore, declines to revise this provision to exclude "slung" loads.

Based on the above discussion, OSHA promulgates § 1926.651(e) as revised.

Section 1926.651(f) of the Final Rule requires that "When mobile equipment is operated adjacent to an excavation, or when such equipment is required to approach the edge of an excavation, and the operator does not have a clear and direct view of the edge of the excavation, a warning system shall be utilized such as barricades, hand or mechanical signals, or stop logs. If possible, the grade should be away from the excavation." This is virtually identical to the proposal except that the explanatory note has been merged directly into the text of the paragraph.

This paragraph (f) replaces the requirement in existing § 1926.651(s) which states "When mobile equipment is utilized or allowed adjacent to excavations, substantial stop logs or barricades shall be installed."

The language of the current standard is unclear because the word "substantial" makes it difficult for employers to determine if the intent of the rule is to provide for physical barriers which will prevent mobile equipment from going over the edge into an excavation, or if the intent is for the log or barricade merely to alert an operator not to proceed any further toward the edge of an excavation. OSHA's intent in this provision is for the stop logs or barricades to serve as a reminder to the operator of the proximity of excavations.

It is OSHA's opinion that there are several effective alternatives available to protect workers in and around excavations from the danger of mobile equipment. Therefore, the requirement both clarifies when warning systems are needed and identifies the types of warning systems that are acceptable to protect vehicle operators and workers in excavations. OSHA believes that signals from observers can be used effectively for the purpose of protecting employees against the hazard in question. Signals are currently specified in other existing standards (see § 1926.601(b)(4)) as an acceptable means of guiding mobile equipment which is backing up.

OSHA notes that the words "if possible the grade should be away from the excavation" currently appear at the end of the existing paragraph. Although the language is advisory it does provide an example of a safe practice to follow in addition to the required practices. Therefore, OSHA is maintaining this language in the Final Rule.

OSHA received one comment (Ex. 4–17) and input from the ACCSH (Tr. 8/5/87, p.497). Both comments merely noted a typographical error in the document.

Therefore, the Agency promulgates § 1926.651(f) as revised.

Section 1926.651(g) of the Final Rule addresses work in hazardous atmospheres. Paragraph (g)(1) presents the introductory text for requirements related to testing and controls. This provision states: "In addition to the requirements set forth in subparts D and E of this part (29 CFR 1926.50–1926.107) to prevent exposure to harmful levels of atmospheric contaminants and to assure acceptable atmospheric conditions, the following requirements shall apply:" This is identical to the proposed rule. OSHA received no comments on this provision and, therefore, promulgates paragraph (g)(1) as proposed.

Section 1926.651(g)(1)(i) of the Final Rule requires that "Where oxygen deficiency (atmospheres containing less than 19.5 percent oxygen) or a hazardous atmosphere exists or could reasonably be expected to exist, such as in excavations in landfill areas or excavations in areas where hazardous substances are stored nearby, the atmosphere in the excavation shall be tested before employees enter excavations greater than four feet (1.22 m) in depth." This provision is identical to the proposed rule, except the sentence has been reordered to describe first when testing would be appropriate.

The proposed and Final Rule require testing for oxygen deficiency or gaseous conditions in excavations greater than four feet (1.2 m) in depth where these conditions exist or could reasonably be expected to exist. Further, the rules require that the testing be done before employees enter the excavation. This differs from the existing language in § 1926.651(v), which would appear to require that all excavations be tested regardless of employee exposure. The existing rule states: "In locations where oxygen deficiency or gaseous conditions are possible, air in the excavation shall be tested."

The definition of "confined" or "enclosed space" in existing § 1926.21(b)(6)(ii) includes "* * * open top spaces more than four feet in depth such as pits, tubs, vaults, and vessels." The four foot (1.2 m) depth requirement in proposed § 1926.651(g)(1)(i) was added to clarify where testing is required for excavations, and to be consistent with the above definition.

The existing language requiring that tests be performed "where oxygen deficiency or gaseous conditions are possible" was changed to a requirement that OSHA believes is more reasonable, but still provides appropriate employee

protection. Taken literally, the conditions listed in the existing rule are possible in any given excavation if the proper circumstances are present. However, hazardous atmospheric conditions are more likely to exist or occur in some circumstances than in other circumstances. For example, work involving the extension or maintenance of sewer utility or gas utility systems, work near refineries or near areas where petroleum distillates are handled or stored, and work near landfills or hazardous waste dumps are situations where hazardous atmospheric conditions are likely to occur (Ex. 2–8, pp. 224–226, 369–370). Atmospheres in excavations in these types of situations must be tested.

However, it is OSHA's opinion that it is not reasonable to require that all excavations be tested routinely since there is limited potential for oxygen deficiency or gaseous conditions in the vast majority of situations. Where the conditions are such that these hazards could not reasonably be expected to occur, OSHA believes that routine testing should not be required. Accordingly, the final requirement is written to reflect what OSHA believes to be a more reasonable approach to testing.

The examples cited above of areas that are more likely than not to be hazardous are not intended to be a comprehensive list. There are many unique circumstances that could result in the formation of a hazardous atmosphere in excavation-related work. An excavation that is free of hazardous atmospheric conditions on any particular day may not be safe the following day. To ensure that employees are continually protected against the development of hazardous atmospheres in excavations, OSHA is requiring in § 1926.651(k)(1) that daily inspections (not necessarily involving air testing) for evidence of potentially hazardous atmospheric conditions be conducted by a competent person. It is intended that such inspections be conducted to identify areas or situations where hazardous atmospheric conditions exist, or could reasonably be expected to exist, during the course of work. Where such areas or situations are identified, the requirements of paragraph (g) apply.

OSHA received six comments and input from the ACCSH on this requirement. Two commenters (Exs. 4–25 and 4–67) objected to the requirement for testing the atmosphere, noting that the gas industry normally tests for hazardous atmospheres. Both commenters also contended that respiratory protection or ventilation should be permitted in lieu of testing.

OSHA notes that respiratory protection or ventilation is required by § 1926.651(g)(1)(ii) of this final rule, and the requirement for testing establishes what, if any, precautions or additional precautions are necessary. If an employer chooses to provide adequate employee protection in accordance with the appropriate regulations as a matter of procedure, the failure to test would be de minimis.

One of the commenters (Ex. 4–67) also recommended extending the four-foot level to six or seven feet. OSHA, however, is not convinced that the four-foot level should be increased. OSHA points out that the four-foot level is consistent with other regulations and notes again that the testing requirement does not apply to every excavation, only to those where oxygen deficiency or hazardous atmospheres can be reasonably anticipated. OSHA believes that the requirement, as proposed, provides adequate employee protection, without being unnecessarily burdensome.

Two other commenters (Exs. 4–17 and 4–111) suggested modifying paragraph (g)(1)(i) to reorder the sentence, putting the conditions which require testing first. Some commenters (Exs. 4–21, 4–23, 4–31, 4–40, 4–42, and 4–86) indicated that this whole paragraph (g)(1), as written, implied that respiratory protection and ventilation are required at all times when hazardous, flammable, and oxygen-deficient atmospheres exist. OSHA agrees with the suggested reformatting of this provision, but disagrees with the comments that interpret this provision to require respiratory protection and ventilation at all times. The requirement specifies when the atmosphere is or could be reasonably expected to be either oxygen-deficient (less than 19.5 percent oxygen) or otherwise hazardous, then testing must be done before employees enter.

Another commenter (Ex. 4–91) supported the provision and suggested a revision reading in part: "Where oxygen deficiency [exists] * * * the atmosphere in the excavation shall be tested * * *." OSHA sees merit in defining when testing would be required to alert employers that special precautions may be necessary, and therefore has made the recommended reordering of the sentence.

The ACCSH (Tr. 8/5/88, pp. 497–507) recommended treating all excavations four feet or more in depth as confined spaces. The Agency, lacking public input on this point, raised such an issue in the hearing notice (53 FR 5281).

OSHA received 11 comments on the hearing issue, and testimony at the public hearing. Seven commenters (Exs. 8–6, 8–7, 8–14, 8–16, 8–18, 8–19, and 8–25) disagreed with the ACCSH recommendation, most of them noting that excavations are open to the air or have adequate egress. Testimony at the public hearing (Tr. 4/19/88, pp. 73–74) also opposed this recommendation.

Four other commenters (Exs. 8–21, 8–22, 8–26, and 8–29) objected to excavations four feet or deeper being considered confined spaces, but provided no rationale for their objection.

Based on the comments received, the Agency declines to act on the ACCSH recommendation that all excavations four feet or deeper be considered confined spaces. The Agency believes that testing is only necessary when there is a likelihood of hazardous conditions, and that the requirement for inspection by the competent person provides continuing assurance that hazardous conditions will be recognized and addressed appropriately. In addition, the Agency does not have any other data to support a requirement that "every" excavation be considered a confined space.

Therefore, based on the above discussion, OSHA promulgates § 1926.651(g)(1)(i) as revised.

Section 1926.651(g)(1)(ii) of the Final Rule requires that "Adequate precautions shall be taken to prevent employee exposure to atmospheres containing less than 19.5 percent oxygen and other hazardous atmospheres. These precautions include providing proper respiratory protection or ventilation in accordance with subparts D and E of this part respectively."

This provision is similar to the language of the proposed rule which was added to clarify when protection against exposure to oxygen deficiency is required, and to identify the precautions that are necessary to prevent such exposures. Oxygen deficiency is not specifically defined in the existing excavation standard. However, the existing requirements for air quality for "supplied air" in § 1910.134(d)(1) of the General Industry Standards, have been identified as applicable to the construction industry. § 1910.134(d)(1) states that "Breathing air shall meet at least the requirements of the specification for Grade D breathing air as described in Compressed Gas Association Commodity Specification G–7.1–1966." This specification, as well as § 1910.94, denotes a concentration of 19.5 percent oxygen as the lower limit

for synthesized air. Therefore, the 19.5 percent limit for oxygen was specifically identified in the proposed standard in order to be consistent with the existing requirements and to clarify when testing and protection are required.

The existing standard requires that employees subjected to oxygen deficiency be protected with approved respiratory protection as set forth in subpart D. However, the use of increased ventilation can be as effective or more effective in dealing with oxygen deficient atmospheres. Therefore, this type of protection was also identified as acceptable in the proposal.

OSHA received one comment on this provision. The commenter (Ex. 4–30) pointed out that the provision seemed to indicate that implementation of subparts D and E is only to prevent employee exposure to atmospheres containing less than 19.5 percent oxygen. The commenter pointed out that subparts D and E are also intended to prevent employee exposure to materials and substances in the Z–1 tables of § 1910.1000 and other OSHA standards.

OSHA agrees with the observation, but received no other input which indicated confusion as to the intended application of subparts D and E. However, in order to clarify its' regulatory intent, the Agency has editorily revised this provision. The Agency notes that all constuction employers must comply with subparts D and E to prevent employee exposure which exceed the prescribed permissible exposure limits.

The Agency, therefore promulgates paragraph § 1926.651(g)(1)(ii) as revised.

Paragraph § 1926.651(g)(1)(iii) of the Final Rule requires that "Adequate precautions shall be taken such as providing ventilation to prevent employee exposure to an atmosphere containing a concentration of a flammable gas in excess of 20 percent of the lower flammable limit of the gas."

This provision is identical to the proposed rule which addressed the hazards posed by the accumulation of flammable gases. The proposed standard required that adequate precautions be taken to prevent employee exposure to atmospheres containing a concentration of flammable gas in excess of 20 percent of its lower flammable limit (LFL). This differs from the existing requirement which states in § 1926.651(v): "When flammable gases are present, adequate ventilation shall be provided or sources of ignition shall be eliminated."

As stated, the existing provision requires that ventilation be provided when a flammable gas exists in any concentration or, as an alternative, that sources of ignition be eliminated. OSHA believes that this requirement is too restrictive at low concentrations of flammable gas in the atmosphere, but not restrictive enough where high concentrations exist. By setting forth a limit for the allowable concentration of flammable gas, the proposal notified employers of the level of performance required to protect employees.

OSHA received a large number of comments on this provision, primarily from employers in the natural gas industry, and input from the ACCSH.

Many commenters (for example, Exs. 4–6, 4–8, 4–14 and 4–61) pointed out that this requirement would, in effect, prevent the repair of damaged or leaking gas pipelines without turning off the gas and disrupting service to customers. Many commenters also noted that the Office of Pipeline Safety (OPS) has regulations which specifically address this type of situation. They requested that OSHA place a specific exclusion to the standard to cover these situations.

It should be noted that the U.S. Court of Appeals for the Third Circuit has determined that under section 4(b)(1) of the OSHA Act, a particular OPS regulation, 49 CFR 192.751, preempts the current requirements in paragraph (v) of OSHA's excavation standard with regard to pipeline repair. (*Columbia Gas of Pennsylvania, Inc.* v. *Marshall*, 636 F.2d 913 (3d Cir. 1980). Since paragraph (g)(1)(iii) of the revised OSHA standard covers the same working condition as existing paragraph (v), OSHA assumes that the new paragraph would also be preempted. However, OSHA declines to place a specific reference to preemption into the standard itself, as noted earlier. Indeed, if OPS were to change or revoke its regulations, pipelines might once again fall within OSHA jurisdiction. The placement of an exemption within the OSHA standard would unduly restrict the standard's coverage in such situations. Therefore, no specific exemption is being incorporated into the standard.

The ACCSH (Tr. 8/5/87, p. 507) recommended adding the words "or explosive gas or vapor" after the word flammable. The Agency declines to make this change because the term "flammable gas" is a generic term which already includes "explosive gas or vapor."

Therefore, based on the above discussion OSHA promulgate § 1926.651(g)(1)(iii), as proposed.

Section 1926.651(g)(1)(iv) of the Final Rule requires that "When controls are used that are intended to reduce the level of atmospheric contaminants to acceptable levels, testing shall be conducted as often as necessary to ensure that the atmosphere remains safe."

This provision is identical to the proposed rule. The proposed paragraph was a new requirement, added to clarify further the intention of the existing requirements for testing. Testing is not an effective method of preventing exposure to hazardous atmospheres if it is used only to detect hazardous conditions initially and then not used again. Therefore, the proposal required the employer to conduct additional testing to ensure that atmospheres remain safe whenever controls are used that are intended to reduce the levels of atmospheric contaminants to acceptable levels.

The Agency received input from the ACCSH (Tr. 8/5/87, p. 508) recommending continuous monitoring when employees are present. No other comments were received on this provision. The Agency has determined that continuous monitoring would not be appropriate in many situations. Further, even in those situations when it might be appropriate, the Agency believes it appropriate to permit the use of alternative monitoring methods which are also effective. For example, in trench situations where work is proceeding rapidly and the trench is being backfilled shortly after the work in a section is completed, installation and calibration of the continuous testing instruments may not be completed before employees move to another section. The provision is written so that adequate monitoring is required, regardless of the situation. This recognizes that in some instances continuous monitoring would be appropriate and would be required, however in other situations periodic monitoring would be more appropriate due to site conditions. Therefore the Agency declines to act on this recommendation, and promulgates § 1926.651(g)(1)(iv), as proposed.

Section 1926.651(g)(2)(i) of the Final Rule requires that "Emergency rescue equipment, such as breathing apparatus, a safety harness and line, or a basket stretcher, shall be readily available where hazardous atmospheric conditions exist or may reasonably be expected to develop during work in an excavation. This equipment shall be attended when in use."

This provision is similar to the proposed rule, which was identical to existing § 1926.651(v) except the requirement for the equipment to be "attended" was deleted in the proposal. The manner in which the word "attended" is used in the current standard implies that personnel must be

with and responsible for the equipment even when the equipment is not in use. This is not the intent of the standard, and this word was dropped in the proposal. However, it is the intent of the existing rule and the proposal that the equipment be attended while in use. Therefore, the Final Rule has been modified to make this intention explicit.

OSHA received a great many comments on this provision, primarily from companies in the natural gas pipeline industry. These commenters (for example, Exs. 4–6, 4–20, 4–66, 4–89, 4–113, and 4–117) pointed out that this regulation was inappropriate for situations involving natural gas pipeline repair or replacement, since these were routine operations performed by trained personnel and not emergencies as understood in normal construction operations. Several of these commenters (for example, Exs. 4–58, 4–112, and 4–116) noted that Office of Pipeline Safety (OPS) regulations already regulated equipment and material needed at the scene of emergencies in the gas industry.

As noted earlier, although OSHA disagrees with the rationale provided in Columbia Gas, we agree that paragraph (g)(2)(i) might well be preempted by OPS regulations, under the holding in that case. However, for reasons which have also been noted above, the Agency declines to add a specific exemption within the standard itself.

OSHA received no other input in this provision and, therefore, promulgates § 1926.651(g)(2)(i), as proposed.

Section 1926.651(g)(2)(ii) of the Final Rule requires that "Employees entering bell-bottom pier holes, or other similar deep and confined footing excavations, shall wear a harness with a life-line securely attached to it. The lifeline shall be separate from any line used to handle materials, and shall be individually attended at all times while the employee wearing the lifeline is in the excavation."

This provision is almost identical to the proposed rule, which was based on existing § 1926.652(f). In the Final Rule, OSHA clarified what was intended by "substantially" similar footing excavations.

The existing requirements in § 1926.652(f) apply only to bell-bottom pier holes. These holes are a special type of footing excavation into which employees descend to inspect the hole configuration. However, similar inspections are also necessary, at times, in similar deep and confined footing excavations that are not belled at the bottom. Employees in these excavations must be protected against the same hazards that can exist in bell-footings. Therefore the language of the proposal was changed to reflect this need.

The purpose of this requirement is to allow rapid rescue of an employee in the limited space of these special types of excavations without exposing other employees to the associated hazards. Because of the configuration and unusual depths of these types of excavations, an oxygen deficient or other hazardous atmosphere could occur very quickly, requiring rapid removal of any exposed employee.

The intent of the requirement that lifelines be "individually attended" is that while the lifeline is actually in use (attached to the employee), personnel be assigned to oversee the individual to whom the lifeline is attached.

The current standard provides that lifelines "shall be individually manned and be separate from any line used to remove materials excavated from the bell footing." The proposal revised this language to require that lifelines "shall be separate from any line used to handle materials * * *." This clarification is to indicate that the lifeline must be separate from any line used to remove or supply or otherwise handle any materials from or to the footing excavation.

OSHA received eight comments on this provision. Seven commenters (Exs. 4–21, 4–23, 4–30, 4–31, 4–40, 4–42, and 4–86) recommended deleting this provision from subpart P because, they asserted, these excavations are confined spaces and should be addressed in a confined space standard.

The Agency disagrees with these commenters concerning deleting this provision from subpart P. OSHA notes that bell-bottom pier holes and similar footing excavation require cave-in protection and other precautions related specifically to work in excavations. Consequently, it is appropriate to address these excavations in subpart P. However, this does not preclude these same excavations from being "confined spaces" which would require compliance with additional OSHA regulations (for example, § 1926.21(a)(6)). The rescue procedures required by this provision apply because of possible excavation hazards and because of possible confined space hazards. They do not apply just because of possible confined space hazards.

OSHA received another comment (Ex. 4–72) that suggested deleting this provision and promulgating another full section specifically to address bell-bottom pier holes. This recommendation is addressed in more detail earlier in this preamble in the discussion of Issue 13. Based on that discussion, the Agency declines to act on this recommendation.

Paragraph (h), "Protection from hazards associated with water accumulation," contains four provisions that address the control and removal of water from excavations. Water is present, or very likely to be present, during the course of work in many excavations. Water accumulation can result from rain or melting snow, or from leaking or damaged utilities such as water or sewer lines. Water creates muddy or slippery surfaces that expose employees to slips and falls. Rapid accumulation, such as from damaged water supply line, has even resulted in drownings (Ex. 2–9). The action of water against the sides of excavations can cause undermining and cave-ins. Accumulated water will saturate the sides of excavations and weaken them to the point where cave-ins are very likely to occur even in very shallow excavations. Further, where protective systems are in place, accumulated water can adversely affect the capacity of the systems.

The existing requirement in § 1926.651(p) states: "Water shall not be allowed to accumulate in a excavation." Taken literally, accumulated water in any amount, in any part of an excavation, violates the existing standard. However, OSHA does not intend that to be the case. At times, such as during sudden rain storms, for example, or when snow melts, OSHA realizes that it is impossible to keep some amount of water from accumulating. Additionally, in excavations which employees do not enter, but where there is accumulated water, there is no exposure to a hazard. Further, there are certain excavations, such as long trenches, where water accumulated in isolated sections would not pose a hazard if employees do not enter those sections.

OSHA proposed to revise the existing requirement to recognize that not all water accumulated in excavations poses a hazard. In addition, it is OSHA's opinion that it is not always necessary to remove all water from an excavation in which employees are expected to work. Paragraph (h)(1), as proposed, allowed employees to work in excavations in which there is accumulated water, or in which water is accumulating, but only under the circumstances where adequate precautions have been taken to protect employees against the hazards posed by water accumulation. The precautions could range from providing dewatering equipment to special cave-in protection.

Work can be conducted safely in excavations when there is accumulated water. For example, the record contains

information on a pipeline contractor who installed several miles of pipe in a trench where the water table was only three to four feet below the surface of the ground (Ex. 2–25). The work required the use of divers to place sections of pipe at depths of up to 18 feet. Employees were protected from cave-ins of the sides of the trench by the use of shields.

Depending on the amount of water, the precautions necessary to protect employees adequately will vary. Employers were alerted to this by the note following proposed paragraph (h)(1). The note identified several examples of the types of protection that might be necessary to provide an adequate level of protection. These include the use of special support or shield systems, dewatering to control the level of water, or the use of a safety harness and lifeline.

Section 1926.651(h)(1) of the final rule requires that "Employees shall not work in excavations in which there is accumulated water, or in excavations in which water is accumulating, unless adequate precautions have been taken to protect employees against the hazards posed by water accumulation. The precautions necessary to protect employees adequately vary with each situation, but could include special support or shield systems to protect employees from cave-ins, water removal to control the level of accumulating water, or use of a safety harness and lifeline."

The final provision is virtually identical to the proposal except the word "and" used in the proposed explanatory note has been changed to "or" at the suggestion of several commenters (Exs. 4–21, 4–23, 4–31, 4–40, 4–42, 4–54, and 4–86). The Agency agrees with these commenters that the word "and" could cause confusion regarding the use of options. OSHA has also reformatted this provision by including the explanatory note in the text of the provision.

The Agency also received input from the ACCSH (Tr. 8/5/87, p. 508), recommending retitling § 1926.651(h) to read: "Protection from hazards associated with water accumulation." Two commenters (Exs. 4–17 and 4–91) also suggested this change. Since the change clarifies the regulatory intent of this paragraph, the Agency has made the recommended revision. The ACCSH also recommended that OSHA require that "waterproof outerwear" be used in these situations. The ACCSH did not explain their rationale for this recommendation, and there is no other support in the record for this type of requirement. Therefore, OSHA declines to act on this suggestion.

Finally, the Agency has dropped the phrase "these conditions have been anticipated and * * *" because it added nothing to the standard. The Agency believes employees should be removed from excavations where water is accumulating unless adequate precautions have been taken, regardless of whether the water accumulation has been anticipated or not.

Based on the above discussion, OSHA promulgates § 1926.651(h)(1) as revised.

Section 1926.651(h)(2) of the final rule requires that "If water is controlled or prevented from accumulating by the use of water removal equipment, the water removal equipment and operations shall be monitored by a competent person to ensure proper operation."

This provision is identical to the proposal, which was intended to address the use of water removal equipment as a means to control the accumulation of water. The proposed rules required that such equipment be monitored by a competent person to ensure proper operation.

Water removal or control is generally undertaken to provide a dry work area. The process can also be used to contribute to improved stability of excavation sides, and it is done in emergencies when sudden inflows of water occur. When the equipment that is used to remove or control the flow of water into excavations malfunctions, hazards that were eliminated when the equipment was working can become significant.

The requirements in paragraph (h)(2) are new. The existing standard does not directly address water removal operations, however, as discussed above, it requires that water not be allowed to accumulate in excavations. The type of water removal equipment needed in any given circumstance will vary depending on the volume of water that must be removed or controlled. In a very large excavation, for example, failure of water removal equipment may affect only a portion of the area within the excavation. Therefore, the precautions to be taken will, of course, also vary in the event failure of the equipment occurs. Such precautions could involve removal of all employees to a safe area if they are all exposed. Where the problem is more isolated, only the employees in the area that are exposed to the added danger would have to be removed.

OSHA received no comment on this provision and, therefore, promulgates paragraph (h)(2) as proposed.

Section 1926.651(h)(3) of the Final Rule requires that "If excavation work interrupts the natural drainage of surface water (such as streams), diversion ditches, dikes, or other suitable means shall be used to prevent surface water from entering the excavation and to provide adequate drainage of the area adjacent to the excavation. Excavations subject to runoff from heavy rains require an inspection by a competent person and compliance with paragraphs (h)(1) and (h)(2) of this Section."

The requirement is virtually identical to the proposal, except that the explanatory note has been added to the text of the provision. The proposal was based on a minor revision of existing § 1926.651(p).

OSHA received no comment on this provision and, therefore, promulgates paragraph (h)(3) as reformatted.

Section 1926.651(i) of the Final Rule, "Stability of adjacent structures," contains three paragraphs that address the hazard of unstable structures adjacent to excavations. The collapse of unstable structures endangers employees in excavations and in the area around excavations. Structures can become unstable when excavation takes place close enough to the structures so as to reduce the ability of the soil to support them. The requirements of paragraph 1926.651(i) are intended to ensure that necessary employee protection, over and above that required by paragraph 1926.652, is provided when necessary.

Paragraph (i)(1) of the Final Rule requires that "Where the stability of adjoining buildings, walls, or other structures is endangered by excavation operations, support systems such as shoring, bracing, or underpinning shall be provided to ensure the stability of such structures for the protection of employees." The three examples of support systems generally used for this purpose—shoring, bracing and underpinning—are unchanged from the current standard. This provision is essentially the same as the proposed rule, which was unchanged from the existing standard in § 1926.651(o). However, the words "support systems" are included so that the provision is consistent with other provisions of the standard.

The Agency received no comment on this provision and, therefore, promulgates § 1926.651(i)(1) as proposed.

Section 1926.651(i)(2) of the Final Rule requires that

Excavation below the level of the base or footing of any foundation or retaining wall

that could be reasonably expected to pose a hazard to employees shall not be permitted except when:

(i) A support system, such as underpinning, is provided to ensure the safety of employees and the stability of the structure; or

(ii) The excavation is in stable rock; or

(iii) A registered professional engineer has approved the determination that the structure is sufficiently removed from the excavation so as to be unaffected by the excavation activity; or

(iv) A registered professional engineer has approved the determination that such excavation work will not pose a hazard to employees.

The first two exceptions are essentially unchanged from the existing requirements in § 1926.651(n). The third and fourth exceptions are new and were proposed in similar form because the existing standard has been interpreted by some employers to apply only to excavation at and immediately below foundations or retaining walls. However, the loads imposed on the soil from an adjacent structure are not limited to the immediate area of the structure, but also extend some distance from the structure. This distance varies with the depth of the excavation. Generally, this distance can be estimated as being equal to the depth of the excavation. Thus, a critical plane is formed sloping up from the bottom of the excavation toward the structure at an angle of 45 degrees (one horizontal to one vertical or 1H:1V). If the footing or foundation remains completely below this plane, then the conventional assumption is that it probably will not be affected by excavation operations. The possibility remains, however, that the stability of the structure could be affected in some way. Calculating the effect that excavation activity has on the soil supporting a structure is a highly complex procedure involving expertise in soil mechanics, structural analysis, judgement, and experience. While the discussion above is in terms of generalities, each circumstance must be evaluated on the specifics of the situation.

The fourth exception to the prohibition against excavating adjacent to structures recognizes that some excavation activity will not present a hazard to employees. Such a situation could occur, for example, if a building were on a continuous concrete footing, and excavation was undertaken in a very limited area below the footing. Where the footing could safely span the excavation, no instability in the structure would occur. Again, each circumstance must be evaluated on the specifics of the situation.

As discussed under Issue 2 above, the Agency has determined that these types of determinations must be approved by a registered professional engineer.

OSHA also received two comments (Exs. 4–17 and 4–111) and an ACCSH recommendation (Tr. 8/5/87, p. 509) supporting the use of a registered professional engineer. The Agency received no other comments on this provision.

Therefore, based on the above discussion, OSHA promulgates § 1926.651(i)(2) as revised.

Section 1926.651(i)(3) of the Final Rule requires that "sidewalks, pavements, and appurtenant structures shall not be undermined unless a support system or another method of protection is provided to protect employees from the possible collapse of such structures." This provision is similar to the proposed rule except that "appurtenant structures" (that is, structures attached to sidewalks and pavements) have been added because of the danger they pose when undermined.

The proposed requirement revised the existing language of § 1926.650(a) that requires shoring sidewalks to carry a minimum live load of 125 pounds per square foot. The existing requirement does not protect employees adequately because it does not cover all pavements, only "sidewalks." Loads on pavements during construction operations frequently can exceed the minimum load specified. Therefore, the proposal covered pavements as well as sidewalks. In addition, the live load specification has been changed to a more performance-oriented requirement to be consistent with the overall approach taken in this revised standard. OSHA believes that the performance language provides the employer greater flexibility in determining the most effective means of protecting employees. The Agency notes that this provision is intended to apply not only to employees in the excavation, but to employees who may be required to use the sidewalk or pavement area.

OSHA received two comments (Exs. 4–17 and 4–91) and input from the ACCSH (Tr. 8/15/87, p. 518) on this provision. All commenters recommended adding "appurtenant structures" to this provision. OSHA recognizes that "appurtentant structures" must also be supported to protect employees, and that is the Agency's intent. In order to clarify this intent, OSHA is revising the provision to state clearly that any attached structures must also be supported. In addition, one commenter (Ex. 4–17) and the ACCSH suggested moving the words "is provided" to a position after the word "protection" in order to clarify this provision. The Agency agrees and has revised this provision accordingly.

Therefore, based on the above discussion, OSHA promulgates § 1926.651(i)(3) as revised.

Section 1926.651(j)(1) of the proposed rule has been relocated and combined with § 1926.652(a) of the Final Rule because they are related provisions. This change will be discussed in more detail later in this preamble.

Section 1926.651(j) of this Final Rule is entitled "Protection of employees from loose rock or soil." Paragraph (j)(1) of the Final Rule requires that "Adequate protection shall be provided to protect employees from loose rock or soil that could pose a hazard by falling or rolling from an excavation face. Such protection shall consist of scaling to remove loose material; installation of protective barricades at intervals as necessary on the face to stop and contain falling material; or other means that provide equivalent protection."

This is almost identical to proposed paragraph (j)(2), except that the introductory language has been deleted because of the relocation of proposed paragraph (j)(1) mentioned above. In addition, the phrase "protect * * * against" has been changed to "protect * * * from" to be consistent with language suggested by the ACCSH and other commenters related to this requirement and similar requirements in other parts of this standard.

This provision addresses a hazard similar to cave-ins, although it is not of the same magnitude. Loose rock or soil can fall or roll from an excavation face and, if in sufficient volume, endanger an employee even when an adequate cave-in protective system is in place. For example, when a shield is used in conjunction with sloping, the possibility exists for material to loosen and slide down and over the top of the shield, thus endangering employees.

The existing standard, § 1926.651(j), addresses this hazard. It states: "Sides, slopes, and faces of all excavations shall meet accepted engineering requirements by scaling, benching, barricading, rock bolting, wire meshing, or other equally effective means." The proposed standard did not change the requirement other than to revise the language to improve clarity, and to remove the references to rock bolting and benching. Rock-bolting and benching are considered types of primary support systems intended to prevent cave-ins. They are not normally used to prevent material from falling into an excavation after the primary cave-in protective system is in place.

Section 1926.651(j)(2) of the Final Rule requires that "Employees shall be protected from excavated or other materials or equipment that could pose a hazard by falling or rolling into excavations. Protection shall be provided by placing and keeping such materials or equipment at least two feet (.61 m) from the edge of excavations, or by the use of retaining devices that are sufficient to prevent material or equipment from falling or rolling into excavations, or by a combination of both as necessary."

This provision is identical to proposed paragraph (j)(3), which was based on existing § 1926.651(i). The proposal was rewritten from the existing standard in more concise language.

Existing § 1926.651(i)(1) states that "* * * material shall be effectively stored and retained * * *." Similarly, in existing § 1926.651(i)(2), it is stated that "* * * the employer may use effective barriers or other effective retaining devices * * *." Interested persons have expressed concern as to what these provisions require and have indicated that they should be clarified in the proposed revision. Consequently, the proposed language of paragraph (j)(3) was written in performance-oriented language and required "the use of retaining devices that are sufficient to prevent material or equipment from falling or rolling into excavations." The duty to provide protection is clearly stated, but the employer is allowed some discretion in determining the necessary capacity of the retaining devices by use of the word "sufficient." A device is "sufficient" (and "effective") if it can be shown to be able to resist any forces that may reasonably be expected to be applied to it.

The intent of this requirement is to protect employees from materials, equipment, and spoil piles which might fall into excavations. Obviously, materials such as excavated soil and stored construction supplies can superimpose loads on the walls of an excavation. Such loads can be the cause of cave-ins and must be considered when determining what protection is necessary to safeguard employees.

The application of the existing 2-foot setback requirement to trenching has been questioned in the past because the requirement only appears in existing § 1926.651 "Specific Excavation Requirements," and not in § 1926.652 "Specific Trenching Requirements." However, the requirements in § 1926.651 have always applied to all excavations, including trenches. The format changes in the proposal and in the Final Rule are made to clarify this point.

The language of the existing requirement in § 1926.651(i) is different from the language that was originally promulgated in 1971. The 1971 requirement originally promulgated under the Construction Safety Act was stated as follows: "Excavated or other material shall not be stored nearer than 4 feet from the edge of any excavation and shall be stored and retained as to prevent its falling back into the excavation" (36 FR 7389, April 17, 1971). Upon the recommendation of the ACCSH, it was proposed to change this provision to require that "In excavations which employees may enter, which are more than 5 feet in depth, excavated or other materials shall be stored and retained 4 feet or more from the edge of the excavation. In excavations which are 5 feet or less in depth, all materials shall be stored and retained at least 2 feet from the edge of the excavation" (36 FR 19088, Sept. 28, 1971).

This amendment was proposed "in order to allow more flexibility in storing and retaining excavated materials adjacent to an excavation, while at the same time ensuring the safety of those employees working in the excavation site" (37 FR 3513, Feb. 17, 1972). The comments in response to the 1972 proposal indicated that the proposed change was too rigid to allow employers digging shallow trenches (less than 5 feet in depth) and having narrow rights-of-way to meet the requirement. Alternative methods of storing and retaining such material were suggested which would provide equivalent employee protection.

The ACCSH considered the comments submitted in response to the proposal, and the suggestions made by the OSHA staff, and, as a result, recommended that the language be changed "to permit all appropriate alternative methods which will protect employees working in excavations from the hazards of falling materials" (37 FR 3515, Feb. 17, 1972). The ACCSH recommendations were adopted and the language was revised to become what is now the existing requirement in § 1926.651(i).

Prior to publication of the 1987 proposal OSHA received comments concerning the existing 2 foot (.61 m) set-back requirement. It was suggested that this requirement be changed to 1 foot (30.5 cm) for excavations 5 feet (1.52 m) or less in depth. No data to support this suggestion was submitted to OSHA other than the comment that such a requirement would be practical and adequate.

OSHA did not make that suggested change in the proposal. However, OSHA did request that specific comments regarding this issue be submitted during the comment period.

OSHA received 10 comments on this provision. Many commmenters (Exs. 4–4, 4–82, 4–88, 4–102, 4–106, 4–109, 4–113, and 4–115) expressed support for reducing the 2 foot clearance to 1 foot for excavations 5 feet or less in depth. Three commenters (Exs. 4–82, 4–102, and 4–109) noted that the practice was successful under CAL–OSHA. However, OSHA notes that comments received from CAL–OSHA (Ex. 4–4), while suggesting that the setback for excavated materials be reduced, provided other input which indicated that this practice was causing problems. This input, addressing proposed § 1926.651(a), is as follows:

> The Division feels that the subsection on surface encumbrances should be expanded by inserting the word "spoil," which is common to the industry to designate the earth removed from the excavation, *because it has been our experience that where a large boulder or a tree on the edge might readily be removed to reduce or eliminate the hazard, the "spoil" is frequently left in a condition where it is almost rolling back into the excavation. For this reason too, we believe the requirement to keep the spoil back at least two feet from the edge of the excavation should be in this section rather than in Subsection (j)(3).* (Emphasis added.)

OSHA concludes from this input that the reduced setback for excavations 5 feet or less in depth may be adequate and practical in theory, but not in actual practice.

Other commenters (Exs. 4–41, 4–88, and 4–113) noted that in some instances, space is limited, and compliance with a 2 foot setback is difficult. One commenter (Ex. 4–41) suggested keeping materials at "sufficient distances" rather than specifying a fixed setback.

The Agency disagrees with this approach because "sufficient distances" is too subjective, and does not provide appropriate employer guidance as to what the regulation requires.

Another commenter (Ex. 4–106) supported changing the setback requirement to one foot for excavations less than five feet deep, stating that the change is valid as far as the hazard from falling materials is concerned.

Another commenter (Ex. 4–46) supported the 2 foot setback for excavated materials, and recommended that equipment and materials be kept at least 10 feet from the edge of the excavation.

One commenter (Ex. 4–115) supported the reduced setback, but provided no rationale, and the ACCSH (Tr. 8/5/87, pp. 535–538) recommended increasing

the spoil pile setback to 3 feet, but also gave no rationale.

After careful consideration of the record, OSHA concludes that the spoil pile setback distance should not be changed. The current requirement for a 2 foot setback has provided adequate protection for employees. The record contains no convincing evidence that increasing the setback to 3 feet or more is necessary, nor does it indicate that decreasing the setback to 1 foot for excavation 5 feet or less in depth, would maintain employee protection at the current level. The Agency also notes that employers who encounter site conditions that do not permit a 2 foot set-back must use retaining devices to prevent materials or equipment from falling into the excavation.

Therefore, based on the above discussion, OSHA promulgates paragraph (j)(2) as proposed and renumbered.

Section 1926.651(k) of the final rule sets out provisions for inspections and requires that:

(1) Daily inspections of excavations, the adjacent areas, and protective systems shall be made by a competent person for evidence of a situation that could result in possible cave-ins, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions. An inspection shall be conducted by the competent person prior to the start of work and as needed throughout the shift. Inspections shall also be made after every rainstorm or other hazard increasing occurrence. These inspections are only required when employee exposure can be reasonably anticipated.

(2) Where the competent person finds evidence of a situation that could result in possible cave-ins, indication of failure of protective systems, hazardous atmospheres, or other hazardous conditions, exposed employees shall be removed from the hazardous areas until the necessary precautions have been taken to ensure their safety.

These provisions are similar to the proposed rule, which consolidated requirements in existing §§ 1926.650(i) and 1926.651 (d) and (o).

The existing requirement in § 1926.650(i) states: "If evidence of possible cave-ins or slides is apparent, all work in the excavation shall cease until the necessary precautions have been taken to safeguard employees." This is the only requirement that specifically identifies what is necessary if a hazardous condition is identified, and it only applies to evidence of cave-ins or slides. It is OSHA's opinion that during the course of work in excavations, other hazardous conditions can develop, and that the object of daily inspections must be to identify these conditions as well as to take precautions to protect employees. Therefore, the proposed requirement was written with this intent.

The existing provision also requires that "all work in the excavation shall cease * * *." OSHA recognizes that in many instances a hazardous condition may be limited to only a small area of the excavation. For example, inspection might reveal a weakness in the support system which increases the possibility of a cave-in in a small area of a very large excavation. In such a situation, OSHA does not believe it is necessary to require that "all work" throughout the entire excavation cease until this isolated problem is repaired. Therefore, OSHA proposed to change the requirement to require that "exposed employees shall be removed from the hazardous areas until the necessary precautions have been taken to ensure their safety."

OSHA received three comments and ACCSH input on this provision. These commenters (Exs. 4–53, 4–88, and 4–91) agreed with the proposed requirement, but two commenters (Exs. 4–53 and 4–88) objected to any additional requirement for a written inspection log as suggested in Issue 8 in the preamble of the proposal (52 FR 12295). The ACCSH (Tr. 8/5/87, p. 519) supported creating an inspection certification to verify that the inspection was done. However, based on the discussion of Issue 8 above, the Agency will not require the keeping of a written inspection log.

OSHA, however, agrees with the ACCSH recommendation that the excavation should be inspected prior to the start of the work shift. This suggestion expresses the Agency's original regulatory intent more clearly, and therefore, OSHA has revised the standard to reflect this input.

Therefore, OSHA promulgates § 1926.651(k) as revised.

Section 1926.651 (l) and (l)(2) provide interim fall protection requirements for excavations. These provisions are unchanged from § 1926.651(w), and § 1926.651(t), respectively, in the existing standard. In the proposal, OSHA intended to redesignate these provisions into the fall protection requirements in revised subpart M. However, the revisions to subpart M are not yet completed. Therefore, for the time being, these provisions will be retained in subpart P. When the revised subpart M is issued, § 1926.651(l)(2) of this Final Rule will be revoked. The fall protection requirements contained therein will be covered in subpart M, and § 1926.652(e)(1)(vi) of this Final Rule addresses the requirement for backfilling excavations. Additionally, at the same time, § 1926.651(l)(1) of this Final Rule will be revised by the new subpart M to remove the fall protection requirements (51 FR 42735).

Section 1926.652 of this Final Rule details the requirements for protective systems. Paragraph (a)(1) of this Final Rule requires that "Each employee in an excavation shall be protected from cave-ins by an adequate protective system designed in accordance with paragraph (b) or (c) of this section except when:

"(i) Excavations are made entirely in stable rock; or

"(ii) Excavations are less than 5 feet (1.52 m) in depth and examination of the ground by a competent person provides no indication of a potential cave-in."

This provision is essentially identical to proposed § 1926.651(j)(1) except for editorial changes. This provision was moved from its location in proposed § 1926.651(a)(1) based on comments (Exs. 4–82, 4–102, 4–106 and 4–109) that it was more appropriate in § 1926.652, which specifically addresses employee protection in excavations.

Proposed paragraph (j)(1) required that employees in excavations be protected from cave-ins by the installation or use of an adequate protective system which meets the requirements of proposed § 1926.652, "Requirements of protective systems." This requirement was written in performance-oriented language, consistent with the approach of the overall proposed standard. This proposed paragraph consolidated and replaced several existing requirements and paragraphs. The existing paragraphs affected include §§ 1926.651 (c), (m), and (q), and 1926.652 (a), (b), (c), (e), (f), and (k).

The existing standard is arranged in a format consisting of § 1926.651, "Specific Excavation Requirements," and § 1926.652, "Specific Trenching Requirements." Each of these sections contains provisions designed to protect employees against cave-ins. The substantive requirements for "excavations" often overlap those for "trenches." Thus, an excavation employer may not always be sure which of the existing standards apply to a particular situation.

Some of the current requirements indicate when cave-in protection is required but provide little direct guidance as to how it is to be provided. For example, existing § 1926.651(c) states: "The walls and faces of all excavations in which employees are exposed to danger from moving ground shall be guarded by a shoring system, sloping of the ground, or some other equivalent means."

On the other hand, some provisions set forth specific means of compliance. For example, existing § 1926.652(f) states: "Employees entering bell-bottom pier holes shall be protected by the installation of removable-type casing of sufficient strength to resist shifting of the surrounding earth."

Some of the current requirements specify the earth conditions in which cave-in protection is required. For example, existing § 1926.652(b) states: "Sides of trenches in unstable or soft material, 5 feet or more in depth, shall be shored, sheeted, braced, sloped, or otherwise supported by means of sufficient strength to protect the employees working within them. (See Tables P–1, P–2 * * *;)"

In Table P–1, terms such as "compacted angular gravels," "compacted sharp sand," and "average soils" are used to describe the earth conditions. In Table P–2, terms such as "hard, compact," "likely to crack," and "soft, sandy, or filled" are used to describe the earth conditions.

Other existing requirements specify when special or additional precautions are necessary. For example, existing § 1926.651(m) states: "Special precautions shall be taken in sloping or shoring the sides of excavations adjacent to a previously backfilled excavation or a fill, particularly when the separation is less than the depth of the excavation. Particular attention also shall be paid to joints and seams of material comprising a face and the slope of such seams and joints."

The existing requirements do not appear in any specific order. In addition, it is not always clear when provisions apply to a given situation. However, the one common feature of all the existing requirements is that cave-in protection is required. Therefore, based on this central requirement, OSHA proposed to revise its existing standards to allow any of several types of protective systems to be used, provided that the system will provide protection against cave-ins. OSHA intended this revision to be more performance-oriented than the current standard, while providing greater clarity and guidance as to what steps the employer must take to protect employees from cave-ins.

OSHA believes that there is a potential for a cave-in in virtually all excavations. However, experience has shown that the probability of a cave-in depends upon the combined effects of many factors (Ex. 2–5). These factors include the depth of the excavation, the type of soil involved, the ability of the soil to resist stress imposed on the soil from the weight of the soil itself and from static and dynamic surcharge loads, and from changes in the ability of the soil to resist stress due to exposure to environmental conditions over a period of time. In recognition of the low probability of a cave-in occurring in certain circumstances, the proposal, as does the current standard, sets forth two exceptions to the requirement to provide cave-in protection.

Proposed paragraph (j)(1)(i) stated that excavations in stable rock are exempt from cave-in protection requirements. This proposed exception was consistent with the existing standard which states in Note (1) to Table P–2 that "shoring is not required in solid rock, hard shale, or hard slag." The term "stable rock" was used in the proposed standard instead of the above terms and was defined in § 1926.650(b)(20) of the proposal.

The second exception, which was stated in proposed paragraph (j)(1)(ii), allowed the suspension of the requirement to provide cave-in protection in excavations less than 5 feet (1.5 m) in depth, but only if a competent person first examined the ground and found no indication that a cave-in should be expected.

The exception in proposed paragraph (j)(1)(ii) continued the existing exception which applied to excavations less than 5 feet in depth. In addition, it clarified that cave-in protection would not be required for such excavations only after a competent person first examined the ground and found no evidence of a potential cave-in.

The existing standard in § 1926.652(a) states: "Trenches less than five feet in depth *shall also be effectively protected when examination of the ground* indicates hazardous ground movement is expected" (emphasis added). On its face this requirement does not seem to require that an examination first be conducted, or who must conduct it. However, existing § 1926.650(i) states: "Daily inspections of excavations shall be made by a competent person * * *." The proposal clarified that inspections must first be conducted before an employer could use the exception of not providing cave-in protection in excavations less than 5 feet in depth. There would be a presumption that excavations less than 5 feet deep need to be protected unless there is a determination by a competent person that such protection is not needed.

OSHA received four other comments on proposed § 1926.651(j)(1). One commenter (Ex. 4–28) recommended deleting the reference to the more specific § 1926.652 because it was inappropriate. Moving this provision to § 1926.652(a) of the Final Rule, as discussed above, adequately responds to the concern.

Another commenter (Ex. 4–46) suggested revising paragraph (j)(1)(ii) to specify that if there is evidence of moving ground in excavations 5 feet or less in depth, the excavation should be shored or sloped. The Agency believes this is not needed because § 1926.652(a) of this final rule requires a protective system unless the conditions of the exception are met.

An additional commenter (Ex. 4–30) recommended that OSHA allow a vertical 5 foot section at the bottom of all trenches since trenches with depths of 5 feet or less do not normally require shoring or sloping. This issue is discussed in detail later in the preamble under the discussion of Appendix B. One other commenter (Ex. 4–4) recommended requiring cave-in protection for excavations 5 feet or more deep, regardless of soil type (even stable rock), however, no supporting information was provided. Consequently, OSHA is not convinced that this recommendation is appropriate. As discussed above, experience has shown that there is such a very low probability of cave-in in stable rock that OSHA does not believe it warrants the use of cave-in protection.

Therefore based on the above discussion, OSHA promulgates § 1926.652(a)(1) as revised editorially and renumbered.

Section 1926.652(a)(2) of the Final Rule requires that "Protective systems shall have the capacity to resist without failure all loads that are intended or could reasonably be expected to be applied or transmitted to the system." This provision is virtually identical to proposed § 1926.652(a), but has been revised editorially and has been renumbered to accommodate format revisions as discussed above.

The existing standard does not contain a requirement directly addressing the capacity of protective systems. Such a requirement is necessary in order to clarify the design goal. However, consistent with the approach taken in the proposal, this requirement is written in performance-oriented language. As discussed earlier, proposed § 1926.651(j)(1) (§ 1926.652(a)(1) of this Final Rule) sets forth those situations requiring cave-in protection, and identifies the hazards from which employees are to be protected. Therefore, the employer must first select a protective system for these conditions and hazards. Once a protective system has been selected, this paragraph sets forth performance criteria that must be met by that system.

The paragraphs immediately following this paragraph address different methods and approaches that can be used to provide the required level of protection.

OSHA received no comment on this provision and therefore promulgates paragraph (a)(2) as proposed and renumbered.

The introductory text of § 1926.652(b) of this Final Rule requires that "The slopes and configurations of sloping and benching systems shall be selected and constructed by the employer or his designee and shall be in accordance with the requirements of paragraph (b)(1); or, in the alternative, paragraph (b)(2); or, in the alternative, paragraph (b)(3); or, in the alternative, paragraph (b)(4), as follows". The provision is virtually identical to the proposed rule except that an option for sloping in accordance with tabulated data is provided as is discussed under Issue 10 above.

Paragraph (b) provides four alternative methods of protecting employees from cave-in, arranged in order of increasing degree of performance required, based upon the degree to which the employer performs soil classification analysis needed to do the alternative. Design of other types of cave-in protection is addressed in § 1926.652(c).

OSHA received no comments specifically directed to this provision. However, many commenters provided general input concerning all provisions under this paragraph (b), or input supporting incorporation of a fourth option for sloping as addressed by Issue 10. For example, several commenters (Exs. 4–21, 4–23, 4–31, 4–40, 4–42, 4–54, and 4–86) suggested that OSHA use the terms "steeper than or flatter than" rather than "greater than or lesser than," with reference to slope angles in order to avoid confusion. OSHA agrees that the suggested wording would express the Agency's regulatory intent more clearly and has amended the language accordingly.

Other commenters (Exs. 4–21, 4–23, 4–31, 4–40, 4–42, 4–78, and 4–86) supported the addition of a fourth option for sloping (See the discussion of Issue 10 above).

Based on the above discussion, OSHA promulgates the introductory text to paragraph (b) as revised.

Section 1926.652(b)(1) (i) and (ii) of this Final Rule provide requirements for sloping Option (1). These requirements state:

(1) *Option (1)—Allowable configurations and slopes.* (i) Excavations shall be sloped at an angle not steeper than one and one-half horizontal to one vertical (34 degrees measured from the horizontal), unless the employer uses one of the other options listed below.

(ii) The slopes specified in paragraph (b)(1)(i) of this section shall be excavated to form configurations that are in accordance with the slopes shown for Type C soil in Appendix B to this Subpart.

This requirement is very different than the proposal. In addition to removing the element of short term/long term excavations, as discussed in Issue 4 above, "greater" has been replaced by "steeper" for clarity, as discussed above; and the reference to Figures B–1 through B–1.5 has been deleted because of another revision discussed below.

In this first option, employers who do not make any effort to classify the soil are required to cut excavation sides to an angle that is not steeper than one and one-half horizontal to one vertical (34 degrees measured from the horizontal), as specified in paragraph (b)(1)(i).

In OSHA's opinion, the slope required by this paragraph is safe for virtually all soils. Since, under this option, the employer is not required to make any attempt to differentiate between more stable and less stable soil types, the slope required is conservative to ensure that employees will be protected adequately in those instances where poor soil conditions are encountered.

The required slope angle specified is identical to the slope angle that is required for the worst soil condition determined under Option (2) below. As will be explained below, the employer is required, under the second option, to differentiate between more stable and less stable soil types. Steeper slopes are allowed in soils determined to be more stable. By requiring a slope in Option (1) that is the same as the worst case under Option (2), a necessary level of consistency in the requirements is maintained. If a steeper slope were allowed under Option (1), the situation could arise where an employee might be required to slope an excavation to a greater degree after making an effort to determine the soil type than would be required if no soil classification had been made at all. Sloping is set at a worst case angle in Option (1) to assure that protection is provided even where the employer makes no determination of soil type or stability.

In paragraph (b)(1)(ii), the requirements state that the configurations of slopes excavated under Option (1) must conform to the configuration illustrated for Type C soils shown in appendix B to subpart P. This is to assure that slopes permitted under Option (1) are at least as protective as those set forth under the second design option in § 1926.652(b)(2).

OSHA received seven comments on the proposed provision and input from the ACCSH. One commenter (Ex. 4–17) suggested decreasing the short term/long term time from 72 hours to 24 hours, while another (Ex. 4–91) strongly supported the proposed 72 hours. Another commenter (Ex. 4–37) endorsed this provision as "fail safe" and further noted that it can be employed by anyone with a minimum of experience. Other commenters (Exs. 4–4, 4–28, and 4–53) objected for various reasons, including opposition to the short term/long term concept (Ex. 4–28); opposition to the title of this section, which the commenter implied required all trenches to be sloped (Ex. 4–53); and objection to the standard permitting compound slopes in referenced figure B–1.5 (Ex. 4–4). One commenter (Ex. 4–53) also recommended adding weather conditions to the criteria in determining configuration and slope.

Based on a review of the entire record on this subject (including specifically Issue 4), the Agency promulgates § 1926.652(b)(1) as revised.

Section 1926.652(b)(2) of this Final Rule provides the requirement for sloping Option (2), determination of slopes and configurations using Appendices A and B, which requires that "Maximum allowable slopes, and allowable configurations for sloping and benching systems, shall be determined in accordance with the conditions and requirements set forth in Appendices A and B to this Subpart." This provision is identical to the proposed rule.

In this second option, designs must be in accordance with the conditions and requirements set forth in appendices A and B to subpart P. In brief, Appendix A is a method of classifying soil and rock conditions, taking into account soil, environmental, and load conditions. Appendix A divides all soils into four classifications: Stable Rock, Type A, Type B and Type C. (See discussion for appendix A below.) Appendix B contains requirements specifying the maximum allowable slopes for each of the four classifications. In stable rock, vertical sides are allowed. For Types A, B, and C the maximum allowable slopes vary, with steeper slopes allowed for Type A. Appendix B also contains illustrations of sloping and benching configurations that are acceptable. (See discussion for appendix B below.)

OSHA received three comments on this provision. Two commenters (Exs. 4–28 and 4–64) opposed allowing the employer or the competent person to classify soil and choose a protective system. The other commenter (Ex. 4–37) supported this provision and considered

this option to be the "rule of thumb," which is based on site conditions as determined by the competent person. The Agency disagrees with the two commenters who oppose letting the competent person or the employer use Appendices A and B, noting that these appendices are actually intended for use by non-engineers. OSHA further notes that these appendices provide much more guidance than the current standard, which permits the competent person to determine the degree of protection necessary.

Therefore, based on the above discussion, OSHA promulgates § 1926.652(b)(2) as proposed.

New § 1926.652(b)(3) of the Final Rule adds another option for sloping, *Option (3)—Designs using other tabulated data* which requires that:

(i) Designs of sloping or benching systems shall be selected from and be in accordance with tabulated data, such as tables and charts.

(ii) The tabulated data shall be in written form and include all of the following:

(A) Identification of the parameters that affect the selection of a sloping or benching system drawn from such data;

(B) Identification of the limits of use of the data to include the magnitude and configuration of slopes determined to be safe;

(C) Explanatory information as may be necessary to aid the user in making a correct selection of a protective system from the data.

(iii) At least one copy of the tabulated data, which identifies the registered professional engineer who approved the data, shall be maintained at the jobsite during construction of the protective system. After that time the data may be stored off the jobsite, but a copy of the data shall be made available to the Secretary upon request.

This paragraph is new, and is based on input received on Issues 10 and 14 of the proposal. These issues are discussed in detail earlier in this preamble.

Section 1926.652(b)(4) of this Final Rule, *Option (4)—Design by a registered professional engineer,* requires that:

(i) Sloping and benching systems not utilizing Option (1), Option (2), or Option (3) under paragraph (b) of this section shall be approved by a registered professional engineer.

(ii) Designs shall be in written form and shall include at least the following:

(A) The magnitude of the slopes that were determined to be safe for the particular project;

(B) The configurations that were determined to be safe for the particular project; and,

(C) The identity of the registered professional engineer approving the design.

(iii) At least one copy of the design shall be maintained at the jobsite while the slope is being constructed. After that time the design need not be at the jobsite, but a copy shall be made available to the Secretary upon request.

These provisions are essentially the same as those in proposed paragraph (b)(3), except that "qualified person" has been deleted, and "qualified engineer" has been changed to "registered professional engineer" as discussed under Issue 2 above. In addition, the requirement that the design be made available to the Secretary has been revised slightly, as discussed below, and the explanatory note has been dropped from the language of paragraph (b)(4)(iii) of this Final Rule.

In this option, paragraph (b)(4) sets forth three requirements. The first, paragraph (b)(4)(i), requires that sloping and benching systems be approved by a registered professional engineer. However, a person under the direction of a registered professional engineer is also allowed to design sloping and benching systems under this option, because in this relationship, the registered professional engineer would still be responsible for and approve the design. This approval need be no more than a stamp indicating the identity of the registered professional engineer approving the design.

A second requirement under this option, paragraph (b)(4)(ii), is that designs be in written form and include, as a minimum, the following information: (a) The magnitude of the slopes that were determined to be safe for the particular project; (b) The configurations that were determined to be safe for the particular project; and, (c) The identity of the individual approving the design.

The third requirement, set forth in paragraph (b)(4)(iii), is that at least one copy of the design be maintained at the jobsite while the slope is being constructed. After that, the design need not be kept on the jobsite, but a copy must be made available to the Secretary upon request. In OSHA's opinion, these requirements are necessary to insure that adequate designs will be prepared. Under this option, the employer is allowed a wide range of discretion to determine the degree of the hazard and to determine the necessary level of protection against the hazard. It provides no specific restrictions as to maximum allowed slopes or configurations that a registered professional engineer might design or approve. Therefore, under the option, slopes steeper than those allowed under the other options could be used. Configurations different from those allowed under the other options could also be used. This fourth option is the most performance-oriented of the options provided; and relies heavily on the prudence, competence and expertise of the person selected by the employer to design the system.

The proposed requirements that original engineering design, and tabulated data (including manufacturer's data) be made available to the Secretary have been modified slightly. After a protective system is constructed, such data or designs need not be kept at the jobsite, but need only be made available to the Secretary on request. The proposal indicated that such data or designs must be made available only so long as an excavation is open or only during an inspection. In the Final Rule the requirement is more simply stated that such documentation must be provided upon request to the Secretary. This will insure that such data is also available when an excavation is no longer open, and after a physical inspection is concluded. If there is any issue as to what designs or data were utilized after the physical inspection of the worksite is concluded or after a cave-in, the Secretary must be able to obtain such information.

OSHA solicited opinion on whether or not additional information should be required on any design. The input received concerning this matter is addressed below at the end of the discussion of paragraph (b)(4) of this Final Rule.

Because of the wide discretion allowed, OSHA believes that stricter requirements are needed to verify that design requirements have been met. Therefore, OSHA is requiring that designs be in written form, and that they be made readily available to the Secretary upon request.

In OSHA's opinion, requiring that designs be in written form will not impose a significant burden upon employers. When an employer utilizes an individual to design a sloping and benching system, the results of the design effort must be communicated to the employer, and to those responsible for implementing the design, in some manner. Under current industry practice, this is not done orally, but by the preparation of a written plan.

OSHA is revising the portions of Subpart P relating to sloping for several reasons. The existing standard allows only one approach to be used to determine the degree of slope required to protect employees against cave-ins. This approach requires that excavations be sloped to the "angle of repose." As noted earlier, this term, as currently defined, does not conform to its use in civil engineering and has resulted in considerable confusion in the field. In

addition, the existing approach is not consistent with OSHA's desire to place greater emphasis on the use of performance-oriented standards. More flexibility is possible by allowing the employer the choice to use any of several acceptable approaches to provide the required level of safety for employees.

OSHA is also revising the standard so as to provide greater clarity as to what is required of the employer. Interviews with contractors have indicated that some provisions in the existing standard relating to sloping are difficult to understand (Ex. 2–3).

This difficulty is due apparently to the present format in which specific requirements relating to sloping appear in various places in the standard but in no apparent order. It also results from the fact that the soil types currently specified in Table P–1 (compacted sharp sand, average soil, etc.) are not defined. The use and application of the terms "hard, compact soil" and "unstable or soft material" in the current standard have been the source of considerable confusion and have resulted in considerable litigation. In addition, there are other related format problems that have been discussed previously in this preamble.

It was stated earlier that the existing Subpart P is divided into two sections containing specific requirements. Section 1926.651 is titled "Specific Excavation Requirements;" and § 1926.652 is titled "Specific Trenching Requirements." In § 1926.651 there are several references to sloping. These references appear in existing § 1926.651 (c), (d), (g), (h), (j), and (m), and specify that sloping can be used as a method of protection against cave-ins. They require that when sloping is used "all slopes be excavated to at least the angle of repose * * *." In addition, it is required that adjustments be made to the angle of repose, i.e., flattening, when certain conditions are present. These requirements are not presented in a concise, logical order and there is no guidance given to the employer in existing § 1926.651 indicating either what the "angle of repose" is or to what degree it must be adjusted for the specific conditions mentioned. Although Table P–1 does give an indication of certain "angles of repose," this Table is located in existing § 1926.652; and no direct reference to the Table is made in § 1926.651. Further, as discussed earlier, there are technical problems with the use of the term "angle of repose." (See discussion above for § 1926.650—"Scope, Application, and Definitions Applicable to this Subpart.")

In the current § 1926.652, reference to sloping appears in existing § 1926.652 (b), (c), and (k). These requirements, in general, are intended to give more specific guidance to employers as to the degree of sloping required. Table P–1 is referenced in both existing § 1926.652 (a) and (b), but the language of the existing standard regarding the use of Table P–1 apparently has not been clear to some employers. For example, existing § 1926.652(a) states: "Refer to Table P–1 as a *guide* in sloping of banks." (Emphasis added.) Some employers have contended that the table is, therefore, not mandatory. However, existing § 1926.652(b) is phrased in a manner more consistent with its intended mandatory nature.

Other difficulties are noted that relate to specific terms used in the current standard. For example, 45 degrees is indicated in Table P–1 as the appropriate angle for sloping "average soils." "Average soil" is not defined in the existing standard, nor are the other terms used in Table P–1. Further, only two terms used in the standard itself to describe soils are presently defined. These terms are "hard compact soil" and "unstable soil." Neither term appears in Table P–1, and existing § 1926.652 (b) and (c) use the terms "unstable *or* soft" and "hard *or* compact." (Emphasis added.)

OSHA has concluded that these difficulties can be eliminated, and at the same time a more effective standard for sloping can be created, by revising the language and format of the current standard.

OSHA proposed a format allowing employers to choose from several design alternatives discussed above. These alternatives allow the employer flexibility to determine the degree to which excavation sides must be sloped to protect employees against cave-ins.

The calculation of the degree to which excavation sides must be sloped to protect employees against cave-ins can be a difficult task. This is because of the many factors that must be taken into account which can affect the stability of sloped excavation sides. These factors include: The soil type and its ability to resist stress; changes in the ability of the soil to resist stress due to the effects of exposure to environmental conditions such as freezing, thawing, or rain; loads imposed due to the particular configuration of the excavation; and loads imposed due to the presence of water, and the variation of the water content in the soil. Other factors include: Loads imposed by the presence of structures, equipment, overlying material or stored equipment; and loads imposed due to dynamic forces such as vibration from equipment, blasting, traffic, or other sources.

Soil is a difficult material to work with because there is no control over its structural quality. In addition, its properties vary from place to place, and they change with the passage of time due to environmental exposure. There is an infinite number of combinations of conditions and factors that can affect soil stability. Because of these variables, a great degree of caution must be exercised when relying on its strength in order to design and provide a sloping system with a desired level of protection.

There are practices that are accepted by the engineering community that can be followed to determine safe slopes for most situations. These practices include analyzing soil samples to determine properties of the soil; evaluating intended or expected load conditions and sequences; and considering the possible effects of environmental exposure. Soil analysis can be accomplished in the field, using simple field testing techniques. More extensive and accurate soil analysis can also be done in the laboratory. In addition, slope stability analysis is often used to predict the behavior of a slope. Full scale models have also been used to predict expected behavior.

In OSHA's opinion, however, it is not feasible or necessary to require a rigid soil exploration and analysis program, or a slope stability analysis, for every trench or other excavation that is made. To avoid such specifications in the standard, OSHA is allowing two options in which the required slope angles are specified. In the opinion of the Agency, these two approaches will serve the needs of the industry and provide safe working conditions for employees. OSHA also recognizes that the first two options could be unnecessarily restrictive in some situations. Thus, OSHA is permitting other design alternatives as discussed below, to allow the employer to determine the degree of protection required for any particular circumstance.

OSHA received 10 comments on proposed paragraph (b)(3) and input from the ACCSH. Several commenters (Exs. 4–4, 4–17, 4–28, and 4–37) and the ACCSH supported limiting this responsibility to at least "qualified engineers," or registered civil engineers. This is in line with the determination made on Issue 2 discussed above.

Other commenters (Exs. 4–82, 4–102, 4–106, 4–109, and 4–113) objected to the requirement that a copy of the design be maintained on site and made available

to OSHA during the inspection. The Agency disagrees with the position of these commenters because the design contains the information necessary for the construction and safe use of these protective system and should therefore, be available at all times. The ACCSH recommended maintaining at least one copy of the design at the excavation location and making it available to employees, employee representatives, or the Secretary upon request. OSHA believes the revised provision provides adequate assurance that the design will be available when necessary. OSHA notes that § 1926.21 requires that employees be trained in hazard recognition and avoidance, which means that they are to be informed as to how they are being protected against cave-ins.

Another commenter (Ex. 4–11) suggested the design should include other criteria such as limitations due to rain or groundwater or surcharge loads, and should indicate the means of access and egress. The Agency recognizes the significance of these concerns and notes that other specific provisions of the standard will adequately address these concerns.

The ACCSH (Tr. 8/5/87, pp. 520–521) recommended limiting design to a registered professional engineer, which the Agency has done, based on the input received on Issue 2. Additionally, the ACCSH recommended deleting "an indication of" from proposed § 1926.652(b)(3)(ii) (A) and (B) because the phrase is superfluous. The Agency agrees and has revised these provisions accordingly.

Section 1926.652(c) of the Final rule, "Design of support systems, shield systems, and other protective systems," states that "Designs of support systems, shield systems, and other protective systems shall be selected and constructed by the employer or his designee and shall be in accordance with the requirements of paragraph (c)(1); or, in the alternative, paragraph (c)(2); or, in the alternative, paragraph (c)(3); or, in the alternative, paragraph (c)(4) as follows." This introductory provision is identical to the proposed rule.

OSHA received no public input on this provision. However, the ACCSH (Tr. 8/5/87, p. 522) recommended that OSHA delete the reference to the "designee" because it is standard practice to consider the management representative to be the employer. The Agency believes the proposed language makes this point clear to those who may not follow the standard practice, and declines to act on this recommendation.

Section 1926.652(c) (1) through (4) list the options allowed for design of support systems, shield systems, and other protective systems.

Section 1926.652(c)(1) of the Final Rule sets out Option (1)—Designs using Appendices A, C and D, and requires that "Designs for timber shoring in trenches shall be determined in accordance with the conditions and requirements set forth in appendices A and C to this subpart. Design for aluminum hydraulic shoring shall be in accordance with § 1926.652(c)(2) below, but if manufacturer's tabulated data cannot be utilized, designs shall be in accordance with appendix D." This provision is identical to the proposal except for the inclusion of the requirements for the use of the new appendix D, which is dicussed in detail below.

The Agency received only one comment on this provision. That commenter (Ex. 4–28) pointed out that it appears that this provision in the proposal applied only to trenches. This is OSHA's regulatory intent, and, therefore, the Agency has not revised this provision.

Paragraph (c)(2) (i) through (iii) or § 1926.652 of the Final Rule set out Option (2)—*Designs using manufacturer's tabulated data,* and require that:

(i) Designs of support systems, shield systems, or other protective systems that are drawn from manufacturer's tabulated data shall be in accordance with all specifications, recommendations, and limitations issued or made by the manufacturer.

(ii) Deviation from the specifications, recommendations, and limitations issued or made by the manufacturer shall only be allowed after the manufacturer issues specific written approval.

(iii) Manufacturer's specifications, recommendations, and limitations, and manufacturer's approval to deviate from the specifications, recommendations, and limitations, shall be in written form at the jobsite, during construction of the protective system. After that time this data may be stored off the jobsite, but a copy shall be made available to the Secretary upon request.

These provisions are virtually identical to the proposed rule, except for the minor revision of the requirement to provide the data to the Secretary. The rationale for this change is discussed above under § 1926.652(b)(4).

This second option allows the use of designs based on or drawn from a manufacturer's tabulated data. The manufactured systems generally addressed by the paragraph include metal hydraulic shoring and shields. In the past, manufacturers have developed tabulated data that indicated the conditions for which their various products could be used.

A trend in the construction industry has been to rely more and more on protection systems that are manufactured products. The design of a particular product, such as a trench shield, can be highly complex and the final design can often be adapted to a variety of situations, but not to all situations. It is, therefore, incumbent on the employer to ascertain all criteria and limitations that the manufacturer specifies or recommends regarding the use of a particular product, and then to use the product accordingly.

An employer, then, is allowed a degree of discretion as far as choosing a particular product for use. OSHA believes the likelihood that manufactured products will be used in the manner intended will be enhanced if the specifications and recommendations that the employer uses to select such products, including the limitations set by the manufacturer on their use, are required to be at the jobsite while the system is being constructed, and made available to the Agency upon request.

OSHA received one comment on these provisions and input from the ACCSH. The commenter (Ex. 4–106) objected to the requirement for retention of the manufacturer's specifications at the jobsite. The Agency disagrees with this commenter for several reasons. First, OSHA is not convinced that these manufactured systems can be installed safely from memory. Second, OSHA believes this data must be available in a reasonable amount of time to the competent person if site conditions change. Finally, OSHA compliance staff cannot be familiar with every manufactured system that is on the market, and must have some readily available means to verify that the system is being used properly if such a question arises during an inspection.

The ACCSH (Tr. 8/5/87, pp. 522–523) recommended that these manufacturer's specifications be on site at all times while the excavation is open and be made available to employees, and employee representatives in addition to the Secretary. The Agency is not convinced that it is necessary for these specifications to be kept on-site at all times. OSHA believes that as long as a protective system is constructed in accordance with the specifications, and site conditions do not change, the specifications can be stored or used at another nearby site without decreasing employee safety.

Paragraphs (c)(3) (i) through (iii) of § 1926.652 of the final rule set out option

(3)—*Designs using other tabulated data* and require that:

(i) Designs of support systems, shield systems, or other protective systems shall be selected from and be in accordance with tabulated data, such as tables and charts.

(ii) The tabulated data shall be in written form and include all of the following:

(A) Identification of the parameters that affect the selection of a protective system drawn from such data;

(B) Identification of the limits of use of the data;

(C) Explanatory information as may be necessary to aid the user in making a correct selection of a protective system from the data.

(iii) At least one copy of the tabulated data, which identifies the registered professional engineer who approved the data, shall be maintained at the jobsite during construction of the protective system. After that time the data may be stored off the jobsite, but a copy of the data shall be made available to the Secretary upon request.

These provisions are essentially the same as those in the proposal except that "qualified person" has been deleted, "qualified engineer" has been replaced with "registered professional engineer," and the requirement to make the data available to the Secretary has been modified. The reasons for these changes are discussed under Issue 2 above or under § 1926.652(b)(4).

In this option, it is specified that designs can be selected from other tabulated data, such as tables and charts, that have been approved by a registered professional engineer. This paragraph is intended to allow employers to develop and use general designs that can be used repetitively and that meet the needs of their particular circumstances. OSHA recognizes that the design of protective systems can be a highly complex engineering procedure that involves elements of soil mechanics and structural engineering. Each excavation is unique. Therefore, repetitive use of a general design must be done with caution. Designs for general applications have limits that must not be exceeded, or else employees will be endangered. Tabulated data, therefore, can only be used safely when the necessary information is provided that explains the limitations of the data and demonstrates that the system is safe under prevailing soil, load, and environmental conditions.

OSHA has determined that the requirements for documentation are necessary to balance the wide discretion that is allowed employers when they provide a system of protection, and to assure that employees are adequately protected.

OSHA received nine comments and input from the ACCSH on these provisions. The ACCSH (Tr. 8/5/87, p. 523) and two commenters (Exs. 4–4 and 4–17) supported the use of a "registered professional engineer" as discussed under Issue 2 above.

Four commenters (Exs. 4–82, 4–102, 4–106 and 4–109) objected to the requirement that the tabulated data be retained on-site during the construction of the system and that it be provided during an inspection. OSHA again disagrees with these four commenters for the same reasons discussed above.

Paragraphs (c)(4) (i) through (iv) of § 1926.652 of the final rule require that:

(i) Support systems, shield systems, and other protective systems not utilizing Option (1), Option (2), or Option (3), above, shall be approved by a registered professional engineer.

(ii) Designs shall be in written form and shall include the following:

(A) A plan indicating the sizes, types, and configurations of the materials to be used in the protective system; and

(B) The identity of the registered professional engineer approving the design.

(iii) At least one copy of the design shall be maintained at the jobsite during construction of the protective system. After that time, the design may be stored off the jobsite, but a copy of the design shall be made available to the Secretary upon request.

These requirements are essentially the same as those of the proposal except that "qualified person" has been deleted, "qualified engineer" has been replaced with "registered professional engineer" (as discussed under Issue 2, above), and the explanatory note, defining OSHA's intended meaning for readily available, has been incorporated into the text of paragraph (c)(4)(iii) as a result of format changes.

This paragraph (c)(4) gives employers the flexibility to design protective systems for unique applications. There are no specific restrictions or limitations regarding the application of designs allowed under this option. The employer, through the registered professional engineer, is thus given wide latitude to judge the degree of the hazard present and to determine the degree of protection required.

OSHA recognizes, because such a wide latitude exists under this provision, that there is a possibility the intended goal will be missed. OSHA is, therefore, promulgating two requirements that are intended to increase the likelihood that the protective systems designed under this option will be adequate to protect employees. The first of these requirements, stated in paragraph (c)(4)(ii), requires that "Designs shall be in written form," and must, at a minimum, include "a plan indicating the sizes, types, and configurations of the materials to be used in the protective system," and "the identity of the registered professional engineer approving the design." The second requirement, stated in paragraph (c)(4)(iii), requires that "At least one copy of the design shall be maintained at the jobsite during the construction of the system, and the design shall be made available to the Secretary upon request."

These requirements are similar to those in § 1926.652(b)(4) for sloping and benching. The discussion of those requirements is equally applicable for the requirements proposed under this paragraph.

There are many paragraphs distributed throughout the existing standard that set forth requirements pertaining to the use of shoring and other protective systems. Existing paragraphs (c), (m), (o), and (q) of § 1926.651, and paragraphs (b), (c), (e), and (f) of § 1926.652 state when use of a protective system is required. Other existing paragraphs contain requirements pertaining to the design of such systems. These include paragraphs (e), (f), and (k) of § 1926.651; and paragraphs (d), (g), and (k) of § 1926.652. These existing requirements have been revised and reorganized to make the standard easier to follow and understand.

Some of the shoring requirements in the current standards have been criticized as being either too inflexible or too difficult to understand. For example, existing table P–2, "Trench Shoring—Minimum Requirements," has been criticized by contractors as too inflexible (Ex. 2–3). Table P–2 specifies timber sizes of shoring members, but generally only specifies one configuration of members for any particular case. Each case is defined by three parameters: Soil condition, trench depth, and width of trench. OSHA notes that interpreting the table as not allowing any deviation from the specified configurations is an inaccurate and overly restrictive reading of table P–2. The table only indicates certain configurations that will provide the required minimum protection. Other configurations that provide equivalent or greater protection are acceptable.

Another problem with existing table P–2 is that selection of a configuration is based on soil classifications and soil conditions that are not defined in the existing standard. The terms are not used in a manner that is consistent with the way other similar terms relating to soil conditions are used in the standard.

The current standard has also been criticized with regard to its coverage of protective systems other than timber shoring. Several such protective systems are in fact mentioned in the existing standard. These include shoring, sloping, use of shields, support systems, bracing, and sheet piling. In a footnote to table P–2, trench jacks and steel sheet piling are specifically indicated as being acceptable substitutes for wood members. However, the failure to mention other systems, particularly metal hydraulic shoring, has led to the mistaken impression among some interested persons that such systems are not allowed by the standard. OSHA emphasizes that this is not the case, either with the current standard or in this revision.

OSHA received eight comments and input from the ACCSH on these provisions. Four commenters (Exs. 4–4, 4–17, 4–28, and 4–30) and the ACCSH (Tr. 8/5/87, pp. 523–524) supported a "qualified engineer" or "registered professional engineer" to perform this original design work. These commenters also voiced their support in response to Issue 2.

Four other commenters (Exs. 4–82, 4–102, 4–106, and 4–109) objected to the requirement that the design be maintained on the site during construction of the protective system and that it be provided during an inspection. OSHA disagrees with these commmenters for the same reasons set forth in discussions above.

The ACCSH again recommended that this information be maintained on-site at all times and be available to employees and employee representatives as well as to the Secretary. OSHA believes it sufficient if designs are on site during construction and available upon request afterwards.

Therefore, based on the record, OSHA promulgates § 1926.652(c)(4) (i) through (iv) as revised.

Paragraphs (d) (1) through (3) of § 1926.652 of the Final Rule address materials and equipment and require that:

(1) Materials and equipment used for protective systems shall be free from damage or defects that might impair their proper function.

(2) Manufactured materials and equipment used for protective systems shall be used and maintained in a manner that is consistent with the recommendations of the manufacturer, and in a manner that will prevent employee exposure to hazards.

(3) When material or equipment that is used for protective systems is damaged, a competent person shall examine the material or equipment and evaluate its suitability for continued use. If the competent person cannot assure that the material or equipment is able to support the intended loads or is otherwise suitable for safe use, then such material or equipment shall be removed from service, and shall be evaluated and approved by a registered professional engineer before being returned to service.

These provisions are essentially the same as those in the proposal, except that paragraph (d)(3) has been revised to address a concern raised by the ACCSH which is discussed below.

The provisions in paragraph (d) address the hazard to employees resulting from the use of damaged or defective components of protective systems. The materials and equipment used for employee protection must be structurally sound. The loss of structural capability due to defects or damage can result in the failure of a protective system.

The existing requirements in §§ 1926.651(l) and 1926.652(d) address the condition of materials used for support structures and systems. These requirements have been consolidated into paragraph (d)(1), which covers all elements of protective systems and extends to other types of protective systems, such as shields.

The existing standard does not refer specifically to manufactured items. However, manufactured equipment such as shields and metal hydraulic shoring is used extensively in the industry today. However, to assure their safe use, these items must be used in strict accordance with the manufacturer's recommendations and instructions. In addition, the existing standard does not clearly address the problem of such items becoming damaged while in use. Often material and equipment used in temporary protective systems are designed with only a small factor of safety. If the equipment is damaged, there may be no margin of safety and employees could be in immediate danger. Paragraphs (d) (2) and (3) of the Final Rule address the need for employees to be protected in these circumstances.

OSHA received no public comment on these provisions. However, the ACCSH (Tr. 8/5/87, pp. 524–528) recommended that OSHA require a registered professional engineer to make the determinations required by paragraph (d)(3). The ACCSH argued that the competent person does not have the expertise to make these determinations.

The Agency agrees, in part, with the ACCSH. However, OSHA believes the competent person can be relied upon to make some determinations, especially when wooden shoring is used or when there is only superficial damage to manufactured systems. In situations where damage to manufactured systems is extensive, or where the competent person cannot assure the safe use of the system in the field, OSHA believes the prudent course of action is to require the equipment to be evaluated and approved by a registered professional engineer before the equipment is returned to service.

Section 1926.652(e)(1) of the Final Rule sets out the general provisions for the installation and removal of support system, and reads as follows:

(i) Members of support systems shall be securely connected together to prevent sliding, falling, kickouts, or other predictable failure.

(ii) Support systems shall be installed and removed in a manner that protects employees from cave-ins, structural collapses, or from being struck by members of the support system.

(iii) Individual members of support systems shall not be subjected to loads exceeding those which those members were designed to withstand.

(iv) Before temporary removal of individual members begins, additional precautions shall be taken to ensure the safety of employees, such as installing other structural members to carry the loads imposed on the support system.

(v) Removal shall begin at, and progress from, the bottom of the excavation. Members shall be released slowly so as to note any indication of possible failure of the remaining members of the structure or possible cave-in of the sides of the excavation.

(vi) Backfilling shall progress together with the removal of support systems from excavations.

This provision is virtually identical to the proposal except for some editorial changes to clarify the Agency's intent.

Installation and removal of support systems, which can involve significant material-handling activity, are particularly hazardous periods in excavation work. Additionally, partially completed support systems will not react to loads in the same manner as completed structures. Individual members can become overloaded and fail, leading to a general failure of other portions of the support system. Therefore, employees can be exposed to cave-ins, the collapse of adjacent structures, or collapse of the support system if the employees are not properly protected during installation and removal.

Paragraph (e)(1) contains six requirements that address these hazards. Four of these requirements (Final (e)(1) (i), (iv), (v) and (vi)) are based on existing requirements found in three existing §§ 1926.651(f), and 1926.652 (j) and (l). In the proposal and in the Final Rule, the existing provisions have been grouped into a more logical, easier-to-follow format under one

paragraph heading. The requirements in existing § 1926.652 that currently apply only to specific trenching situations will be extended to cover all excavations because the hazard addressed by those requirements exist whenever and wherever support systems are being installed or removed.

The other two proposed requirements, (e)(1)(ii) and (e)(1)(iii) were new. These specifically require protection for employees from cave-ins, the collapse of structures, or from being struck by members of the support system. The proposal required, in addition, that individual members of support systems not be subjected to loads exceeding the design loads of those members.

OSHA received ten comments and input from the ACCSH on these provisions. Many commenters (Exs. 4–21, 4–23, 4–31, 4–40, 4–42, 4–54, and 4–86) recommended adding the word "predictable" between "other" and "failures" to indicate that the design and installation of support systems take into account factors that can be reasonably anticipated. The Agency agrees that the word "predictable" should be inserted as recommended, and has revised the standard reformatting these provisions. However, the Agency sees no merit in the suggested reformatting, and declines to act on that recommendation.

The ACCSH (Tr. 8/5/87, pp. 528–529) recommended that OSHA revise the heading of paragraph (e) to read "Installation, modification, and temporary or permanent removal of support system." Additionally, the ACCSH recommended requiring that all installation, modification, changes, or removal be done in accordance with a plan supplied by a registered professional engineer or be done under the direct supervision of a registered professional engineer. The Agency has determined that the language requested in the first ACCSH suggestion is not necessary, and notes that these provisions are not intended to address modifications of the support system (see § 1926.652(c)).

OSHA also notes that there is no other evidence in the record to support the suggested requirement to have a registered professional engineer either plan or supervise the installation or removal of support systems. OSHA believes that it would be both impractical and unnecessary to have an engineer involved in installation and removal of support systems for every excavation.

The ACCSH also suggested language to clarify the intent of paragraphs (e)(1), (iv), and (v). The Agency has incorporated these suggestions.

OSHA received three other comments (Exs. 4–17, 4–91, and 4–111) basically agreeing with these provisions or suggesting clarifications that were already addressed by OSHA's incorporation of the ACCSH's suggested revisions.

Paragraph § 1926.652(e)(2) of the Final Rule, *Additional requirements for support systems for trench excavations,* requires that:

> (i) Excavation of material to a level not greater than 2 feet (.61m) below the bottom of the members of a support system shall be permitted, but only if the system is designed to resist the forces calculated for the full depth of the trench, and there are no indications while the trench is open of a possible loss of soil from behind or below the bottom of the support system.
>
> (ii) Installation of a support system shall be closely coordinated with the excavation of trenches.

These requirements are virtually identical to the proposal, except paragraph (e)(2)(i) contains language that allows excavation to a level not greater than 2 feet (.61 m) below the bottom of the members of a support system of a trench. It applies only to trenches. This provision, based upon recommendations made to OSHA by NBS (Ex. 2–6), helps to clarify what was meant by the phrase "installed so as to be effective to the bottom of the excavation" found in existing § 1926.652(d) of the current trenching standards. The revised provision recognizes that trench support systems in some instances need not always be installed to the bottom of the excavation. If designed to resist the forces calculated for the full depth of the excavation, the system can be fully effective, even if it does not extend to the bottom.

Paragraph (e)(2)(ii) requires that installation of support systems be closely coordinated with the excavation of trenches. This is a revision of existing § 1926.652(i). The ACCSH suggested that the existing and proposed requirements be dropped (Ex. 2–8, p. 400) because they seemed to apply to all trenches, even where there would be no employee exposure to cave-in hazards (i.e., where no employees enter the trenches). However, this paragraph is intended to apply only where employees are exposed to cave-in hazards. As with all OSHA standards, these provisions apply only where there is exposure of employees to hazards or potential hazards.

Coordination of installation of the support system with the excavation of the trench will reduce the possibility that a cave-in will occur. The longer a trench is open, the more likely it is to cave-in. Essentially, where employees will be expected to enter a trench, it is a safe work practice to install the support system as soon as possible after excavation. OSHA believes that this proposed requirement is necessary to assure employee safety in trenches.

OSHA received 10 comments and additional input from the ACCSH on these provisions. Several commenters (Exs. 4–21, 4–23, 4–31, 4–40, 4–42, 4–78, 4–86, and 4–91) suggested that excavation more than 2 feet below the support system should be permitted if approved by a qualified person. The Agency notes that this 2-foot depth has support from NBS, as discussed above. However, the commenters who want to be able to dig deeper than 2 feet below the support system have not presented evidence to support their position for an "across the board" relaxation of this requirement.

Employers wishing to excavate deeper than 2 feet below the support system must comply with § 1926.652(c)(4), which requires design by a registered professional engineer. OSHA believes that while deviations from the two foot rule could be safe in some situations, in order to ensure employee safety, employers who dig deeper than 2 feet below a support system must have a protective system designed by a registered professional engineer.

Another commenter (Ex. 4–17) pointed out that the definition of "cave-in" is not quite appropriate, as used in this provision. OSHA agrees and has revised this requirement accordingly. An additional commenter (Ex. 4–111) merely noted that when sloping, a four-foot bench is allowed.

The ACCSH (Tr. 8/5/87, pp. 529–530) recommended eliminating the 2-foot depth, noting that OSHA should not allow excavation below the support system unless the system is so designed. Also, the ACCSH recommended eliminating "of trenches" in paragraph (e)(2)(ii) because trenches are excavations.

The Agency believes that the 2-foot limit, as proposed, provides adequate employee protection, and is supported by NBS. However, as discussed above, excavation deeper than 2 feet below a support system must be designed by a registered professional engineer. In addition, OSHA notes that paragraph (e)(2)(ii) is directed at trenches because prompt installation of the support system is more critical in trenches than in excavations in general.

Therefore, based on the record, OSHA promulgates § 1926.652(e)(2) as revised.

Section 1926.652(f) of the Final Rule requires that "Employees shall not be

permitted to work on the faces of sloped or benched excavations at levels above other employees except when the employees at the lower levels are adequately protected from the hazard of falling, rolling, or sliding material or equipment." This provision is identical to the proposal. OSHA received no comment on this requirement.

Paragraphs (g)(1), (i) through (iv) of § 1926.652 of the Final Rule set out the general provisions for shield systems and require that:

(i) Shield systems shall not be subjected to loads exceeding those which the system was designed to withstand.

(ii) Shields shall be installed in a manner to restrict lateral or other hazardous movement of the shield in the event of the application of sudden lateral loads.

(iii) Employees shall be protected from the hazard of cave-ins when entering or exiting the areas protected by shields.

(iv) Employees shall not be allowed in shields when shields are being installed, removed, or moved vertically.

These provisions are virtually identical to the proposal except that paragraph (g)(1)(iv) has been revised to permit employees to remain inside shields being moved horizontally. This revision is based on input received on Issue 11, discussed above. OSHA received 16 comments and ACCSH input on proposed paragraph (g)(1)(iv), all of which supported this decision.

Section 1926.652(g)(2) of the Final Rule requires that "Excavations of earth material to a level not greater than 2 feet (.61 m) below the bottom of a shield shall be permitted, but only if the shield is designed to resist the forces calculated for the full depth of the trench, and there are no indications while the trench is open of a possible loss of soil from behind or below the bottom of the shield."

This provision is virtually identical to the proposal except for editorial changes suggested by commenters to clarify the intent.

This provision allows excavation of earth material in certain circumstances to a level not greater than 2 feet (.61 m) below the bottom of shields. The reasoning behind this is identical to that discussed in paragraph (e)(2)(i) above.

OSHA received two comments (Exs. 4–17 and 4–111) and input from the ACCSH [Tr. 8/5/87, p. 530] on this provision. All input was of an editorial nature and was substantially the same as the input received on paragraph (e)(2)(i), discussed above.

*Relocated and Deleted Paragraphs*

The fall protection requirements in existing § 1926.651 (t) and (w) are retained in the revision of subpart P until the revised subpart M is issued. These provisions, which require fall protection at remotely located excavations and on walkways or bridges crossing over excavations, respectively, will be incorporated into subpart M—Fall Protection. This action is consistent with OSHA's intention to locate most of the provisions relating to fall protection in construction together under one subpart.

OSHA published a proposed revision of its fall protection standards in subpart M. (See 51 FR 42718, Nov. 25, 1986.) When this proposal is published as a Final Rule, the excavation fall protection provisions will be incorporated into new subpart M.

OSHA is deleting the following existing paragraphs: § 1926.650(e), which requires personal protective equipment as set forth in subpart E; § 1926.651(r), which requires that blasting be performed in accordance with subpart U; and § 1926.651(y), which requires that ladders be in accordance with the requirements of subpart L. These references are redundant in that they require nothing different or in addition to the requirements set forth in the respective subparts. In addition, they might mislead an employer into assuming that other subparts not referenced do not apply to excavations. The requirements of subparts E, U, and L remain applicable to employees working in and around excavations, as do the other subparts of part 1926.

OSHA is also deleting existing § 1926.652(g). This paragraph presently states: "Minimum requirements for trench timbering shall be in accordance with Table P–2." It also requires that compressive stresses in timber braces and diagonal shores not be in excess of certain allowable values as computed using the given formula. The requirements of this paragraph are not consistent with the approach taken in the Final Rule, which does allow the employer to select trench timbering from tables, but does not make the tables minimum requirements for all trench shoring.

In addition, OSHA believes that the equation set out in existing § 1926.652(g)(2), which is intended to be used for determining the maximum allowable compressive stress in braces and diagonal shores in a wood shoring system, is not appropriate for continuation in the standard. OSHA has determined that the equation is outdated and should not be carried forward. The use of the specified equation, in a slightly different form, was originally contained in the USA Standard A10.2—1944, "Safety Code for Building Construction." Since that time, new equations for determining allowable compressive loads have been developed. These newer equations are described in the "Timber Construction Manual" published by the American Institute of Timber Construction (Second edition, 1974.) The more modern equations take into account the shape of the member (i.e., square or round), and the kind of wood used to produce the member. Allowable stresses (i.e., the maximum stresses to which a member should be subjected) vary depending upon the species of wood being considered. The equation given in existing § 1926.652(g)(2) does not account for either of these factors.

However, OSHA does not believe that the newer improved equations should be specified in the revised standard. First, in OSHA's opinion, these equations do not need to be specified in the standard itself. As pointed out above, a particular equation is used only to determine the maximum allowable stress to which a certain structural member should be subjected. Today, such information generally is available in tabulated form for most species and grades of wood. Therefore, it is not necessary to use an equation in the standard to calculate maximum allowable stresses. Furthermore, knowing the maximum allowable stress alone is of little value. The actual stress to which a member is subjected or expected to be subjected must also be known and a comparison made between the actual and allowed stresses. If the actual stress were to exceed the maximum allowable, then the particular member could not be used.

Another reason why equations are not required to be used in the Final Rule is that they address only one type of load situation. For example, the current equation is only intended to be used to calculate the maximum allowable compressive stress for wood members acting as columns under axial compressive loads. However, members are often subject to eccentric loads or lateral loads that create bending stresses in them. These other stresses, alone or in combination with axial compressive forces, can be critical. Therefore, the maximum allowable and actual stresses for various load conditions need to be considered in addition to the one load condition currently specified in the standard.

A final reason why use of the existing equation is no longer required is that it applies only to wood members. Much less wood is used today than in 1944 when use of the equation was recommended. Other materials, primarily steel and aluminum, are used

more frequently today, and different equations are used to calculate allowable stresses in members made of these materials.

In OSHA's opinion, the alternatives set forth in the appendices of the Final Rule for design of protective systems will provide added flexibility for the employer while increasing the degree of safety afforded the employees, thus eliminating the need for the existing equation.

OSHA is also deleting other existing regulations currently in subpart P. Two tables which are part of the present standard have been deleted and will be replaced by material contained in the Appendices to the standard. The contents of these Appendices are discussed in detail below. Existing Table P–1, "Approximate Angle of Repose for Sloping of Sides of Excavations," would, in effect, be replaced by appendices A and B, which provide a detailed soil classification scheme and sloping requirements for the employer who selects the second option for designing sloping system protection.

Similarly, existing Table P–2, "Trench Shoring-Minimum Requirements," will be replaced by material in appendices A and C.

*Appendix A—Soil Classification*

Appendix A details a method of classifying earth deposits, taking into account various environmental conditions, site-specific conditions, and soil-specific conditions. The results of the categorization of soils in accordance with this method would then be subsequently used to determine the level of protection from cave-ins that is required to protect employees.

It is not required in every instance that employers use this Appendix as the basis of classifying earth conditions. The standard provides two options for designing protective systems which involve the use of appendix A. First, § 1926.652(b)(2) provides for the use of appendix A to determine the requirements for sloping and benching. The second option, in § 1926.652(c)(2), uses appendix A to determine the requirements for timber shoring. This Appendix may also be necessary to determine the requirements for aluminum hydraulic shoring in accordance with appendix D. OSHA, however, prefers employer to use manufacturer's data (in accordance with § 1926.652(c)(2)) where possible, when using aluminum hydraulic shoring. Appendix D is intended for use in the absence of manufacturers data. It should be noted again that the employer is required to select one of the options set forth in paragraph § 1926.652(b) if using a sloping system, or in § 1926.652(c) if using shoring, shields, or another system. When an employer chooses an option where this appendix is to be used, the employer must then adhere faithfully to the requirements and provisions of the appendix. The appendix then becomes mandatory.

Appendix A may also be used in conjunction with appendix D to determine requirements for the use of aluminum hydraulic shoring in the absence of manufacturer's tabulated data permitted in § 1926.652(c)(2).

Appendix A is arranged into four major paragraphs. These are: (a) Scope and Application; (b) Definitions; (c) Requirements; and (d) Acceptable Visual and Manual Tests.

The first paragraph states the scope of the appendix and when it is applicable. Terms used throughout the appendix are defined in the second paragraph. The requirements for making soil classifications are set forth in the third paragraph and basically state that the classifications, as defined in the previous paragraph, shall be determined based on the results of visual and manual analyses. Acceptable visual and manual analyses are described in the fourth paragraph.

OSHA recognizes that all or none of the particular analyses described in the fourth paragraph may apply at any one time, and that other tests could be developed or used which would meet the intent of the standard. Therefore, these analyses are recommended, but not mandatory.

This soil classification system, as with all soil classification systems, is not intended for universal application. OSHA does not intend that the system be used to replace analysis and testing for engineering design. OSHA does not require sampling and testing for engineering design in the current standard, and for reasons discussed below is not requiring specific soil testing procedures in this Final Rule. The decision to conduct a more sophisticated soil sampling and testing program, as under the current standard, would be left to the employer's discretion. When an engineering analysis is desired, OSHA recommends that other presently accepted methods of soil sampling and testing be used. Methods, such as those adopted by the American Society for Testing and Materials (ASTM), are accepted methods.

This soil classification system is intended to address a deficiency in the existing standard. The existing standard does not rely on a consistent method of classifying soils, but relies on terms that cannot be easily quantified, such as "hard and compact" and "soft and unstable." Further, there is an inconsistency in the terminology currently found in subpart P. For example, one set of terms is used in Table P–1 which indicates recommended slopes in certain primarily granular materials. A different set of terms to describe soils is used as the basis of the divisions of Table P–2, which specifies minimum requirements for timber shoring in trenches.

This soil classification system is intended to eliminate this deficiency. It is intended to provide construction personnel and OSHA Compliance Officers with a common language that can be used to assess the requirements and adequacy of sloping and shoring systems used to prevent cave-ins.

The soil classification system that was proposed was developed by the National Bureau of Standards (NBS). The background of the system is explained in more detail in Exhibit 2–5. OSHA incorporated this classification system in the proposal based on the recommendations of NBS, after consultation with the ACCSH, and after a review by interested parties at the five industry-sponsored workshops. In addition, OSHA used several American Society for Testing and Materials (ASTM) Standards, as well as other sources, to obtain information that, in OSHA's opinion, was needed to supplement and clarify the NBS recommendations. The ASTM Standards included:

(1) Designation: D653–67 (Reapproved 1973)—"Standard Definitions of Terms and Symbols Relating to Soil and Rock Mechanics," (Ex. 2–27);

(2) Designation: D2487–69—"Standard Method for Classification of Soils for Engineering Purposes," (Ex. 2–28); and,

(3) Designation: D2488–69—Standard Recommended Practice for Description of Soils (Visual—Manual Procedure)," (Ex. 2–29).

OSHA used these sources to clarify and provide additional information in paragraph (b) of the appendix, "Definitions," and in paragraph (d), "Recommended Visual and Manual Tests."

One example of the use of supplemental information involved the development of the definition of "cemented soil." NBS made reference to cemented soil in its recommended definition of Type A soil, but provided no discussion as to what constitutes cemented soil other than to suggest that soils referred to as "hardpan" or "till" are examples of cemented soil.

Cemented soils are most commonly composed of granular, or coarse-grained

particles. Carbonate salts—calcium carbonate being the most common—are the primary chemical agents that provide the cementation of the particles of soil. The action of the cementing agents adds to the strength of the soil by binding the particles together so that the soil can resist a greater degree of stress.

The quantity of the cementing agent in a soil sample can be estimated by subjecting a soil sample to a solution of dilute hydrochloric acid and visually noting the intensity of the reaction. Unfortunately, this test does not give a good indication of the strength of the cemented soil. However, a satisfactory estimate of the relative strength of a cemented soil can be made by conducting a dry strength test. This is a test that is conducted by crushing dry soil samples between the fingers. The dry strength test is used primarily for estimating the strength of fine-grained soils, i.e., clays which have cohesive qualities. Conducting this test on cemented coarse-grained soils, however, can give good estimates of relative strength that are equivalent to the strength estimates of fine-grained soils.

ASTM D2488 (Ex. 2–29) states, in a description of the dry strength test, that: "The presence of high-strength water soluble cementing materials, such as calcium carbonate, may cause exceptionally high dry strength * * *." In the dry strength test, "high" strengths are indicated if "the sample cannot be crushed to powder by finger pressure, even though the sample may be broken." "Very high" strength is indicated "if the sample cannot be broken between the thumb and a hard surface." In another reference ("Handbook of Soil Mechanics", Volume I, p. 98, by Arpad Kezdi) under a discussion of the dry strength test, it is stated: "If the sample resists crushing by finger pressure altogether, the soil is an inorganic clay of high plasticity, or a coarse-grained soil aggregate cemented by some high-strength binder (e.g., calcium carbonate or iron oxide)."

Based on the discussions of cemented soils in this literature, OSHA supplemented the NBS recommendations by developing a proposed definition of "cemented soil" with the intent of clarifying the NBS recommendations. The definition of "cemented soil" is intended to include those soils that exhibit strengths at least equivalent to the strengths required for Type A cohesive soil. The result of this was that some soils containing a slight amount of a cementing agent would not be considered as cemented soil, as such soil will not exhibit sufficient strength.

The soil classification system proposed had not been widely used in practice. However, in OSHA's opinion, use of this system will be a major improvement over the terminology and practices used in the existing standard.

The Agency received a great amount of comment on the proposed soil classification system and has revised this Appendix substantially, as discussed below.

Paragraph (a)(1), *Scope*, of appendix A of the Final Rule states "This Appendix describes a method of classifying soil and rock deposits based on site and environmental conditions, and on the structure and composition of the earth deposits. The Appendix contains definitions, sets forth requirements, and describes acceptable visual and manual tests for use in classifying soils."

The paragraph is nearly identical to the proposal except that "recommended" has been changed to "acceptable" for reasons discussed below.

The Agency received comment and testimony from the Associated General Contractors (AGC) of California (Ex. 8–18 and Tr. 4/19/88 p. 114) suggesting that "recommended" be changed to "acceptable" because they felt that "recommended" implied these tests were mandatory. OSHA is revising the Final Rule accordingly, noting that it was never the Agency intent that any of these tests be mandatory. (See 52 FR 12315.) The Agency is requiring only that one acceptable visual test and one acceptable manual test be performed in classifying soil in accordance with appendix A. These tests may include those listed in the Appendix or may include other generally recognized visual or manual tests.

Paragraph (a)(2), *Application*, of appendix A of the Final Rule states:

> This appendix applies when a sloping or benching system is designed in accordance with the requirements set forth in § 1926.652(b)(2) as a method of protection for employees from cave-ins. This appendix also applies when timber shoring for excavations is designed as a method of protection from cave-ins in accordance with appendix C to subpart P of part 1926 and when aluminum hydraulic shoring is designed in accordance with appendix D. This Appendix also applies if other protective systems are designed and selected for use from data prepared in accordance with the requirements set forth in § 1926.652(c), and the use of the data is predicated on the use of the soil classification system set forth in this Appendix.

The ACCSH (Tr. 8/5/87 p. 530–531) recommended changing "against cave-ins" to "from cave-ins" and changing "trenches" to "excavations." The Agency recognizes that for consistency and accuracy, the first change was appropriate, and has incorporated it into the Final Rule. However, as discussed above, the Agency declines to blur the distinction between trenches and excavations. OSHA has also clarified the reference to § 1926.652(b) by citing § 1926.652(b)(2) to be more specific, as recommended by NIOSH (Ex. 4–30). The Final Rule reflects these changes. OSHA received no other comments on this paragraph.

Paragraph (b) of appendix A of the Final Rule defines terms used in this appendix for soil classification. The Agency has added an introductory statement to this paragraph to identify and reference source documents so users of this appendix will know where to look if further clarification is needed. This revision is in line with suggestions made by the ACCSH (Tr. 8/5/87 p. 531), the Building and Construction Trades Department (BCTD) of the AFL–CIO (Ex. 4–17), and the National Utility Contractors Association (NUCA) (Ex. 4–91). In addition, the commenters demonstrated a clearer understanding of the proposed definitions which included examples of soils given in readily recognizable terms. Therefore, OSHA has modified several definitions by providing such examples.

Paragraph (b) defines "cemented soil" as "a soil in which the particles are held together by a chemical agent, such as calcium carbonate, such that a hand-size sample cannot be crushed into powder or individual soil particles by finger pressures."

This definition is identical to the proposal. OSHA received no comment on this provision and therefore promulgates this definition, as proposed.

Paragraph (b) of appendix A defines "cohesive soil" as "clay (fine grained soil), or soil with a high clay content which has cohesive strength. Cohesive soil does not crumble, can be excavated with vertical sideslopes, and is plastic when moist. Cohesive soil is hard to break when dry and exhibits significant cohesion when submerged. Cohesive soils include clayey silt, sandy clay, silty clay, clay and organic clay."

This definition is identical to the proposal. OSHA received one specific comment on this definition from the BCTD (Ex. 4–17), which suggested that the ASTM definition might be of more value. OSHA notes that the proposed definition incorporated the ASTM definition and provided further guidance as to examples of cohesive soils. Therefore, the Agency has decided to keep the definition as proposed.

Paragraph (b) of appendix A defines "Dry soil" as "soil that does not exhibit visible signs of moisture content."

This definition is identical to the proposal. OSHA received no comment on this provision, and, therefore, carries the definition to the Final Rule unchanged.

Paragraph (b) of appendix A defines "Fissured" as "a soil material that has a tendency to break along definite planes of fracture with little resistance, or a material that exhibits open cracks, such as tension cracks, in an exposed surface."

This definition is identical to the proposal. OSHA received no comment on this definition, and, therefore promulgates it unchanged.

Paragraph (b) of appendix A defines "granular soil" as "gravel, sand, or silt, (coarse grained soil) with little or no clay content. Granular soil has no cohesive strength. Some moist granular soils exhibit apparent cohesion. Granular soil cannot be molded when moist and crumbles easily when dry."

This definition is similar to the proposal except that the phrase "and temporarily stand on a vertical slope but normally cannot be excavated with vertical sideslopes" has been deleted as suggested by the ACCSH (Tr. 8/5/87 p. 531) and the BCTD (Ex. 4–17). Both commenters believed that the phrase is misleading and confusing. OSHA recognizes that the phrase is subject to misinterpretation, and has deleted the phrase from the Final Rule.

Paragraph (b) of appendix A defines "layered system" as "two or more distinctly different soil or rock types arranged in layers. Micaceous seams or weakened planes in rock or shale are considered layered."

This definition is similar to the proposal, except the Agency has clarified that the definition does, indeed, include shale, and weakened planes in both shale and rock. This revision is in response to a question raised by the sole commenter on this provision (Ex. 4–111). The Agency feels that this revision is necessary in order to clarify its regulatory intent.

Paragraph (b) of appendix A defines "Moist soil" as "a condition in which a soil looks and feels damp. Moist cohesive soil can easily be shaped into a ball and rolled into small diameter threads before crumbling. Moist granular soil that contains some cohesive material will exhibit signs of cohesion between particles." This provision is identical to the proposal. OSHA received no comment on this definition, and therefore carries it forward in the Final Rule.

Paragraph (b) of appendix A defines "Plastic" as "a property of a soil which allows the soil to be deformed or molded without cracking, or appreciable volume change."

This definition is almost identical to the proposal, except that the word "crumbling" has been deleted. This deletion was suggested by the BCTD (Ex. 4–17) because the proposed definition was the ASTM definition with the word crumbling added. This commenter and others (Ex. 4–91, and the ACCSH) all recommended OSHA be consistent with existing soil classification systems. Therefore, OSHA is revising this definition because the word "crumbling" added nothing to the definition, and to be consistent with ASTM. OSHA received no other comment on this definition.

Paragraph (b) of appendix A defines "saturated soil" as "a soil in which the voids are filled with water." Saturation does not require flow. Saturation, or near saturation, is necessary for the proper use of instruments such as a pocket penetrometer or sheer vane."

This definition is substantially different from the proposal which defined "saturated soil" as:

> Submerged soil that is below the ground water table, and very wet soil such as soil that forms the sides of an excavation from which water can be seen seeping; soil that forms the sides of an excavation that has been flooded to more than one-half its depth and has not been drained for a least one day; and soil in which water is retained by a shoring system.

This change is based on the comments of the BCTD (Ex. 4–17) and is in line with current ASTM usage. The Agency notes that, while ASTM D–653–85 (Ex. 4–17 attachment) defines neither "saturated soil" nor "submerged soil" it does, in fact, differentiate between these two conditions under the definition of "unit weight."

OSHA has determined that the proposed definition could lead to confusion in that soil conditions at or near saturation, as defined in the Final Rule, are necessary for proper use of mechanical instruments sometimes used to measure soil strength. On the other hand, soils that are submerged, namely, actually underwater or seeping, present a different set of soil conditions and must be treated differently from "saturated soils." For example, beach sand that is saturated or nearly saturated, can be shaped to form sand castles, or other shapes and will hold those shapes until the sand dries out or is submerged by the incoming tide. At that time, the sand will return to its natural angle of repose (as used in current engineering practice) for the site conditions.

Therefore, OSHA has determined that it is appropriate to differentiate between these two conditions and has revised the definition of "saturated soil" as discussed above. Additionally, the Agency is defining "submerged soil" as "soil which is underwater or free seeping," and has added this new definition to appendix A of the Final Rule.

Paragraph (b) of appendix A defines "soil classification system" as follows:

> For the purpose of this Subpart, a method of categorizing soil and rock deposits in a hierarchy of Stable Rock, Type A, Type B, and Type C, in decreasing order of stability. The categories are determined based on an analysis of the properties and performance characteristics of the deposits and the environmental conditions of exposure.

The definition is virtually identical to the proposal except that the Agency notes that this definition is for the purpose of this subpart only. This revision was suggested by the BCTD (Ex. 4–17) to clarify that not all soil classification systems use the soil types used in this appendix. The Agency recognizes this distinction and has revised the Final Rule to incorporate this input.

Paragraph (b) of appendix A defines "stable rock" as "natural solid mineral matter that can be excavated with vertical sides and remain intact while exposed."

This definition is very similar to the proposed definition except that the ASTM definition for "rock" has been substituted in the proposed definition replacing the word "rock."

This change was made to address the concerns of Granite Construction Company (Ex. 4–28), which pointed out that the proposed definition could be misinterpreted by the competent person to include some other types of soils.

OSHA received other comments and hearing testimony arguing that hardpan and caliche soil should be included in the stable rock category.

Four commenters (Exs. 4–82, 4–102, 4–106 and 4–109) objected to the exclusion of hardpan and caliche from the stable rock classification. These commenters provided the same qualified recommendations, for allowing these soils to be excavated with vertical sides, as they presented under Issue 12, discussed above. In addition, these commenters were represented by the Associated General Contractors (AGC) of California at the informal public hearing (Tr. 4/19/88 pp. 108–165) and provided similar arguments at that forum. Mr. Richard Frankian, a consultant for the AGC of California, testified at the hearing (Tr. 4/19/88 p. 118) that hardpan and caliche could be included in the stable rock group

provided they have an unconfined compressive strength of at least four tons per square foot (4 T/ft² or 8000 lbs/ft²).

OSHA recognizes that hardpan and caliche can be excavated with vertical sides under some site conditions. However, as pointed out even by the advocates of this practice, there are many restrictions (see discussion of Issue 12) which must apply. Therefore, the Agency declines to include hardpan and caliche in the stable rock classification in all circumstances for the purpose of this appendix. OSHA wishes to restate and reiterate that even though appendix A does not allow for it, the employer has the option of using this practice if approved by a registered professional engineer, or if it is in accordance with tabulated data prepared by a registered professional engineer.

Finally, OSHA recognizes that soil with an unconfined compressive strength over four tons per square foot is, indeed, very stable. However, this measure of strength is only one factor that must be considered when classifying soils. (Other factors are discussed under Issue 12.)

Hardpan is defined in Exhibit 2–27 as "a layer of extremely dense *soil*" (emphasis added), and in ASTM D653–85 (Attachment to Ex. 4–17) as "a hard impervious layer, composed chiefly of clay, cemented by relatively insoluble materials, that does not become plastic when mixed with water and definitely limits the downward movement of water and roots." Caliche is defined in the New College Edition of the American Heritage Dictionary as "a hard *soil* layer cemented by calcium carbonate" (emphasis added). OSHA notes that all of these definitions recognize hardpan and caliche as a soil (clay is fine grained soil by definition), not as rock.

Exhibit 2–27 defines soil as "sediment or other *unconsolidated* accumulations of *solid particles* produced by physical and chemical disintegration of rocks, and may or may not contain organic matter" (emphasis added). Rock is defined in the same exhibit as "natural solid mineral matter occurring in large masses or fragments." These definitions also appear in the updated version of ASTM D653–85, attached to Exhibit 4–17.

Therefore, by definition, hardpan and caliche are not rock, and for the purpose of this Appendix are considered Type A soils.

The definition of "Submerged Soil" is new. "Submerged soil" is defined as "soil which is underwater or is free seeping." The rationale for this new definition is discussed above.

Paragraph (b) of appendix A of the Final Rule also defines the soil classifications used in this appendix.

OSHA has revised these definitions somewhat, based on the record, but has not added additional types of soil as requested by the AGC of California (Ex. 24 which was revised by Exs. 28B and 30), and at the public hearings (Tr. 4/19/88 p. 117).

OSHA believes that the additional soil types recommended by the AGC of California, while they appear to be valid, would complicate this soil classification and would require a degree of accuracy in soil type determination beyond the capabilities and limitations of this Appendix. OSHA notes that even the use of objective test procedures, such as the pocket penetrameter suggested by the commenter at the informal public hearing (Tr. 4/19/88 p. 117), or the torvane shear device, are still only estimates which are subject to error. One commenter (Ex. 42) points out that Spangler and Hardy, in their book "Soil Engineering," Harper and Row, pp. 101–3, 1982, estimate the pocket penetrometer has a ±20 to ±40 percent error, and the authors also discuss some limitations of the torvane shear device.

OSHA recognizes the limitations of these methods, as well as those methods described in appendix A. The Agency believes that any field estimated soil type must, by necessity, be based on a simple, conservative soil classification system. The A–B–C soil classification scheme given in this Appendix meets that need. A more complex system would require far more accurate methods of determining soil classification to provide sufficient employee protection.

OSHA also notes that two commenters (Exs. 36, and 37) and a late submission by Mr. William Winans of Allied Steel and Tractor Products, Inc. supported the use of the A–B–C soil classification, as proposed in appendix A.

OSHA emphasizes that the use of this appendix is only required in two of the eight options allowed by the Final Rule. In these options (§ 1926.652 (b)(2) and (c)(1)) the employer cannot substitute other soil classification systems. Employers wishing to use other legitimate soil classification schemes, in conjunction with tabulated data that is in accordance with the standard, or who wish to use the services of a registered professional engineer and laboratory testing, can do so under the other permissible options.

Paragraph (b) of appendix A defines "Type A" as:

> Cohesive soils with an unconfined compressive strength of 1.5 tons per square foot (tsf) (144kPa) or greater. Examples of cohesive soils are: clay, silty clay, sandy clay, clay loam and, in some cases silty clay loam and sandy clay loam. Cemented soils such as caliche and hardpan are also considered Type A.
>
> However, no soil is Type A if:
>
> (i) The soil is fissured; or
>
> (ii) The soil is subject to vibration from heavy traffic, pile driving, or similar effects; or
>
> (iii) The soil has been previously disturbed; or
>
> (iv) The soil is part of a sloped, layered system where the layers dip into the excavation on a slope of four horizontal to one vertical (4H:1V) or greater; or
>
> (v) The material is subject to other factors that would require it to be classified as a less stable material.

This definition is very similar to proposed paragraph (b)(12). However, as discussed above, the Agency has provided additional specific examples of soils that are considered Type A, to help the user. Additionally, OSHA has dropped the word "till" from the definition, because, as pointed out by one commenter (Ex. 4–17), its use in the proposal was inconsistent with the ASTM definition.

Paragraph (b) of appendix A defines "Type B" as:

> (i) Cohesive soil with an unconfined compressive strength greater than 0.5 tsf (48kPa) but less than 1.5 tsf (144kPa); or
>
> (ii) Granular cohesionless soils including: angular gravel (similar to crushed rock), silt, silt loam, sandy loam, and in some cases, silty clay loam and sandy clay loam.
>
> (iii) Previously disturbed soils except those which would otherwise be classed as Type C soil.
>
> (iv) Soil that meets the unconfined compressive strength or cementation requirements for Type A, but is fissured or subject to vibration; or
>
> (v) Dry rock that is not stable; or
>
> (vi) Material that is part of a sloped, layered system where the layers dip into the excavation on a slope less steep than four horizontal to one vertical (4H:1V), but only if the material would otherwise be classified as Type B.

This definition is very similar to proposed paragraph (b)(13), except that the Agency has added specific examples to this definition to assist the user, as discussed, and has clarified that most disturbed soils are Type B.

OSHA received comments from the AGC of California (Exs. 4–106, 24, 28B and 30) and testimony at the hearing (Tr. 4/19/88 p. 113) recommending at least one more intermediate soil classification between Type A and Type C. The Agency declines to act on this suggestion because, as discussed above, OSHA believes that this appendix does

not have the capabilities to determine soil type with the degree of accuracy that the addition of one or more soil types would require. Additionally, the Agency feels that incorporating a more complex system into this appendix would make the system less likely to be used properly. Again, OSHA reiterates that employers are allowed to use alternative soil classification systems in accordance with other options provided by this Final Rule.

The ACCSH (Tr. 8/5/87 handout) and the BCTD (Ex. 4–17) pointed out that some parts of the proposed definitions for both Type B and Type C soils were inconsistent with proposed table B–1. In particular they noted that the definition of Type B included "granular soil that can stand on a slope of three horizontal to one vertical," while table B–1 allowed a slope of 3/4:1 short term or 1:1 long term.

OSHA now recognizes that this criteria, although used in the NBS document (Ex. 2–5 p. 39), is inconsistent with the rest of this appendix and introduces ambiguity into this definition and other places in this Appendix. OSHA has therefore dropped this evaluation criteria and instead is providing examples of granular cohesionless soils.

Another commenter (Ex. 4–30) noted that the 4:1 ratio of sloped, layered systems discussed in proposed paragraph (b)(12)(iv) was somewhat restrictive. The Agency is of the opinion that, while restrictive, this degree of caution is necessary, because of the limits of this appendix, and declines to revise this provision.

Paragraph (b) of appendix A defines "Type C" as:

(1) Cohesive soil with an unconfined compressive strength of 0.5 tsf (48 kPa) or less; or

(ii) Granular soils including: gravel, sand, and loamy sand, or

(iii) Submerged soil or soil from which water is freely seeping; or

(iv) Submerged rock that is not stable; or

(v) Material in a sloped, layered system where the layers dip into the excavation or a slope of four horizontal to one vertical (4H:1V) or steeper.

This definition is very similar to proposed paragraph (b)(14) except that the criteria relating to the slope of three horizontal to one vertical has been replaced with examples of this type of soil, and "saturated" has been removed from proposed paragraph (b)(14)(iii). These changes have been made to be consistent with similar changes discussed above.

In addition to input from the ACCSH and the BCTD, discussed above under Type B, OSHA received a comment from R. T. Frankian (Ex. 33), a consultant for the AGC of California, recommending that the only prudent course for Type C soil would be to require shoring with solid sheeting or require an engineer to evaluate the situation and make recommendations. OSHA believes this is not necessary and notes that NBS (Ex. 2–5) felt that Type C soil, as defined, could be sloped safely to a maximum of 1½ horizontal to 1 vertical. OSHA also notes that no other commenters made similar recommendations to those of the AGC of California concerning Type C soils.

Paragraph (b) of appendix A defines "unconfined compressive strength" as "the load per unit area at which a soil will fail in compression. It can be determined by laboratory testing, or estimated in the field using a pocket penetrometer, by thumb penetration tests, and other methods."

This definition is identical to proposed paragraph (b)(15). OSHA received no comment on this definition and carries it forward in the Final Rule.

Paragraph (b) of this appendix defines "wet soil" as "soil that contains significantly more moisture than moist soil, but in such a range of values that cohesive material will slump or begin to flow when vibrated. Granular material that would exhibit cohesive properties when moist will lose those cohesive properties when wet."

This definition is identical to proposed paragraph (b)(16). OSHA received no comment on this definition and carries it forward in the Final Rule.

Paragraph (c)(1) of appendix A provides the requirements for classification of soil and rock deposits using this appendix. This paragraph states: "Each soil and rock deposit shall be classified by a competent person as Stable Rock, Type A, Type B, or Type C in accordance with the definitions set forth in paragraph (b) of this appendix."

This provision is identical to the proposal. OSHA received no comment on this provision and therefore carries it forward in the Final Rule.

Paragraph (c)(2) of appendix A details the basis for soil classification using this appendix. This paragraph states: "The classification of the deposits shall be made based on the results of at least one visual and at least one manual analysis. Such analyses shall be conducted by a competent person using tests described in paragraph (d) below, or in other recognized methods of soil classification and testing such as those adopted by the American Society for Testing Materials, or the U.S. Department of Agriculture textural classification system."

This paragraph is essentially the same as the proposal except that the Agency has clarified that the tests in paragraph (d) are not mandatory and that other recognized tests and classification are acceptable.

OSHA received four comments (Exs. 4–82, 4–102, 4–106, and 4–109) objecting to a requirement for any specific tests, and also objecting to the requirement for at least one visual and at least one manual analysis. These commenters argued that specific tests would be impractical because of the variety and subjectivity of such methods and the changing nature of soil conditions. One commenter, the AGC of California (Ex. 4–106), suggested that soil classification be based on an evaluation of soil condition and visible factors. OSHA recognizes that evaluation of soil condition is necessary, and has determined that this evaluation must include manual testing as well as visual analysis. Visual analyses alone are not sufficient to classify soil properly. Manual analyses are needed to confirm the findings of visual analyses and to provide additional information necessary for more accurate soil classification.

OSHA notes that neither the proposal nor the Final Rule requires specific tests/methods. Requiring at least one visual and at least one manual test leaves the employer a great deal of latitude as to which tests are used. In order to clarify this latitude the Agency has revised this provision to state specifically that other recognized method of analyses are acceptable, and gives examples of some of these other acceptable methods.

This revision is in line with the suggestion made at the public hearing by the AGC of California [Tr. 4/19/88 p. 114]. However OSHA has not deleted the requirement for at least one visual and at least one manual test, for reasons discussed above.

The only other commenter (Ex. 4–111) supported OSHA's requirement for both a visual and a manual test.

Paragraphs (c)(3) through (c)(5) of appendix A discuss visual and manual analyses, layered systems, and reclassification of soils using this appendix. These provisons state:

(3) *Visual and manual analyses.* The visual and manual analyses, such as those noted as being acceptable in paragraph (d) of this Appendix, shall be designed and conducted to provide sufficient quantitative and qualitative information as may be necessary to identify properly the properties, factors, and conditions affecting the classification of the deposits.

(4) *Layered systems.* In a layered system, the system shall be classified in accordance with its weakest layer. However, each layer may be classified individually where a more stable layer lies under a less stable layer.

(5) *Reclassification.* If after classifying a deposit, the properties, factors, or conditions affecting its classification change in any way, the changes shall be evaluated by a competent person. The deposit shall be reclassified as necessary to reflect the changed circumstances.

These provisions are virtually identical to the proposal except for an editorial change in paragraph (c)(3). That change, based on input from the AGC of California, revises the word "recommended" to "noted as being acceptable." The input from the AGC of California (Tr. 4/19/88 p. 114) was directed to another reference to "recommended" test, however, the Agency has also made the change here in order to be consistent.

OSHA received no other comments on these provisions and carries them forward in the Final Rule.

Paragraph (d) of appendix A lists some acceptable visual and manual tests. The title of this paragraph has been revised to read "Acceptable" rather than "Recommended" at the request of the AGC of California (Tr. 4/19/88 p. 114), who noted that "recommended" implied these were the only tests allowed. This was not OSHA's regulatory intent and therefore the Agency has made the requested change.

Paragraph (d)(1) of appendix A discusses and lists visual tests which are acceptable when using this appendix. This list is not intended to be all-inclusive and other recognized visual test are also acceptable. Paragraph (d)(1) reads as follows:

(d) *Acceptable visual and manual tests.* (1) *Visual tests.* Visual analysis is conducted to determine qualitative information regarding the excavation site in general, the soil adjacent to the excavation, the soil forming the sides of the opened excavation, and the soil taken as samples for excavated material.

(i) Observe samples of soil that are excavated and soil on the sides of the excavation. Estimate the range of particle sizes and the relative amounts of the particle sizes. Soil that is primarily composed of fine-grained material is cohesive material. Soil composed primarily of coarse-grained sand or gravel is granular material.

(ii) Observe soil as it is excavated. Soil that remains in clumps when excavated is cohesive. Soil that breaks up easily and does not stay in clumps is granular.

(iii) Observe the side of the opened excavation and the surface area adjacent to the excavation. Crack-like openings such as tension cracks could indicate fissured material. If chunks of soil spall off a vertical side, the soil could be fissured. Small spalls are evidence of moving ground and are indications of potentially hazardous situations.

(iv) Observe the area adjacent to the excavation and the excavation itself for evidence of existing utility and other underground structures, and to identify perviously disturbed soil.

(v) Observe the opened side of the excavation to identify layered systems. Examine layered systems to identify if the layers slope toward the excavation. Estimate the degree of slope of the layers.

(vi) Observe the area adjacent to the excavation and the sides of the opened excavation for evidence of surface water, water seeping from the sides of the excavation, or the location of the level of the water table.

(vii) Observe the area adjacent to the excavation and the area within the excavation for sources of vibration that may affect the stability of the excavation face.

These provisions are virtually identical to the proposal except as follows. Paragraph (d)(1)(i) has been revised to read "composed of fine-grained material." This change drops the word "clay" from the proposed language, which reads "fine-grained clay material." This change was made because two commenters, the ACCSH (Tr. 8/5/87 p. 533) and the BCTD (Ex. 4–17), pointed out that other fine-grained materials such as silt should be included. Based on these comments OSHA is deleting the word "clay" and thereby including all finegrained materials.

Paragraph (d)(1)(iii) of the proposal has been revised to indicate that tension cracks and small soil spalls do not necessarily mean the soil is fissured. This revision is based on input from the BCTD (Ex. 4–17). Additionally, another sentence has been added to alert the users of this Appendix that small spalls are miniature cave-ins and are indications of potentially hazardous situations.

Paragraph (d)(1)(vii) of the proposal which recommended one type of visual test, is being deleted. Several commenters (Exs. 4–17, 4–30, 4–91 and 4–111) and the ACCSH (Tr. 8/5/87 pp. 533–534) all recommended deleting this provision because it was vague, and therefore could be very misleading to the users of this appendix. OSHA agrees and is therefore deleting this provision, and renumbering proposed paragraph (d)(1)(viii) as paragraph (d)(1)(vii) of the Final Rule.

Paragraph (d)(2) of appendix A discusses and lists manual tests which are acceptable when using this appendix. This list is not intended to be all-inclusive and other recognized manual tests are also acceptable. Paragraph (d)(2) states:

(2) *Manual test.* Manual analysis of soil samples is conducted to determine quantitative as well as qualitative properties of soil and to provide more information in order to classify soil properly.

(i) *Plasticity.* Mold a moist or wet sample of soil into a ball and attempt to roll it into threads as thin as ⅛ inch in diameter. Cohesive material can be successfully rolled into threads without crumbling. For example, if at least a two inch (50 mm) length of ⅛ inch thread can be held on one end without tearing, the soil is cohesive.

(ii) *Dry strength.* If the soil is dry and crumbles on its own, or with moderate pressure into individual grains or fine powder, it is granular (any combination of gravel, sand or silt). If the soil is dry and falls into clumps which break up into smaller clumps, but the smaller clumps can only be broken up with difficulty, it may be clay in any combination with gravel, sand or silt. If the dry soil breaks into clumps which do not break up into small clumps, and which can only be broken with difficulty, and there is no visual indication the soil is fissured, the soil may be considered unfissured.

(iii) *Thumb penetration.* The thumb penetration test can be used to estimate the unconfined compressive strength of cohesive soils. (This test is based on the thumb penetration test described in American Society for Testing and Materials (ASTM) Standard designation D2488—"Standard Recommended Practice for Description of Soils (Visual—Manual Procedure).") Type A soils with an unconfined compressive strength of 1.5 tsf can be readily indented by the thumb, however, they can be penetrated by the thumb only with very great effort. Type C soils with an unconfined compressive strength of 0.5 tsf can be easily penetrated several inches by the thumb, and can be molded by light finger pressure. This test should be conducted on an undisturbed soil sample, such as a large clump of spoil, as soon as practicable after excavation to keep to a minimum the effects of exposure to drying influences. If the excavation is later exposed to wetting influences (rain, flooding), the classification of the soil must be changed accordingly.

(iv) *Other strength tests.* Estimates of unconfined compressive strength of soils can also be obtained by use of a pocket penetrometer or by using a hand-operated shearvane.

(v) *Drying test.* The basic purpose of the drying test is to differentiate between cohesive material with fissures, unfissured cohesive material, and granular material. The procedure for the drying test involves drying a sample of soil that is approximately one inch thick (2.54 cm) and six inches (15.24 cm) in diameter until it is thoroughly dry:

(A) If the sample develops cracks as it dries, significant fissures are indicated.

(B) Samples that dry without cracking are to be broken by hand. If considerable force is necessary to break a sample, the soil has significant cohesive material content. The soil can be classified as a unfissured cohesive material and the unconfined compressive strength should be determined.

(C) If a sample breaks easily by hand, it is either a fissured cohesive material or a granular material. To distinguish between the

two, pulverize the dried clumps of the sample by hand or by stepping on them. If the clumps do not pulverize easily, the material is cohesive with fissures. If they pulverize easily into very small fragments, the material is granular.

These provisions are virtually identical to the proposal except for some clarifications suggested by the ACCSH (Tr. 8/5/87 p. 534) and the BCTD (Ex. 4–17).

OSHA received several other comments (Exs. 4–21, 4–23, 4–31, 4–40, 4–42, 4–54 and 4–86) suggesting that this section be deleted. All these commenters indicated that this type of analysis can only be done accurately in the laboratory, and not in the field. These commenters, however, did not indicate whether they supported a requirement for laboratory testing for all soil analysis or whether they merely opposed a manual testing requirement for use in the field.

OSHA has determined not to follow these suggestions, since all the acceptable tests listed and other accepted tests not discussed in the standard appear in published literature, and are recognized as methods of providing reasonable estimates of soil properties. OSHA does not believe it is feasible or necessary to require laboratory analysis of soils for every excavation where Appendix A is used, nor is it realistic to believe that visual analyses alone can provide sufficient information to classify soils.

OSHA recognizes the limitations of each of these testing methods, and has taken them into account in developing this Final Rule. The Agency stresses that the results of these tests must be closely tied to a simple, conservative soil classification system, the A–B–C system which OSHA has provided in this Appendix.

OSHA notes that with regard to manual analyses, that Mr. R.T. Frankian, a consultant for the AGC of California, testified at the public hearing (Tr. 4/19/88 pp. 145–146):

> * * * I think if you stick with A, B and C, you could probably do this only with a finger test. I think that would be perfectly okay.

In addition, with regard to appendix A, in general, a report by Mr. Frankian, submitted as an attachment to the AGC of California comments (Ex. 4–106) noted:

> The methods used to identify various soil groups include both visual and test parameters and include assessment based on performance characteristics. In general the methods appear to offer sound and readily understood instructions which should lead an experienced person to properly assess the engineering characteristics of earth materials. (p. 2–3)

And:

> The intent of the classification system is to provide a reasonably accurate and easily understood method of permitting an experienced person, who may not necessarily be an engineer, to assess the ability of the soil to stand at gradients specified in Table B–1. It is concluded that, in general, the proposed standards would serve that function. (p. 4)

OSHA believes that revised appendix A provides more guidance to the user and, therefore, will provide effective employee protection.

*Appendix B—Sloping and Benching*

Appendix B sets forth the requirements for sloping and benching when those methods are used for protecting employees against cave-ins.

Employers are not required in every instance to use this Appendix. Therefore, in this respect, it is not mandatory. This appendix is provided as one option that employers can use to meet the requirement to provide cave-in protection for employees. The option to use this appendix is stated in § 1926.652(b)(2). It is the second option employers may choose to follow to determine the requirements for sloping and benching protective systems. When this option is chosen by the employer, the provisions of this Appendix become mandatory.

The slopes required by this appendix vary, and are dependent upon the type of soil in which the excavation is made. To use this appendix, soils must first be classified in accordance with the provisions of appendix A to this Subpart—"Soil Classification."

Paragraph (a) of the appendix is a scope and application statement.

Paragraph (b) sets forth applicable definitions.

In this appendix, slopes are expressed as maximum allowable slopes. The maximum allowable slope is the steepest incline from the horizontal that will be acceptable under the most favorable site conditions for a particular type of soil. These slopes vary with the soil type in which the excavation is made. In addition, the depth of the excavation and the length of time that the excavation is open are specifically taken into account in only one instance. In Type A soils, the maximum allowable slope for the short-term (less than 24 hours) can may be used in excavations less than 12 feet (3.6 m) in depth.

The allowable slopes given for all other exposures in this appendix (in table B–1), coupled with the allowable configurations shown in figure B–1, should provide a greater level of protection to employees than is now provided by the existing standard.

Paragraph (c) of this appendix states the requirements for sloping and benching. Primarily, it is required that soil types be determined in accordance with appendix A; that the maximum allowable slopes be in accordance with table B–1 of this appendix B; and that the configurations of the sloping and benching systems be in accordance with the illustrations in figure B–1. Other requirements state when slopes less than the maximum allowable slope must be used.

This appendix is intended to replace table P–1 found in the existing standard. The difficulties associated with the use of table P–1, such as a lack of definitions of terms, are a major reason for replacing the table. Another reason for replacing the table is to provide a new set of provisions that are correlated with the soil classification system described in appendix A. The reasons for providing a new soil classification system have been addressed earlier in this preamble.

This new system is broader than the current standard in that more parameters must be considered when determining allowable slopes, and in that various allowable configurations of sloping and benching are illustrated. The system is based primarily on the recommendations made to OSHA by NBS (Ex. 2–6).

OSHA believes that this appendix will provide employers with a realistic and flexible approach to sloping and benching. In OSHA's opinion, the maximum allowable slopes will provide a safe work area for employees in excavations when the soils are properly classified and the slopes properly made.

OSHA received a great volume of comment on this appendix. However the vast majority of the comment was directed to proposed table B–1 and figures Bl.1 through Bl.5. Very little comment was received on paragraphs (a), (b) and (c) of this appendix.

Paragraphs (a), (b) and (c) of appendix B read as follows:

*Sloping and Benching*

(a) *Scope and application.* This appendix contains specifications for sloping and benching when used as methods of protecting employees working in excavations from cave-ins. The requirements of this appendix apply when the design of sloping and benching protective systems is to be performed in accordance with the requirements set forth in § 1926.652(b)(2).

(b) *Definitions.*

"Actual slope" means the slope to which an excavation face is excavated.

"Distress" means that the soil is in a condition where a cave-in is imminent or is likely to occur. Distress is evidenced by such phenomena as the development of fissures in

the face of or adjacent to an open excavation; the subsidence of the edge of an excavation; the slumping of material from the face or the bulging or heaving of material from the bottom of an excavation; the spalling of material from the face of an excavation; and ravelling, i.e., small amounts of material such as pebbles or little clumps of material suddenly separating from the face of an excavation and trickling or rolling down into the excavation.

"Maximum allowable slope" means the steepest incline of an excavation face that is acceptable for the most favorable site conditions as protection against cave-ins, and is expressed as the ratio of horizontal distance to vertical rise (H:V).

"Short term exposure" means a period of time less than or equal to 24 hours that an excavation is open.

(c) *Requirements.* (1) *Soil classification.* Soil and rock deposits shall be classified in accordance with appendix A to subpart P of part 1926.

(2) *Maximum allowable slope.* The maximum allowable slope for a soil or rock deposit shall be determined from Table B–1 of this appendix.

(3) *Actual slope.* (i) The actual slope shall not be steeper than the maximum allowable slope.

(ii) The actual slope shall be less steep than the maximum allowable slope when there are signs of distress. If that situation occurs, the slope shall be cut back to an actual slope which is at least ½ horizontal to one vertical (½H:1 V) less steep than the maximum allowable slope.

(iii) When surcharge loads from stored material or equipment, operating equipment, or traffic are present, a competent person shall determine the degree to which the actual slope must be reduced below the maximum allowable slope, and shall assure that such reduction is achieved. Surcharge loads from adjacent structures shall be evaluated in accordance with § 1926.651(i).

(4) *Configurations.* Configurations of sloping and benching systems shall be in accordance with Figure B–1.

These provisions are very similar to the proposal except that proposed paragraph (b)(3) "long term exposure" has been deleted, as discussed in Issue 4, above; proposed paragraph (b)(4) and (b)(5) have been renumbered (b)(3) and (b)(4), respectively, to accommodate the above discussed deletion; and, "short term exposure" has been redefined to mean 24 hours or less, as discussed under Issue 4.

In addition, OSHA received input from the ACCSH (Tr. 8/5/87 Attached handout), the BCTD (Ex. 4–17), and NIOSH (Ex. 4–30) recommending replacing competent person in paragraph (c)(3)(iii) of appendix B with registered professional engineer, particularly in regard to surcharge loads from adjacent structure. OSHA recognizes the potential hazards (collapse of structures or cave-ins) pointed out by the commenters and has revised this provision to direct the user to § 1926.651(i) in situations involving surcharge loads from adjacent structures.

Table B–1 of appendix B has been revised to eliminate, in most cases, different slopes for short term and long term excavations. (See Issue 4 for more discussion.) Table B–1 now requires:

| Soil or rock type | Maximum allowable slopes (H:V) [1] for excavations less than 20 feet deep [3] |
|---|---|
| Stable rock | Vertical (90°). |
| Type A [2] | ¾:1 (53°). |
| Type B | 1:1 (45°). |
| Type C | 1½:1 (34°). |

**Notes:**

[1] Numbers shown in parentheses next to maximum allowable slopes are angles expressed in degrees from the horizontal. Angles have been rounded off.

[2] A short-term maximum allowable slope of ½ H:1 V (63°) is allowed in excavations in Type A soil that are 12 feet (3.67 m) or less in depth. Short-term maximum allowable slopes for excavations greater than 12 feet (3.67 m) in depth shall be ¾ H:1 V (53°).

[3] Sloping or benching for excavations greater than 20 feet deep shall be designed by a registered professional engineer.

This table is similar to proposed table B–1 except that in most cases "short term" slopes have been deleted. However, the maximum allowable slope for Type C soil has been changed to 1½ H to 1V which is in line with the slope suggested by NBS (Ex. 2–5 p. 39). An additional note has also been added limiting the use of this table to 20' as suggested by the AGC of California. This is discussed further below.

Several commenters (Ex. 4–28, 4–82, 4–102, 4–106, and 4–109) objected to different requirements for short term and long term excavations. One commenter, the AGC of California (Ex. 4–106), recommended that the reference to short term exposures be deleted and that the table be limited to a maximum depth of twenty feet, with deeper excavations planned by an engineer.

OSHA agrees with the suggestion to limit this table to excavations with a maximum depth of twenty feet. This was OSHA's original intent, as evidenced by the limitations on the shoring tables presented in appendix C, but was inadvertently left out of the proposal. The issue of short term versus long term excavations is discussed under Issue 4 above.

The AGC of California also introduced information concerning additional soil types which they felt should be added to appendix A. This suggestion is discussed earlier in the summary and explanation of appendix A.

Three of these commenters (Exs. 4–82, 4–102 and 4–109) objected to the permitted slopes and table B–1 as being too conservative, arguing that less conservative slopes were permitted in California. However, in this regard OSHA notes that Title 8 of the Construction Safety Orders of California requires at least a ¾ horizontal to 1 vertical slope in hard compact soil, the same as OSHA proposed for long term excavations in Type A soils which is comparable to hard compact soil. Short term excavations in Type A soils were proposed to allow a ½ horizontal to 1 vertical slope. The Title 8 Standards do not address short term exposures, rather they require a flatter slope if the soil is not stable, but provide no guidance as to what that slope should be.

OSHA received comment from Granite Construction (Ex. 428), and the AGC of California (Exs. 4–106 and 28) recommending that OSHA revise appendix B, based on a report by R.T. Frankian (Ex. 30). This recommended system, based primarily on a determination of unconfined compressive strength, would add a new soil Type, "AB", but would not address soils defined in the proposal as Type C (less than .5 TSF unconfined compressive strength). Mr. Frankian, in a separate comment (Ex. 33), recommended that Type C soil should be required to have shoring with solid sheeting or be evaluated by an engineer. The slopes and configurations suggested in this report are less conservative than those proposed by OSHA, and, indeed, are less conservative than those permitted under the California regulations (Title 8, Construction Safety Order) or under the Construction Safety Standards of the State of Michigan (Ex. 4–46). Appendix B of the final rule is more in line with these two proven systems.

The Agency sees merit in Mr. Frankian's suggested system, but not as a replacement for appendix B. The system is limited to use with cohesive soils, assumes a uniform soil strength for the full depth of the excavation, and would require a greater degree of accuracy in soil type determination than OSHA's appendices A and B. The Agency believes that the suggested system would be more appropriate for use under the new third option for sloping (§ 1926.652(b)(3)) or design by a registered professional engineer (§ 1926.652(b)(4)), provided it meets the requirements of these provisions. The slopes in final table B–1 based on the A–B–C system are more conservative in most cases than the suggested system. However, OSHA believes this is

necessary in order to account for the limitations of soil testing methods and potential errors in soil classification which may result.

The slopes in table B–1 are not based on any one safety factor, as was suggested by Mr. Frankian at the public hearing (Tr. 4/19/88, p. 123). Instead, the slopes in table B–1 have varying safety factors, with higher factors for steeper slopes and lower factors for flatter slopes, because flatter slopes do not pose as much danger of a cave-in as steeper slopes. For example, a cave-in of a bank sloped at 34° (1½H:1 V) from the horizontal contains much less soil and will be less likely to entrap workers than a cave-in of a bank sloped at 54° (¾H:1 V). The Agency does not intend to spell out factors of safety either in this appendix or in the options requiring design by a registered professional engineer. The Agency believes that site conditions vary to such a degree that specifying a safety factor is inappropriate either for use of the appendices or for any of the other options requiring approval by a registered professional engineer. In particular, the Agency believes specifying safety factors would restrict the registered professional engineer from using his or her best judgement to design tabulated data or a sloping or benching system to provide adequate employee protection for given site conditions.

OSHA also notes that no slope is an absolute value. For example, use of appendices A and B, while taking into account many factors affecting soil stability and providing "maximum allowable slopes," also requires additional sloping when the soil shows signs of distress (appendix B paragraph (c)(3)(ii)). The same principle could also apply to slopes designed under the other options with a safety factor. If OSHA did specify a safety factor, designers might not accurately assess soil stability, the factors affecting that stability, and might assume that the safety factor would take care of the difference. On the other hand, OSHA believes it would be inappropriate to require a safety factor of two, for example, if a registered professional engineer determines that a safety factor of 1.2 is sufficient for the particular site conditions. In either case OSHA feels that safety factor designed into the system should be determined by the registered professional engineer. By not requiring a specific safety factor, the Agency believes the designer will accurately assess the site conditions and will provide a safety factor appropriate for those site conditions.

OSHA received a large volume of comment on the configuration in Figures B 1.2 and B 1.4, which were intended to clarify the Agency interpretation of existing § 1926.652(c).

The current standard, § 1926.652(c), has been interpreted by some individuals as permitting a trench dug in hard or compact soil to be vertical for the first five feet [1.52 m] level. However, OSHA has always interpreted and enforced this provision to require shoring or a trench shield in the unsloped vertical sided portion of the trench. The proposed rule, in appendix B, Figure B 1.4 was intended to clarify OSHA's intent. The Agency made special efforts to draw public attention and comment to this interpretation in the preamble of the proposed rule (52 FR 12291) and again in the notice of public hearing (53 FR 5281).

Many commenters (Ex. 4–5, 4–13, 4–25, 4–28, 4–57, 4–82, 4–102, 4–106, and 4–10) objected to Figures B–1.2 and B–1.4. All of these commenters noted that California permitted excavations to have an unshored vertical section of 3.5 feet, with the slope starting at the top of the vertical portion with no bench. OSHA recognizes that in some instances this configuration would be desirable in order to limit loading on pipes or other structures being installed. However, OSHA also notes that the California regulations limit the depth to which this configuration can be used, specify the slope depending on the prescribed depth limitations, and limit the use of the practice to hard, compact soil which is equivalent to Type A soil as defined in the proposal.

The responses to the hearing notice indicated that some commenters found the configuration proposed in Figure B–1 to be too complex to use (Ex. 8–6), or suggested allowing a 3.5 foot vertical portion as in California (Ex. 8–7). The AGC of California on the other hand supported deleting the requirement for shoring or shielding the vertical sided portion of the excavation. However, other commenters ((Ex. 8–14 (Milwaukee Construction Industry Safety Council) and 8–16, (AGC of America)) endorsed a requirement for the bottom portion of the trench in Figure B–1.4 to be supported unless the slope is figured from the toe of the entire excavation, and benched (Fiqure B–1.2), noting that not following this procedure increases the risk of collapses.

On the other hand, the State of Texas, and Southern California Gas (Exs. 8–25 and 8–27) also supported maintaining the requirement to support the vertical sided portion of the excavation, as proposed.

The suggested AGC of California revisions which were developed by R.T. Frankian (Ex. 30), would allow for unsupported vertical sided portions of excavations, ranging in depth from 5 feet in Type A soil, to 4 feet in Type AB soil and to 3 feet in Type B soil, based on the suggested revised soil classification system, and varying excavation depths.

OSHA has determined based on the whole record, that some modification to appendix B is appropriate. However, the revision does not go as far as suggested by the AGC of California.

The Agency is revising appendix B of the final rule to allow for certain excavations to have vertical sided bottom portions, with sloping starting at the top of the vertical sided portion. This Appendix will permit this configuration only in the same context as the Title 8, Construction Safety Orders of the State of California. OSHA has chosen this course because, unlike the suggested Frankian revision, the California standard has actually been in use successfully for several years. The Agency is not denigrating the suggested revision, and believes that its use may well be appropriate under § 1926.652(b)(3) of the Final Rule. The Agency feels that the slopes permitted under the suggested revision would require a more precise soil determination, and that any errors based on the suggested system could be more hazardous because that system would permit steeper slopes in most instances.

The slope depicted in proposed Figure B–1.2 is being retained in the Final Rule, because, as noted by several commenter (Ex. 8–25 and 8–27) it is a viable alternative method of sloping when a vertical sided portion of a trench is needed. However the format of all of Figure B–1 is being revised to provide more specific examples of acceptable configurations based on soil type, as suggested by the ACCSH and other commenters.

Finally, OSHA has determined that the required two foot set back for spoils will not be revised (See § 1926.651(j)(2).) The ACCSH (Tr. 8/5/87 p. 535) and the BCTD (Ex. 4–17) both recommended a minimum 3 foot setback, while NUCA (Ex. 4–91) supported the proposed 2 foot setback. OSHA has no data to support revising the setback as suggested by ACCSH and BCTD.

Therefore, based on the above discussion, OSHA promulgates appendix B, as revised.

*Appendix C—Timber Shoring for Trenches*

Appendix C contains information that can be used to provide timber shoring in trenches. Timber shoring is one of several methods that can be used to provide protection for employees against cave-in hazards.

Employers are not required in every instance to use the appendix. Therefore, in this respect, it is not mandatory. The appendix is provided as one option that employers can use the provide cave-in protection. The option to use this appendix is stated in § 1926.652(c)(1). When this option is chosen by the employer, the Appendix becomes mandatory.

The appendix is structured as follows:

Paragraph (a) discusses the scope of the appendix and its interrelationship with the requirements for protective systems in § 1926.652(b) or § 1926.652(c).

Paragraph (b) notes that the provisions of appendix A to subpart P must be followed for the purposes of soil classification. The configurations of timber shoring that can be selected using this Appendix are directly tied to the soil classifications described in appendix A.

Paragraph (c) describes the information is contained within appendix C.

Paragraph (d) describes the basis and limitations of the data contained in appendix C.

Paragraph (e) is a description of how to use the tables. Paragraph (f) contains examples to illustrate use of tables, and paragraph (g) contains notes that apply when using the tables.

Paragraph (g) is followed by six tables of data. There are two tables for each of the three soil types. Stable rock is exempt from shoring requirements. One table for each soil type provides shoring requirements in actual lumber size, while the other does so in nominal lumber size.

This appendix is intended to replace Table P–2, "Trench Shoring—Minimum Requirements," which is found in existing subpart P. This new approach is intended to address the problems detailed earlier in this Preamble concerning soil classification. It provides a shoring system that is correlated with the new soil classification system detailed in appendix A. This appendix, however, also provides a greater degree of flexibility than the current standard in that the tables can be used to select a greater number of configurations than is currently possible with Table P–2.

The tables in this appendix have been developed based primarily on recommendations and data provided to OSHA from NBS (Ex. 2–6), and public comment received during the rulemaking. Data in the tables not specifically recommended by NBS or by substantive comment are based on traditional practice. NBS could find no evidence that traditional timber practice, if properly executed, is unsafe (Ex. 2–6, p. 65).

OSHA received 15 comments and input from the ACCSH on appendix C. Most of these comments were directed at the proposed tables.

The text of appendix C is very similar to the proposal, except for minor explanatory and editorial changes suggested by the ACCSH (Tr. 8/5/87 pp. 539 and 540) and the BCTD (Ex. 4–17), and a revision of the text to incorporate the addition of shoring tables based on nominal size lumber as suggested by the AGC of California (Ex. 4–106).

The ACCSH and the BCTD questioned OSHA's use of a surcharge load of 20,000 pounds resulting from equipment used near excavations in paragraph (d)(2)(ii)(c) of appendix C. The Agency points out that the 20,000 pound weight limit is equivalent to a two foot spoil pile surcharge, and notes that shoring in accordance with the tables will withstand such a surcharge.

Several commenters (Exs. 4–21, 4–23, 4–31, 4–40, 4–42, 4–54 and 4–86) recommended that the Agency change the reference in the tables from "Width of trench" to "Length of Cross Brace," citing that this is the actual structural dimension that is of concern.

OSHA recognizes that the length of cross braces is the actual structural dimension, but notes that the current Table P–2 and the NBS recommendation are both designed using "width of trench." This, in fact, shortens the length of the cross brace because of the placement of other members of the shoring system, and therefore increases the amount of pressure necessary to cause significant deflection of the cross brace. This increases the strength of the shoring system. Therefore, OSHA declines to make the suggested change.

Several other commenters (Exs. 4–82, 4–102, 4–106 and 4–109) argued that the use of full size lumber was impractical and excessively expensive.

OSHA notes that these commenters are all from the West Coast and recognizes that standard practice in that area is to use nominal size lumber for shoring, while on the East Coast, full size lumber is normally used for shoring. OSHA also notes that other tables, such as those issued by the Corps of Engineers, Bureau of Reclamation, and the State of Wisconsin all use nominal size lumber. Therefore, OSHA has decided to incorporate the nominal tables recommended by the AGC of California (Ex. 32) in order to recognize that nominal size lumber is indeed an acceptable alternative to full size lumber under the Final Rule.

These commenters (Exs. 4–82, 4–102, 4–106, and 4–109) also argued that, based on their experience with the California Table, OSHA's proposed tables would result in overdesign of the system in some cases, and underdesign in others. However, OSHA notes that the California tables refer to the use of nominal size, Douglas fir lumber, which has a very high bending strength, about 1500 psi. OSHA, on the other hand, proposed tables based on the NBS data for the use of full size white oak or mixed oak, which has a bending strength in the 850 to 875 psi range. This difference accounts for the preceived "overdesign" or "underdesign" as addressed by the commenters.

At the public hearing (Tr. 4/19/88 p. 130–133), the AGC of California, suggested various revisions to the proposed timber shoring tables directed primarily at increasing the timber dimension of the uprights. OSHA has decided not to make these changes in the Final Rule. The Agency notes that the sizes of the uprights in the proposed tables in appendix C were based on the recommendations presented by NBS, and were reviewed by a series of workshops prior to the rulemaking. The criteria in the tables are comparable to existing Table P 2 in the OSHA standard and section 601 of the Wisconsin Administrative Code covering trenching and excavation, both of which have been used succcessfully for many years.

Several other commenters (Ex. 4–28, 4–106 and 4–114) suggested that OSHA expand the standard to address more specifically, hydraulic shoring and other forms of shoring which are in common use throughout the country. OSHA has decided to provide critera for use of hydraulic shoring systems in a new appendix D, discussed below. The Agency has also added statements to Appendix C noting that other forms of shoring (for example, hydraulic shoring, trench jacks, and pneumatic shores) are acceptable and may be substituted for wood if they possess equivalent strength.

Appendices D, E and F are new. Appendix D, "Aluminum Hydraulic Shoring for Trenches," contains criteria that can be used when aluminum hydraulic shoring is used as a method of protection in trenches that do not exceed 20 feet (6.1 m) in depth, in the absence of manufacturers' tabulated data. This appendix D is provided for

those situations where manufacturers data, as permitted under § 1926.652(c)(2), has been lost or is otherwise not available. It must be used in conjunction with appendix A, Soil Classification. Additionally, when this appendix is selected, the user must also comply with the basis and limitations of this data as provided in paragraph (d) of appendix D.

These data were provided by the Trench Shoring and Shielding Association of America (Ex. 36) and are being incorporated by OSHA in response to several comments recommending that the Agency provide this type of data. OSHA notes that the State of California also provides very similar data.

OSHA received no similar information from this Association concerning trench jacks, pneumatic shores or shields. However, the Agency notes that air shore and trench jacks can be substituted for timber shoring members if they are of equivalent strength or as specified by the manufacturer. This would make generic tables for trench jacks or air shores unnecessary.

Shields, on the other hands, are usually designed for specific conditions and, as noted at the public hearing (Tr. 4/19/88 p. 77–79), the manufacturers provide data as to shield capacity, how to use the shield safely, and the soil conditions where the shield can be used. For this reason, the Agency believes that it would be impractical to provide "generic" tables for shield use.

Appendix E gives examples of acceptable alternatives to timber shoring, displayed graphically, to provide guidance to employers and to recognize explicitly that alternatives to timber shoring are acceptable means of complying with the requirements of this regulation.

This appendix provides illustrations of pneumatic shores, aluminum hydraulic shoring, trench jacks and trench shields. This appendix does not limit the use of other alternatives which may be developed, because any new alternative based on new technology can be used in accordance with § 1926.652(c)(2) of this Final Rule.

Appendix F of this Final Rule provide a "decision chart" for selection of protective systems. This chart is intended to assist the employer in choosing appropriate employee protection by showing all available options and giving accompanying references to appropriate sections of the standard.

Although the current standards for excavations and trenches require employers to implement protective measures such as sloping or shoring, most of the 90 cave-in fatalities occurring each year have happened because the employer did not provide any protection. In these instances, compliance with the current rules would have prevented the accidents. Similarly, the revised final rule published here today will provide protection only if employers comply with its requirements. OSHA anticipates that the increased clarity and flexibility of the revised standards will provide incentives for employers to provide the necessary protection rather than ignore them completely.

However, assuming that many accidents have been caused by employers who have consciously violated OSHA trenching and excavation rules, these and other employers may continue to put their workers at risk despite this revised final rule. If this assumption is correct, OSHA needs to examine ways of improving the rate of compliance with these regulations.

One way of improving compliance may include additional reporting requirements for excavation cave-ins. For example, OSHA could require that employers report all excavation cave-ins to OSHA within a limited time period. This reported information would enable OSHA to evaluate the so-called "near-misses" to determine whether the employer made an effort to comply with the standard. Such information should allow OSHA to identify those employers who routinely failed to shore or shield their trenches and excavations when it is needed.

However, a reporting requirement is only one way to increase the rate of compliance with these regulations. OSHA solicits comment on whether there are other means of increasing compliance. In addition, OSHA seeks comment on whether a cave-in reporting requirement should be proposed, and what elements should be contained in such a requirement. Comments should be sent to the Docket Officer, Docket S–204, U.S. Department of Labor, Occupational Safety and Health Administration, Room N–2634, Frances Perkins Building, Washington, DC 20210.

## IV. Final Regulatory Impact Assessment

*Introduction*

The Occupational Safety and Health Administration (OSHA) has prepared this Final Regulatory Impact Assessment (RIA) in compliance with Executive Order 12291 and the Regulatory Flexibility Act of 1980 (Pub. L. 96–353, 94 Stat. 1164 [5 U.S.C. 60 et seq.]). In this assessment, OSHA has determined that the revised excavation standard (29 CFR part 1926, subpart P) is technologically and economically feasible and that the environmental impacts of the amendments are not significant.

The amendments are estimated to reduce the annual rate of worker fatalities by one and of lost workday injuries by 1,107, relative to the current standard. Further, they are estimated to reduce compliance costs by at least $38.0 million per year, relative to the current standard. These cost savings will arise principally by allowing firms the flexibility to select less costly methods of providing a safe workplace and therefore are consistent with the Administration's program to reduce unnecessary burdens on industry. As the net effect of the Subpart P amendment is less than $100 million, this regulatory action does not constitute a "major rule."

*Regulatory History*

The Construction Safety Act of 1969 (Pub. L. 91–54) amended the Contract Work Hours Standards Act (40 U.S.C. 333) by adding section 107. This section provided for occupational safety and health standards for construction employees working on federal, federally-financed, or federally-assisted projects. In 1971, pursuant to section 107, the Secretary of Labor issued safety and health regulations for construction in 29 CFR part 1518. The Occupational Safety and Health (OSH) Act (29 U.S.C. 650 et seq.), which was passed by Congress on December 29, 1970, and became effective 4 months later, ordered the Secretary of Labor to adopt established federal standards that were issued under other statutes. In accordance with section 6(a) of the OSH Act, in May 1971, the Secretary adopted the construction standards that had been issued under the Construction Safety Act in 29 CFR part 1518. Later in 1971, these standards were redesignated as part 1926. As part of this process, the regulations covering excavation (subpart P, §§ 1926.650–1926.653) were adopted as OSHA standards.

*Need for Revision*

The need to revise subpart P has been recognized since it was first incorporated as an OSHA standard. Consequently, after review by the Advisory Committee on Construction Safety and Health (ACCSH) and issuance of a Notice of Proposed Rulemaking (NPRM, 36 FR 19083, September 28, 1971), several

amendments were made to the standard in 1972 (37 FR 3512, February 17, 1972). After another NPRM in 1972 (37 FR 15317, July 29, 1972), the standard was further amended (37 FR 24345, November 16, 1972).

Complaints and controversy, however, continued to surround the standard. As a result, in 1976, OSHA commissioned the National Bureau of Standards (NBS) to study the standard's compatibility with actual construction practices and to recommend modifications that could improve the standard's effectiveness. The results of the NBS study were published in several reports during 1979 and 1980.

These studies, other OSHA and state data, and private sources of information revealed the need to modify the standard. Surveys of firms involved in excavation indicated widespread confusion regarding requirements of the standard. Many contractors were critical of the standard, claiming that it was confusing, sometimes inadequate, and often irrelevant. The tables on sloping and shoring procedures were described as confusing and inadequate. Contractors were also unsure about the acceptability of new safety techniques, such as freezing the ground rather than shoring. Morever, they generally believed that the standard was too rigid and was insufficiently performance oriented. In response, OSHA has revised the current standard to clarify and revise the regulatory language, and expects that these changes will facilitate compliance.

*Industry Profile*

Background

Excavation* projects vary in complexity. For example, a trench may be only a few feet deep and may be dug in less than one hour by one person using a backhoe. A small excavation may simply be a hole scooped out by a bulldozer. Alternatively, the construction of a stable 30-foot-deep trench requires a knowledge of engineering, geology, and soil mechanics.

The major occupational hazards of excavation work result from cave-ins, from exposure to underground utilities, and from material or equipment falling into the excavation. Precautions to protect against cave-ins include bracing, sloping, benching, using shields, or freezing. However, the proper use of these techniques requires an understanding of the importance of such factors as excavation depth and width, soil type, hydraulic pressure, and other specific conditions present at the worksite. In addition, some new technologies may result in fewer accidents by reducing the amount of time that workers are physically exposed to the hazards of trenching. Such equipment includes trenching machines that dig and lay cable, remote-controlled equipment that compacts the soil in the trench, and systems of "no dig" trenching, where equipment burrows to lay pipe without an open cut.

Trenching is performed primarily by utility contractors who construct gas, sewer, water, and utility lines. Much of this work is performed as a result of competitive bids from state and local governments or local utilities. Surveys indicate that 70 percent of utility contractors receive about 90 percent of their business through competitive bidding. Minimizing costs, including safety-related costs, is therefore very important to these contractors. Larger excavation work is performed for many kinds of construction, including buildings, bridges, towers, swimming pools, and port facilities.

A number of important economic and technical characteristics separate trenching from other excavation work and make trenching the more hazardous activity. For example, other excavations tend to be adjacent to buildings that would collapse if the excavation were not shored. The probability that damage suits would result from the collapse of these buildings provides a strong economic incentive to shore these excavations. Even where other structures are not adjacent, large excavations are typically so deep that the risk of incurring the expense of reexcavating following the collapse of an unbraced wall, gives sufficient incentive to contractors to brace the walls. In contrast, such incentives are greatly diminished for trenching work. Trenches are less likely to be in close proximity to other structures, structures adjacent to trenches are less likely to collapse, and the cost of redigging a collapsed trench is far lower than of reexcavating the foundation of a large building.

Industries and Economic Activity

Trenching and other excavation occur chiefly in the following 13 four-digit Standard Industrial Classifications (SIC):

SIC 1521 General Contractors—Single Family Houses.
SIC 1522 General Contractors—Residential Buildings Other than Single Family Houses
SIC 1541 General Contractors—Industrial Buildings and Warehouses.
SIC 1542 General Contractors—Non-Residential Buildings Other than Industrial Buildings and Warehouses.
SIC 1611 Highway and Street Construction Contractors.
SIC 1622 Bridge, Tunnel, and Elevated Highway Construction.
SIC 1623 Water, Sewer, Pipeline, Communication and Power Line Construction Contractors.
SIC 1629 Heavy Construction Contractors, Not Elsewhere Classified (NEC).
SIC 1711 Plumbing, Heating (Except Electrical) and Air Conditioning.
SIC 1771 Concrete Work.
SIC 1781 Water Well Drilling.
SIC 1794 Excavation and Foundation Work.
SIC 1799 Specialty Trade Contractors, NEC.

No published data exist that allow the estimation of either the total value of excavation work or the number of establishments and workers involved and no additional data has been submitted to the record on this point. Bureau of the Census data [1], however, do exist on the amount of contracted non-trenching excavation work by four-digit SIC code. The data demonstrate that most of such work occurs in SIC 1794 and that most contract work in SIC 1794 is non-trenching excavation work. Excavation work performed under another contract (e.g., as part of a high-rise apartment) would be included in another category. Thus, although most contracted non-trenching excavation work is performed in SIC 1794, it cannot be assumed that most non-trenching excavation work occurs in SIC 1794. Moreover, the Bureau of the Census publishes no data that specifically identify trenching as a category of business. For these reasons, OSHA has estimated trenching and other excavation activity in the following manner.

The Associated General Contractors of America (AGC) [2] conducted a survey of contractors whose work closely corresponded to that in SIC 1623. The results of this survey were used to estimate the percentage of revenues from excavation in SIC 1623. The 96 responding firms indicated that 38 percent of their revenues were from trenching. Another survey also conducted by AGC [3] on the practices of contractors engaged in excavation

* The term "excavation" includes trenches.

found that of the 22 firms responding, an average of 36.5 percent of their revenues were derived from excavation. The majority of these firms would probably be classified in SIC 1623, as most of their trenching work was for the construction of sewer and water lines. Based on these surveys, OSHA assumes that no more than 45 percent of the revenues in SIC 1623 are derived from excavation.

It becomes more difficult, however, to develop similar estimates for the other affected SIC categories, and their revenues are derived at a more aggregate level. For example, most of the excavation activity classified within SIC 15 involves the excavation of foundations for houses, offices, and warehouses. Foundation work for these types of structures ranges from 2 percent of the total costs for single-family houses to 12 percent for industrial buildings [4]. Because the foundation phase also includes all of the concrete costs not related to excavation, it is assumed that roughly 5 percent of the activity in SIC 15 would be affected by subpart P. For SIC 16, the major affected activity, other than that in SIC 1623, would be highway, bridge, and other heavy construction. To estimate the excavation activities for this SIC code, a number of bids for these types of jobs were examined [5]. The excavation component of these bids was in the range of 1–5 percent of the total project costs. Based on this information, 5 percent has been used as a conservative estimate of the percent of revenues in SIC 16 that are affected by subpart P. In SIC 17, the two main classifications affected are SIC 1711 (plumbing, heating and air conditioning) and SIC 1794 (excavation and foundation work). A best estimate of 1 percent of revenues was used for SIC 1711 based on average plumbing estimates from a construction estimation manual [6], where trenching and backfilling represented 0.7 percent of the total time required for the job. For SIC 1794, it was assumed that 45 percent of revenues are affected by subpart P. This was based on the assumption that although SIC 1794 almost exclusively represents firms doing excavations and foundation work, the actual excavation activity affected by subpart P is only one phase of the project. Once the walls are supported, laying the foundation, stripping, etc. are the other major cost factors. In sum, this approach results in a total industry revenue estimate of $20.07 billion for excavation work (see Table 1).

TABLE 1.—ESTIMATES OF EXCAVATION REVENUES BY INDUSTRY, 1987

| Industry | Net revenues (dollars billions) | Proportion subpart P related | Trenching and excavation revenues (dollar billions) |
|---|---|---|---|
| SIC 15 (Except 1531) | 78.5 | .05 | 3.92 |
| SIC 16 (Except 1623) | 71.5 | .05 | 3.57 |
| SIC 1623 | 17.0 | .40 | 6.79 |
| SIC 1711 | 46.6 | .01 | .47 |
| SIC 1794 | 11.8 | .45 | 5.31 |
| | | | 20.07 |

Source: U.S. Department of Labor, OSHA, Office of Regulatory Analysis.

*The Revisions to the Standard*

Introduction

This section discusses the revisions to OSHA's current excavation standard. The revisions are intended both to clarify and explain the requirements of the standard, and to eliminate discrepancies between requirements and current practices where there is no evidence that current practices pose a hazard to workers.

The following paragraphs describe only those changes that may have significant economic impacts.

Changes in Format

The current standard consists of four main sections: General Protection Requirements, Specific Excavation Requirements, Specific Trenching Requirements, and Definitions. The General Protection Requirements also apply to each section of the standard. The use and application of these provisions, however, are not clearly identified in the current standard and some users did not understand their intent [2, appendix D]. Consequently, the presentation and format of the standard have been revised in order to clarify the language and requirements of subpart P. The amended standard includes a section on Scope, Application and Definitions, followed by General Requirements, and then by the Requirements for Protective Systems. The existing standard contains two tables on sloping and shoring, whereas the revised standard contains six nonmandatory appendices that provide a soil classification system, describe tests for determining soil type, and provide designs for sloping, benching, timber shoring, aluminum hydraulic shoring, a pictorial representation of nontimber shoring methods, and a flow chart of compliance options. OSHA expects that this reorganization will clarify the requirements and the applicability of the various provisions and appendices, and increase the use of some form of protective system.

Changes in Provisions

Numerous changes have been made to specific provisions of the standard. In the following discussion, the changes are presented in broad groupings according to their expected effects, and important examples of these groupings are examined.

*Specific Changes.* The first group of changes are called specific changes because, individually, they affect specific requirements of the standard. A number of these specific changes are designed to bring the requirements of the standard into conformity with current industry practices when doing so would not compromise safe work practices. Some of the specific changes are simply definitional in nature. For example, the existing standard defines "belled excavations," and the revised standard defines and refers to "belled-bottom pier holes." Because belled excavations are actually called belled-bottom pier holes, the change simply brings the terminology of the standard into conformity with current usage.

The specific changes, however, involve more than just changes in wording; many change the actual requirements of the standard. For example, one change alters the definition of a trench shield by stating that it must protect employees from the hazards of cave-ins, but need not protect against the occurrence of cave-ins. In another case, the existing definition specifies that shields must be composed of steel plates and braces, whereas the revised standard allows shields to be made of wood or other materials.

Many of the specific changes that OSHA is implementing will lower costs of compliance without increasing worker risk. For example, the existing standard requires that work must be discontinued in excavations where water has accumulated. The revision would allow work to continue under some circumstances of water accumulation if proper precautions have been taken to protect employees. Another example of potential cost-savings results from modifying the existing provision for the use of emergency rescue equipment where adverse atmospheric conditions exist. The revised standard no longer requires the equipment to be physically "attended" by a worker.

*General Changes.* The general changes affect several provisions of the standard. Perhaps the most important

general changes are those specifying alternative acceptable ways for contractors to comply with the requirements for protective systems. Although most of the existing standard's provisions allow the use of alternative means of protection, the availability of these options or alternatives was not generally appreciated. Michael Plank, of the Speed Shore Corporation observed:

> Everyday today if you read the current table P–2, you go to the bottom lines and read the footnotes, there's two footnotes that specifically leave you an option to use materials other than timber. But I'll promise you today, if I take hydraulics in a new part of the country where it's not currently being used, I will fight for weeks on end trying to get them convinced that aluminum is an accepted standard as an equivalent to this timber [8, p. 203].

In addition, there is some confusion about the minimum standards contractors must meet in order to be in compliance. The revisions to the requirements for protective systems clarify such requirements. Contractors who choose to use a support system, must follow one of four basic options: (1) They can slope the excavation at no more than 1½ horizontal to 1 vertical (34 degrees), (2) they may use OSHA's Appendices A and B for soil classification and supports, shields, or other systems prepared in accordance, (3) they can use other tabulated data prepared by or approved by a registered professional engineer, or (4) they can have the system designed by or approved by a registered professional engineer.

These requirements represent a substantial change to the existing standard. The existing standard does not clearly specify the function of Table P–1 on sloping and Table P–2 on timber shoring or indicate who may design sloping or support systems. For example, Table P–1 is required as "a guide" for trenches, which appears to imply that it is nonmandatory. Elsewhere, the standard states that trench banks are required to be "laid back to a stable slope," while excavations, which are defined to include trenches, are to be dug to the "angle of repose." In addition, there has been much ambiguity regarding what is the "angle of repose". These requirements are exceedingly vague. The existing Table P–2 on timber shoring is described as containing "minimum requirements," but it is unclear whether such requirements are to be interpreted as minimum performance requirements or as exact specifications. Similarly, although the standard defines a trench as a form of excavation, the section on "Specific Excavation Requirements" contains the statement that support systems must be designed by a qualified person according to accepted engineering practices. However, it is unclear if these requirements would allow a qualified person to design a different timber shoring system than that contained in Table P–2.

*Changes in Tables.* The final type of amendment that distinguishes the revised standard from the existing standard will clarify and broaden the applicability of the material contained in Tables P–1 and P–2 of the current standard. The set of tables in the existing standard not only are confusing (as noted above), but also lead to inflexibility in application. For example, they contain no information about benching, or the combined use of sloping and benching practices. Table P–1 on sloping contains the note that "clays, silts, loams or nonhomogeneous soils require shoring or bracing," thus apparently implying that sloping is inappropriate in such situations. In addition, although Table P–1 notes the importance of both soil type and environmental conditions in determining proper sloping, it contains no method for determining either soil type or environmental conditions. Finally, Table P–2 on timber shoring for trenches contains only one set of specifications for a given soil type and depth. The specifications in Table P–2 would be cost-effective only incidently because the relative prices of types and grades of lumber vary sharply both over time and geographic region.

In contrast, the new appendices are designed to elminate these problems. For example, the revised standard's appendix A on soil and environmental classification is applicable to field use. Appendix B on sloping clearly applies to all excavations including trenches, and sloping is allowed for clays, silts, and other soils. In the current standard these applications were not clearly identified. Benching and the combined use of sloping and benching are also discussed in this appendix. Appendix C on timber shoring is also more flexible than the requirements shown in Table P–2 of the current standard. This appendix contains as many as four sets of timber shoring procedures for a given soil classification and trench depth. Appendices E & F provide further clarification through visual displays and flowcharts. Finally, in the revised standard, the use of these appendices are nonmandatory, unless they are being employed as a compliance option.

In addition, while a nonmandatory appendix provides instruction on the proper assembly of timber shoring, the standard no longer centers its regulatory language, with respect to support systems, on timber shoring. Numerous commentors noted that hydraulic shoring is now more common than timber shoring, primarily because it is frequently more practical and is typically safer [7, 8]. OSHA has accordingly added nonmandatory Appendix D, which provides guidance for hydraulic shoring.

OSHA believes that, overall, these changes will significantly reduce the burden of compliance by increasing the flexibility, clarity, and usefulness of the standard.

*Worker Risk*

The hazardous nature of construction work, especially that related to excavation work, is well documented. The fatality rate in SIC 1623, which is dominated by trenching, was estimated by OSHA at 50.8 deaths per 100,000 workers per year for 1984–88, whereas for construction work generally, it was estimated at 24.8 deaths per 100,000 employees per year during 1982–86 [1, 9, 12]. Similarly, trenching cave-in fatalities have been estimated by NIOSH at 75 per year, and lost workday injuries due to cave-ins at 1000 per year [11]. The incidence rate for injury among construction workers, including those doing excavation work, is about two times the all industry average (i.e., 15.1 injuries per 100 workers in construction compared with 7.7 injuries per 100 workers in all industries [12]).

Both industry and labor representatives, as well as insurance firms, agree that shoring, shielding, and sloping to a sufficient angle eliminate or substantially diminish the risk of cave-ins. Yet, analysis of data from OSHA's case files indicate that about 78 percent of all fatalities in excavation came from cave-ins [10, 16, 36]. A central provision of subpart P is the requirement to provide protection against death or injuries resulting from cave-ins by using methods that are now in use in the industry and that were prompted by the original consensus standards.

A study by Johns Hopkins University of 306 trenching cave-in fatalities between 1974 and 1986 determined that 85 percent of them occurred in trenches that did not have shoring of the walls or in which the sides were not adequately sloped to prevent soil from sliding in [13]. In addition, NIOSH's National Occupational Fatality study found an average of 73 deaths per year from cave-ins [14]. The measures required to prevent deaths from excavation cave-ins have been known for more than 75 years, since the first English-language

study of this problem was commissioned by Winston Churchill in 1912 [14].

Recently, several states and localities have made significant progress in lowering cave-in deaths. California has been able to cut its number of cave-in fatalities by more than half [14]. Between 1974 and July 1979, the Milwaukee area had 20 fatalities associated with trench cave-ins, the highest in the region. With the cooperation of local contractors, they have managed since 1979 to avoid all cave-in fatalities [15]. In the Dallas area, there has been a significant reduction in cave-in accidents since mid-1985 [15]. Clearly, there is significant room for progress in decreasing worker risk in excavation projects.

The primary purpose of the revisions is to clarify the requirements and to add flexibility so that firms can tailor their protective measures to their particular situations. Descriptions of 163 excavation fatalities were reviewed by Eastern Research Group (ERG) [16] in order to identify those which would have been prevented through compliance with the existing or revised standards. The analysis is based on accidents as they were described in accident inspection abstracts. As a preliminary indication of the types of accidents which occur, ERG summarized some of the basic characteristics of the sample of accident narratives. The data indicate that the majority of fatalities resulted from cave-ins. The effectiveness of the subpart P standards therefore largely depends on its effectiveness in preventing this type of accident. The other categories with more than one fatality include (1) "struck by" accidents, which typically resulted when workers were struck by pipe or other materials, (2) gas-related accidents (explosions and asphyxiations), (3) falls, and (4) electrocutions.

The pattern of injury incidence was quite similar to that for fatalities. This finding, however, reflects the fact that a large proportion of injuries in this sample was due to cave-ins because OSHA primarily investigates fatalities or catastrophes, and includes only the associated injuries in its data base. Thus, these data may not be representative of all injuries related to excavation activities.

Fatalities

*Baseline Incidence Rates.* ERG employed two separate approaches toward estimating the annual number of fatalities in excavations. The first approach relied on fatality data from California [17] and Texas [32]. Data from these two states account for a large proportion of national construction activity in recent years. These states are also distinguished by their large geographic size, which increases the likelihood of encountering varied soil types.

California and Texas reported annual averages for fatalities due to cave-ins of 5.3 and 9.3 respectively. The two states combined generate 23 percent, or nearly one-fourth, of national construction receipts as measured in the 1982 Census of Construction [1].

The cave-in fatalities in these states were extrapolated to the total fatalities from excavation work using a sample of excavation fatalities reported in the OSHA fatality/catastrophe reports. ERG reviewed a sample of accident reports to determine their preventability under the existing and proposed standards (this sample is described more fully below). The sample was judged to be a reliable indicator of the relative portion of fatalities in excavation work due to cave-ins and other causes. Using this sample, it was calculated that 78 percent of the fatalities were due to cave-ins. The average cave-in related fatalities for the California and Texas data were then increased by a factor of 1.3 (1.0 divided by 0.78) so that they would represent the total fatalities for trenching and excavation work. The combined state average for California and Texas was thus calculated at 19.0 (5.3 plus 9.3 times 1.3). Extrapolating to the national level with California and Texas representing 23 percent of national construction receipts in 1982, gives a national total of 83 fatalities.

The second estimation procedure was based on the number of fatalities recorded in the OSHA fatality/catastrophe reports. The data used in this study were derived from the years 1978 to 1980 (the most recent complete years for which IMIS data related to excavation activity could be retrieved when ERG did their analysis). The total number of fatalities for this time interval was 138 (39, 50 and 49). The more recent Johns Hopkins' analysis of OSHA's IMIS abstracts covering the period 1984 to 1986 found 52, 85 and 75 cave-in related fatalities annually for all states with the exception of California, Michigan and Washington [13].

Recent studies, however, have indicated that underreporting of accidents is significant in many areas [33, 34]. Companies sometimes choose not to report fatal accidents or are unaware of the requirement to do so, and OSHA personnel sometimes learn of accidents through news reports and other unofficial sources. Nevertheless, the extent of underreporting is not known with certainty and no adjustment to the data was attempted.

The fatality/catastrophe reports used by ERG are not a comprehensive sample of accident records for the years represented since the reports were filed only in states with federally operated safety and health programs. These states represent about one-half of all states. Assuming that the fatality/catastrophe reports represent half of all fatalities for the years covered, the numerical average for 1978–1980 was 92 deaths per year. The growth in construction employment over that period was calculated at 5 percent [35]. Applying a simple growth factor of 5 percent to the fatality estimate produces a revised figure of 97 fatalities per year.

ERG based their best estimate on an average of the two approaches. OSHA agrees and concludes that 90 fatalities per year represents a best estimate of the current baseline risk in excavation work.

Injuries

*Cave-In Injuries.* A National estimate of cave-in-related injuries was derived using data from a special study of California cave-ins [17]. Over a 22-year period, the California researchers identified 2,229 lost workday injuries and 193 fatalities due to cave-ins. The data indicate a ratio of 11.5 lost workday injuries for every cave-in fatality. This estimate was assumed to be representative of the relationship for the nation as a whole. An OSHA analysis of 221 trenching fatalities [10] has indicated that 78 percent of excavation fatalities are due to cave-ins. Therefore, given the projection of 90 excavation fatalities annually, OSHA estimated that there are 70 fatalities annually due to cave-ins. Extrapolating from the California incidence rates, OSHA estimates that there are 805 cave-in related lost-workday injuries annually in the United States.

The approximate range for this estimate was independently confirmed in a separate study by the National Institute for Occupational Safety and Health (NIOSH) [17]. These researchers reviewed accident reports of the Supplementary Data System of the Bureau of Labor Statistics for 1976 to 1981. The NIOSH researchers derived an estimate of approximately 1,000 lost workday injuries per year due to cave-ins, including 75 fatalities.

An estimate of the noncave-in related lost workday injuries occurring in excavation activities was developed using a special study of injuries to construction laborers prepared by the Bureau of Labor Statistics [18]. That study reviewed survey responses from 658 injured construction laborers.

Construction laborers are estimated to constitute one-fifth of the total construction workforce.

The BLS survey of construction workers provided two main indicators of the share of construction injuries occurring in excavation work. Specifically, the injured workers were asked questions on (1) the type of work being performed and (2) the location of the worker at the time of the accident. Numerous other questions were included but none allowed an accurate depiction of excavation work. The survey results indicated that for 6 percent of the injured workers, the type of work was identified as "laying sewer lines or other pipelines". (Other types of work included construction of homes, buildings, or other structures and roadways. Some of these, in turn, could have included excavation work. Workers may have selected these other activity categories even if they were actually doing excavation work related to them.) Further, 7 percent of workers reported their location at the time of injury as "in trench". None of the other categories allowed a worker to state that he was in an excavation.

Thus, the survey results suggest that at least 7 percent of injuries occurred during trenching work. Although it is possible that some injuries occurring in excavations have been reported in other categories that do not allow them to be identified, OSHA has relied on the 7 percent estimate, based on the location of workers, as the best indication of the proportion of injuries occurring during excavation work. Coincidentally, ERG's estimate of the value of excavation work as a share of the value of construction put in place is also approximately 7 percent. Thus the 7 percent estimate was judged to be a reasonably accurate estimate of the share of all construction injuries occurring in excavation work.

The number of lost workday injuries occurring among construction workers in 1986 was estimated at 326,800 based on incidence rates and employment data provided by the Bureau of Labor Statistics [12]. This estimate was derived using an employment level for construction workers in 1986 of 3,890,000 workers and a derived incidence rate for lost workday cases of 8.4 per 100 full-time workers. Applying the 7 percent estimate, the total lost workday injuries in excavation work was calculated at 22,876. Since 805 injuries have been identified as occurring during cave-ins, the remaining number of lost workday cases is calculated to be 22,071.

*Prevention Rates.* ERG reviewed a sample of 163 fatalities from 1979 to 1985 (115 fatalities from OSHA fatality/catastrophe inspection reports from 1979–1981 and 48 fatalities from OSHA's Integrated Management Information System (IMIS) abstracts from 1983–1985) for preventability under the existing and revised standards. Fifteen fatalities had to be eliminated because the accident narratives were incomplete or otherwise insufficient to allow classification. The remaining 148 fatalities were classified as either preventable or not preventable assuming full compliance with either the existing or revised standards.

These reports and abstracts had certain limitations as data sources because the amount and specificity of narrative information are inconsistent from report to report. For example, in some cases, information on trench or excavation dimensions, type of soil, and various contributing factors (e.g., water accumulation, digging in a backfilled area, lack or positioning of ladders) may be suggestive of rule violations, but may not be detailed enough to allow a firm judgment. This was particularly problematic in the analysis of cave-ins. ERG assumed that, where there was no support system, the cave-in was likely due to the lack of such a system, and that any support system in place at the time of a cave-in was by definition inadequate. In some of these cases, it is possible that the most likely cause of the cave-in was some other factor (such as water accumulation) that was not adequately described. ERG's assumption therefore may have biased their preventability assessment in favor of the sections of Subpart P that pertain to support systems, and against other sections of Subpart P.

Some of the accident narratives included a listing of the OSHA citations that were issued. In a number of cases, however, the relevance of the citation could not be unambiguously interpreted because the narratives did not correlate very well with the citation noted. For this reason, the listed citations were considered, but not totally relied upon, in making preventability judgments.

Fatalities that were judged by ERG as preventable accounted for 81.1 percent of the sample under the existing standard and 82.4 percent under the revised standard [16]. Cave-ins accounted for the largest percentage of preventable fatalities (72.3 percent under the existing standard and 73.0 percent under the revised standard). The relevant provisions deal with the lack of or inadequacies in support systems (e.g., sloping, shoring, trench jacks, boxes, and shields), and to a much smaller extent, with problems in installing or removing such systems. In these cases, workers were generally either asphyxiated or fatally injured by falling soil or rock.

The balance of preventable fatalities are associated with a variety of factors. For example, 2.7 percent of the fatalities that were judged preventable by compliance with the existing standard and 3.4 percent with the revised standard are associated with inadequate attempts to locate or support underground installations, such as water, fuel, and electric lines. These fatalities mainly occurred from drowning as a result of a water main breakage, from electrocution, or from inhalation of toxic fumes from broken gas mains.

Two percent of preventable fatalities under each standard were associated with failure to test (or adequately test) or provide adequate ventilation, or eliminate sources of ignition where there are dangerous gaseous conditions (lack of oxygen or presence of toxic gases). In these cases, workers were either asphyxiated or fatally injured as a result of explosions.

In 1.4 percent of the preventable fatalities under each standard, the stability of structures (generally building walls) adjoining the trench or excavation was not properly assured by appropriate support systems. In these cases, the walls gave way and fell on the workers.

Inadequate protection from unintended movement by mobile equipment accounted for a single preventable fatality under both the existing and revised standards. In this case, a piece of equipment struck and fatally injured the worker. Various other hazards accounted for the balance of the preventable fatalities.

Overall, ERG found both the existing and revised standards to be potentially effective for the prevention of most fatalities. The high rate of prevention is due primarily to the effectiveness of these requirements in preventing the most common type of fatality, those due to a cave-in. The revised standard was found to offer a slightly higher rate of accident prevention because it is more effective against fatalities resulting from the failure to locate underground installations and to safely install cave-in protection systems.

Using the earlier estimate of 90 fatalities and applying ERG's preventability estimates of 81.1 percent for the existing standard and 82.4 percent for the revised standard results in 73 fatalities avoided per year under the existing standard and 74 per year under the revised standard.

To estimate the preventability of nonfatal injuries, ERG reviewed 103

injuries from OSHA fatality/catastrophe inspection reports from 1979–1981. They found a similar pattern to that of fatalities, with cave-ins accounting for most injuries under both standards. As noted previously, this sample of injury data includes primarily those injuries caused by cave-ins. Few accidents of other types have been included.

ERG found 74 of the injuries were due to cave-ins. For each standard, all but 3 of these injuries (96 percent) were preventable. For the three injuries not preventable, a cave-in occurred despite apparently correct sloping of a trench as described in the accident report. For all other classifiable injuries, 23 in total, the existing and revised standards would prevent 6 (26 percent) and 11 (48 percent) respectively. These injuries may not be representative of all noncave-in injuries since only the more serious accidents are investigated by OSHA. These more serious accidents are also more likely to be addressed by both the existing and revised standards. ERG therefore estimated that the existing standard would reduce all non-cave-in accidents by five percent and that the revised standard would reduce them by ten percent.

Based on the earlier baseline cave-in injury estimate of 805 annually and applying the 96 percent preventability estimate results in 773 preventable lost workday injuries per year due to cave-ins under either standard. For noncave-in related injuries it was estimated that the existing standard would prevent 1,104 (.05×22,071) and that the revised standard would prevent 2,207 (.1×22,071) lost workday injuries annually. The combined total is 1,909 lost workday injuries prevented per year or an overall injury prevention rate for the existing standard of 8.3 percent (based on a total of 22,876 injuries). Under the revised standard, the total reduction in lost workday injuries is 3,012 per year, or 13.2 percent.

Quantitative Estimation of Employee Benefits Due to Accident Reductions

The accident reductions attributable to a standard have a monetary value to the employee who would otherwise bear the occupational risk. This report uses estimates based on the willingness-to-pay approach to represent the dollar amount that employees would be willing to pay to reduce the statistical probability of a lost workday injury. Economic studies projecting these values show a high variability, but most estimates range between $23,000 and $64,000 [20]. OSHA has chosen $33,000 as a reasonable value for a lost workday injury [21, p. VI–10]. Based on the above injury preventability estimates the value of these lost workdays prevented would be approximately $63.0 million under full compliance with the existing standard and $99.4 million under full compliance with the revised standard.

Employer Benefits Due to Cost Savings from Accident Prevention

The elimination of a fatality or injury generates additional social benefits through the restoration of all productivity losses associated with an accident. These benefits are represented by the cost savings which occur to the firm which avoids the accident. The cost savings (or prevented losses) include the value of lost production time due to job interruption and delay, administrative, paperwork, and investigative costs associated with an accident, rehiring and retraining costs to replace a seriously injured or killed worker, medical costs, and costs of re-excavation (in the case of a cave-in) or other property loss. Estimates of these costs are presented in this section.

Several previous safety studies have examined the costs of work disruptions and other direct losses due to accidents. ERG selected one such study which is based on accident investigations in the construction industry. These research findings were used in estimating the cumulative benefits of the indirect benefits from accident reduction. The study selected was performed at The Construction Institute, Department of Civil Engineering, Stanford University (Levitt et al.) [31]. The authors studied 49 reports of lost workday and non-lost workday injuries. Only results for the former category are used here. Data were assembled on the following items:

1. Insurance company claims handling and administrative fees.
2. Cost of transporting the injured worker to a medical facility.
3. Wages paid to the injured worker for the time not worked.
4. Wages paid to other workers for the time not worked (work interrupted).
5. Cost of scheduling and funding overtime necessitated by the accident.
6. Cost of loss of crew efficiency.
7. Cost to train and orient a replacement worker.
8. Extra wage cost to rehabilitate the returning worker at a reduced capacity.
9. Costs to clean up, repair, or replace damage from the accident.
10. Cost of wages for supervision associated with the accident.
11. Costs for safety and clerical personnel to record and investigate the accident.

Costs of pain and suffering or other non-quantifiable elements were not included.

The work disruption costs and other losses were found to range from $90 to $24,900 for lost workday accidents. The mean losses for the lost workday injuries studied (25 of the sample of 49) was $5,380. Identical cost savings were assumed to apply to avoided fatalities. (It should be noted that even non-lost workday injuries, which have not been added to the totals here, have notable work disruption costs. The mean estimate of work disruption costs for a non-lost workday injury was $1,450.)

The cost savings attributable to the existing standard under an assumption of full compliance were estimated at $5,380 times 1,932 (the sum of 73 fatalities and 1,909 lost workday injuries), or $10.7 million. The cost savings for the revised standard were calculated at $5,380 times 3,086 (74 fatalities and 3,012 lost workday injuries), or $16.6 million.

Incremental Benefits of the Amended Standard

The benefits generated under the existing or revised standard consist of avoided fatalities, avoided lost workday injuries, and cost savings from avoided work disruptions due to accidents. Full compliance with the revised standard will prevent more fatalities (estimated at 1 per year), will prevent more lost workday injuries (estimated at 1,103 more per year) and will generate larger cost savings due to accident avoidance (estimated at $5.9 million in cost savings per year).

*Incremental Costs*

Preliminary Estimates

The changes to the current subpart P represent numerous clarifications and amendments that in most cases will increase the flexibility of and reduce the regulatory burden on private enterprise without impairing worker protection. On average, the amendment is expected to result in a net reduction in costs. However, particular provisions may result in cost increases for some firms.

There are few available published data on the safety costs related to excavation projects. Thus, for its Preliminary Regulatory Impact Assessment (PRIA) of the proposed standard, OSHA relied heavily upon the judgement of those people in the contracting business, since they would be in the best position to know the costs imposed by an OSHA regulation. These individuals clearly had no incentive to underestimate such costs. Cost questions were posed to the Associated General Contractors (AGC), who in turn queried a sample of its members (about

two dozen contractors). None were able to provide precise estimates of either the absolute or relative costs of particular subpart P requirements. Similarly, a number of representatives of firms were contacted directly by OSHA and asked if they could estimate the percent of their excavating costs that stemmed directly from OSHA requirements; or conversely, how their costs would be affected were this particular regulation to disappear tomorrow. Once again, none could provide precise estimates, owing in part to the variety of jobs and circumstances. Only after further probing did industry representatives indicate that only under the most extreme circumstances would subpart P requirements account for 5 percent of total job costs.

In a further attempt to isolate these costs, all of the major publishers of construction industry cost indexes, as found in "Engineering News Record" [22], were contacted in an attempt to determine if either subpart P or safety costs generally were calculated separately in the compilation of costs. Of the 15 firms contacted, all stated that labor and materials costs were considered individually, but that all safety costs were absorbed within overhead costs and could not be separately identified. Items such as offsite wages, fringe benefits, financing costs, inventory, other administrative expenses, and profit are included in overhead costs. In addition, bids on major construction projects that had been published over several years in "Engineering News Record" [5] were examined to determine whether safety costs were a line item in the specifications. None were found. Based upon the above information, OSHA assumed that all safety costs do not exceed that portion of the costs represented by overhead. Moreover, the costs associated with subpart P are only one factor contributing to the total safety costs of an excavation job.

The most recent Deparment of Labor studies [23] of the distribution of construction contract costs for various types of construction projects found that for sewer line construction, overhead and profit accounted for 23.3 percent of the total contract costs. Before-tax profit alone accounts for over 10 percent of the total; all other overhead items account for the remaining 13 plus percent. From this remainder it was assumed that no more than 5 percent of the total project cost can be attributed to all safety items, only a portion of which is a direct result of complying with subpart P requirements.

There were approximately $12.42 billion in annual excavating revenues in 1982. OSHA assumed that 5 percent of this total represents costs imposed by the existing standard. Thus, OSHA's PRIA estimated that the cost of the existing standard was $621 million annually. Based on discussions with contractors and their representatives, OSHA's preliminary analysis estimated that the amendments would save between 2 and 7 percent of the current cost of subpart P. The estimated savings arising from the amendments therefore ranged between $12.42 million and $43.47 million to the economy as a whole.

### Final Estimates

Under contract to OSHA, Eastern Research Group (ERG) [16] developed revised estimates of the cost of the existing and amended excavation standards based upon model projects. They examined sewer line installation trenching, utility hook-up trenching, foundation excavation for suburban office buildings and residential building excavation. They estimated the likely means of compliance under the two standards, and the soil types of these projects.

ERG estimated, based on Commerce Department data, that the total value of construction affected by the standard is $15.8 billion, the majority of which ($9.2 billion) is in sewer and highway trenches. Based upon OSHA inspection data, sewer and highway trenches were found to have the highest non-compliance rate with the existing standard. As shown in Table 2, they were estimated to have a 24 percent non-compliance rate, followed by utility hook-up trenches at 21 percent. ERG estimated that the greatest cost impact on non-complying firms would fall on suburban commercial and industrial building excavations, where a 26.5 percent cost increase would occur after complying with either the existing or the revised standard. After accounting for non-compliance rates, utility hook-ups as a group (complying firms included) were estimated to have the highest average percent increase in cost, at just under 3 percent. Costs in this sector were attributed to the relative inability to use sloping as a means of compliance with the standard, along with relatively little current usage of hydraulic shoring or trench boxes. Given the relative size of the sewer and highway trench sector, over half the costs of compliance for cave-in protection ($149 million per year) were expected to fall in this sector (see Table 3). Again, the majority of these costs were attributed to the added use of trench boxes, which reduce productivity. Suburban commercial and industrial building excavations were estimated to incur $79 million per year and utility hook-up projects $52 million per year in compliance costs to avoid cave-ins. In total, ERG estimated that cave-in protection would cost $332.0 million under the existing standard, and $289.0 under the revised standard.

TABLE 2.—AVERAGE PERCENTAGE COST INCREASES FOR ALL TRENCHING AND EXCAVATION PROJECTS

| | Estimated non-compliance rate | Percentage cost increase for non-complying model projects | | Average percentage increases for all projects | |
|---|---|---|---|---|---|
| | | Existing standard | Revised standard | Existing standard | Revised standard |
| Sewer and highway trenches | 0.24 | 8.7 | 6.7 | 2.0 | 1.5 |
| Utility hook-ups | 0.21 | 15.6 | 14.4 | 2.9 | 2.7 |
| Suburban commercial and industrial building excavations and "other" excavations | 0.10 | 26.5 | 26.5 | 2.1 | 2.1 |
| Residential building excavations | 0.05 | 21.3 | 21.3 | 0.9 | 0.9 |

Source: ERG estimates. The categories of urban building excavations, gas and other pipeline trenches, and shallow water fine trenches were assumed to be in compliance.

TABLE 3.—TOTAL COMPLIANCE COSTS FOR THE GENERAL CAVE-IN PROTECTION REQUIREMENTS

[$millions per year]

| Project category | Estimated total value | Total cave-in protection compliance costs | |
|---|---|---|---|
| | | Existing standard | Revised standard |
| Sewer and highway trenches [1] | 9,200 | [1] 188 | [1] 149 |
| Utility hook-ups | 1,900 | 56 | 52 |
| Suburban commercial and industrial building excavations and "other" excavations | 3,700 | 79 | 79 |
| Residential building excavations | 1,000 | 9 | 9 |
| Total | [2] 15,800 | 332 | 289 |

[1] Includes trenches for water systems greater than 5 ft. deep. Also includes $8 million in cave-in protection costs incurred due to soil compaction problems.

[2] The estimated total value shown here does not include the value of excavations for urban building projects, all of which were assumed to be in compliance.

Source: ERG estimates. The categories of urban building excavations, gas and other pipeline trenches, and shallow water line trenches were assumed to be in compliance.

ERG also estimated costs for the other provisions of the standard, including those related to inspections, hazardous atmospheres, warning systems for mobile equipment, traffic vests and means of access and egress from trenches. They estimated that these would cost $12.0 million to comply with the existing standard, and $17.0 million for the revised standard. Thus, as shown in table 4, ERG estimated that the total annual cost of compliance, figuring in current non-compliance, would be $344.0 million for the existing standard, and $306.0 million for the revised standard. ERG therefore estimated that the revised standard would save $38.0 million.

TABLE 4.—SUMMARY OF COMPLIANCE COSTS UNDER FULL COMPLIANCE WITH THE EXISTING AND PROPOSED STANDARD

[Dollar million per year]

| Topic | Existing standard paragraphs(s) of part 1926 | Annual cost [1] | Proposed standard paragraph(s) of part 1926 | Annual costs [1] |
|---|---|---|---|---|
| Cave-in protection [2] | Various | 332.0 | Various | 289.0 |
| Access and egress; means of egress from trenches | 652(u) | 0.4 | 651(c)(2) | Neg. |
| Traffic vests | 650(f) | 0.1 | 651(d) | 0.1 |
| Exposure to suspended loads | 650(u) | Neg | 651(e) | Neg. |
| Warning system for mobile equipment | 651(s) | 1.1 | 651(f) | Neg. |
| Hazardous atmospheres | 650(g), 651(v) | 4.1 | 651(g)(1) | 4.1 |
| Store excavated materials 2 feet from edge | 651(i) | Neg | 651(j)(3) | Neg. |
| Inspections | 650(i), 650(d) | 6.3 | 651(a) | 6.3 |
| Paperwork | NA | 0.0 | Various | 6.5 |
| Total | | 344.0 | | 306.0 |

[1] Includes some annualized equipment costs as derived for the general paragraph requirements.
[2] Includes incremental soil compaction costs.
Neg. = Negligible.
Source: ERG estimates.

In short, using a model, or 'micro' approach of estimating costs of compliance under both the existing and proposed standards, ERG projected a cost savings from the amendments to subpart P of approximately the same magnitude as the "high" preliminary estimate OSHA produced using an aggregate approach.

It should be noted, however, that ERG's analysis examined only the impact on firms that are out of compliance with the current and revised standards. It did not examine the potential for cost savings under the revised standard in firms already in compliance with the current standard. It is possible, therefore, that the revised standard may save more than $38.0 million.

In addition to these provisions, there was some concern expressed about the need to hire a certified engineer [24, 25, 26, 27]. The final standard, however, does not require the use of an engineer, but simply allows their participation as an alternative to using the tables provided in the standard. The rule therefore will impose no additional cost and will in fact generate cost savings for those firms that now use engineers.

Cost Effectiveness

Based on the cost estimates developed by ERG, the monetized savings of the revised standard to employers from less work disruption are estimated at $16.6 million, and the monetized benefits to employees from fewer non-fatal accidents are estimated at $99.4 million. To derive a cost-effectiveness ratio, these monetized benefits were subtracted from the total annualized costs of $306.0 million, and this total divided by the expected number of lives to be saved by the standard. Since full compliance with the revised standard is expected to save 74 lives per year, OSHA estimates that the net cost per life saved is about $2.6 million.

Feasibility

The above analysis indicates that compliance with the revised standard is easier and less expensive than compliance with the existing standard. Since the analysis also indicates that most firms are currently in compliance with the existing standard, OSHA concludes that compliance with the revised standard is both economically

and technologically feasible for these firms.

OSHA indicates that additional contractors will comply with the revised standard for excavation work because of its increased flexibility and clarity as compared to the existing standard. Based upon the following analysis, OSHA also concludes that the aggregate economic impacts of achieving full compliance starting from a baseline of current industry practice are small, as are the impacts to representative excavation firms, and differential impacts on small firms.

Aggregate Economic Impacts

The aggregate economic impacts of enforcing full compliance with the subpart P regulations depend on the extent to which price hikes based on compliance cost increases would cause a decline in the demand for excavation services. Since excavation is an input in the production of construction activities, the demand for excavation services depends ultimately on the demand for construction output. Thus, unless cost-based price increases would result in a reduction in demand for construction outputs, no significant economic impacts will be borne by the affected industry.

*Methodology.* Increasing the price of excavation has two potential effects on the demand for such services. First, increasing the price of excavation relative to the price of other inputs may result in factor substitution away from excavation. The extent to which this would occur depends on the substitutability between excavation and other input factors used in the construction process. Second, an increase in excavation prices would result in an increase in the marginal costs of construction output and, therefore, an upward shift in the construction supply curve. This in turn would result in a higher equilibrium market price and, in general, a reduction in the market equilibrium level of output. Such a reduction in construction output would not result in a decline in the demand for excavation services.

It can be shown, in general, that the price elasticity of demand for excavation services depends directly on (1) the price elasticity of demand for construction output and (2) the share of the value of construction output accounted for by excavation; and varies inversely with the elasticity of substitution between excavation and other factors of production.

The degree of substitutability between inputs depends on the nature of the production function. In construction, the substitutability between excavation and other factors is quite low and, therefore, its impact on the demand elasticity for excavation is of a second order in magnitude. If the elasticity of substitution is assumed to be zero, the price elasticity of demand for excavation is equal to the price elasticity of demand for construction multiplied by the share of construction output accounted for by excavation activities.

This derived demand relationship is used to assess the economic impact of the estimated compliance cost increases. If the demand elasticity were zero, there would be no effect on output and industry revenues would increase in an amount equal to the cost increase projected in section 3. If the demand elasticity were greater than zero (in absolute value), output would decline and revenues would increase by less than the amount of the projected cost increases. The difference between those two levels represents the aggregate economic impact of full compliance. It represents the loss in revenues from that which would be necessary to support excavation work in a full compliance state at the existing level of activity.

*Demand for construction.* ERG [16] judged that several categories of excavation projects would be impacted by the subpart P regulations. These include work related to sewers, highways, and water supply systems, work associated with non-residential building construction and other non-building construction, and work associated with residential building construction. This category includes building excavations for basements and foundations and trenching for utility hook-ups. The demand characteristics of each of these three construction categories is considered below.

*Highway, sewer, and water system construction.* Expenditures for construction projects in this category are, as a rule, publicly financed. For this reason, decisions regarding the appropriate level of such investments are not made in the private marketplace. Any relationship between the price (cost) of such investments and the level of demand depends, therefore, more on political considerations than on the factors that determine demand for privately produced goods and services.

In the case of highways, no output price exists. Thus, no simple relationship can be specified between the level of construction expenditures and the price of such investments. The cost of sewers and water systems investments is often embodied in a sewer or water charge, which is in effect a "price". In the absence of a perfect political system, decisions regarding the level of water and sewer investments will not reflect a price influence in accordance with demand theory constraints.

These considerations imply that the effect of small cost changes on the level of construction investments in this category would not be significant, a conclusion reinforced by econometric analyses of expenditures for these types of construction. For example, the Brookings Econometric Model of the United States does not include any price or cost variables in its equations forecasting public expenditures for highways or sewer and water systems. For the purposes of their study on excavating, therefore, ERG concluded that the price elasticity of demand for these construction categories is not significantly different from zero.

*Non-Residential Building Construction and Other Non-Building Construction.* Included in this category are commercial and industrial building construction and "other" non-building construction (highways, sewer systems, water supply facilities, gas and other pipelines). In this case, the outputs of construction activity (e.g., commercial buildings) are themselves inputs into the production of other services (e.g., services that require commercial building space). Thus the elasticity of demand for the construction output is related to (1) the price elasticity of demand for the final service and (2) the importance of the costs of buildings or other construction in the total costs of the final service. Since the cost of the building is likely a small factor in affecting the demand for the service, the price elasticity of demand for these types of construction is likely to be small. For similar reasons, the derived demand for excavation activities will be another order of magnitude smaller. Thus, ERG concluded that changes in costs of excavation activities in the ranges projected in the cost analysis will not have significant impacts on the expenditures for construction projects falling within this category.

*Residential Construction.* Expenditures for this category of construction activities represent investments in the stock of single and multi-family housing. A number of studies have examined the price sensitivity of the demand for housing services. Depending on the data source and estimation methodology, these studies have estimated the price elasticity of demand for housing services at values ranging from −0.4 to −1.0 [28].

In the long run, it is reasonable to expect the demand for the stock of housing to reflect similar levels of price

sensitivity. Depending on the rate of market adjustment, short-run price sensitivity should be lower. It is also important to consider that housing investments include modifications, renovation, and depreciation (negative investment) to the existing stock as well as new housing construction. For this reason, the elasticity of demand for new residential construction is likely to be lower than that for residential construction as a whole. Thus, for purposes of the economic impact analysis, ERG assumed a price elasticity of −0.5, which is at the lower end of the spectrum of estimated price elasticities.

*Aggregate Economic Impacts.* Based on the magnitude of the elasticity developed above, and the small portion of each construction activity composed of excavation work, ERG concluded that no significant impacts should be expected from compliance-related cost increases for trenches for sewers, highways, and water supply systems and for excavations for commercial and industrial buildings and other non-building excavations.

Only in the case of housing construction does the possibility of a significant impact exist for excavation work for basements and foundations and trench work for residential utility hook-ups. Excavation is estimated to represent 0.5 percent of residential construction and utility hook-ups are estimated to account for 1.0 percent of residential construction. Combining these shares with the estimated construction price elasticity of −0.5 suggests an elasticity of demand with respect to price of −.003 for residential construction excavations and −.005 for utility trenches.

Economic impacts on excavation contractors will occur to the extent that cost increases exceed revenue increases. The estimated changes in average project costs due to compliance are 0.9 percent for residential foundation excavations and 2.9 percent for utility hook-ups under the more costly existing standard. The revenues from residential foundation excavations and utility hook-up trenches are $1 billion and $1.35 billion, respectively. The project cost increases (at current levels of activity) will generate aggregate cost increases of $9.0 million and $39.2 million in these two sectors.

Revenue increases are derived by applying the revenue elasticity (which is equal to one plus the price elasticity) to the cost increases. This calculation indicates that the revenue increases fall short of the cost increases by approximately $27,000 in residential excavations and $196,000 in utility hook-up trenches.

Given the magnitude of these estimates in comparison to total industry revenues, OSHA believes that no significant impacts on the construction industry will result from enforcing full compliance with either version of the Subpart P standard. Only in residential construction does the possibility of measurable impacts exist. Even in this case, however, the estimated aggregate impacts are less than the value of the construction work performed by one typical excavation contractor. As a result, OSHA concludes that full compliance with the revised standard is economically feasible.

## Regulatory Flexibility Certification

Pursuant to the Regulatory Flexibility Act of 1980 (Pub. L. 95–353, 94 Stat. 1164 (5 U.S.C. 60 et seq.)), OSHA has assessed the impact of the revisions and concludes that they would not adversely affect a significant number of small entities.

As is generally known, the burden of regulation, especially the legal and paperwork burdens, can fall disproportionately on small enterprises. This occurs primarily because larger firms often have the legal and clerical support in place to handle the burdens imposed by government regulation. ERG concluded that the sector most likely to incur some revenue loss is residential construction. Firms providing excavation services for this sector are among the smallest firms in the construction industry. Nevertheless, ERG concluded that the impacts from revenue loss will be minor.

In general, the amended standard will not generate differential impacts on small firms, but there may be instances in which full compliance will be more difficult for smaller firms. Full compliance with the Subpart P standards will sometimes require contractors to utilize trench boxes or more expensive means of cave-in protection. This occurs when there is not sufficient space for sloping of the trench sides, or where uneven trench sides may make the use of hydraulic shores unwieldy. For the smallest contractors, compliance through these methods may be difficult because they lack adequate equipment capabilities, such as a backhoe of sufficient size to pull a trench box. These inequities among firms are ameliorated to the extent that firms are able to rent the necessary equipment. Technological impacts (e.g., light-weight trench boxes) also help. Rental costs may cut into profit margins, however, and as a result small firms may prefer not to participate in some excavation jobs. Overall, OSHA believes that these disadvantages are minor and will be less evident under full compliance with the revised standard than with the existing standard because of the additional flexibility permitted under the former.

The primary point of concern registered by smaller contractors dealt with the possibility of having to have a qualified engineer design cave-in protection. OSHA's **Federal Register** notice on June 16, 1987 asked "Should OSHA limit all design responsibility to a "qualified engineer?" In reponse, several commentors suggested this would place a disproportionate impact on small contractors. The Underground Contractors Association of Northern California stated that:

> We feel that the most severe impact of this requirement would be on small, minority and disadvantaged businesses. From a competitive standpoint, larger firms would hire someone in-house and would integrate the cost into their overhead more effectively than the small business who would be required to retain a consultant on a very expensive hourly contract rate [29, p. 3].

As stated earlier, however, employers have several options to choose from in selecting cave-in protection. The Washington Metropolitan Area Construction Safety Association correctly stated, "With all the options provided, the use of a [registered professional] engineer should seldom if ever be required" [30].

Other impacts of the revised standard will not create unusual compliance problems for small firms. The revised standard does not explicitly or implicitly require that small firms have substantial organizational infrastructure for providing training or other safety-oriented administrative controls. Nearly all compliance can be achieved without a change in normal operating procedures. The major compliance issue, cave-in protection, can clearly be provided by small firms in normal operating circumstances.

Similarly, it may be true that the larger excavating firms are less affected by the requirements than their smaller rivals because the very size of the larger firms may have prompted the adoption of companywide construction practices that meet or exceed the minimum requirements. It is therefore likely that the amendments, which serve principally to reduce the cost of compliance by increasing the flexibility of the regulations and clarifying their intent, will also benefit smaller firms. Thus, clarifying the standard and explicitly stating the flexibility and choice available to firms will reduce compliance costs to both small and large firms.

Some portion of these savings will pass through to the consumers or to the state and local governments that often are the purchasers of excavation projects. In sum, economy-wide savings from the revision are estimated to be $38.0 million. Thus, the overall effect on prices, output, and employment in the U.S. economy will be small, but favorable. For these reasons, OSHA concludes that the revised standard is unlikely to have an adverse impact on a significant number of small excavation companies.

Additional Impact Measures

*Impacts on State and Local Governments.* The value of new construction financed by state and local governments totaled approximately $55 billion in 1985 [27, Table S–7]. ERG estimated the incremental compliance cost expenditure on sewer and highway projects at $188 million under the existing standard. It will be slightly less under the revised standard. This equals 0.34 percent of state and local construction investments.

*Employment.* The employment impacts of achieving compliance with the existing or revised standard are dependent upon the general economic impacts discussed in previous sections. OSHA does not expect significant impacts for such firms and believes the employment impacts will be negligible.

*Foreign Trade.* Changes to the excavation standard or enforcement of full compliance with this standard will not impact U.S. foreign trade. The OSHA standard is applicable to excavation work performed in the U.S. and there is no possibility of substitution to lower cost foreign excavation services.

Environmental Impacts

The revisions to subpart P have been reviewed in accordance with the requirements of the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4231 et seq.), the Regulations of the Council on Environmental Quality (CEQ) (40 CFR part 1500), and OSHA's DOL NEPA Procedures (29 CFR part 11). As a result of this review, the Assistant Secretary for OSHA has determined that the amended standard would have no significant environmental impact.

Although safety standards rarely influence air, water, or soil quality, plant or animal life, or the use of land or other aspects of the environment, it is appropriate to examine whether the revisions to the OSHA standard on excavation (29 CFR part 1926, subpart P) will alter the environment external to the workplace. Excavation can have significant effects upon local environments. For example, erosion, runoff, and similar actions can result in environmental degradation. These potential impacts can be more or less severe depending upon how and where the excavation is dug, how long it is left open, the disposition of the earth that is removed, etc. OSHA has determined, however, that the revisions to subpart P consist primarily of clarifications in work practices and procedures and are unlikely to have significant impacts on any of these activities; therefore, these revisions will have no significant environmental effects.

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## V. OMB Approval Under the Paperwork Reduction Act

This subpart contains a collection of information in § 1926.652(b) (3) and (4), and (c) (2), (3) and (4). These provisions require employers to maintain a copy of protective systems designs, including tabulated data and manufacturers data at the worksite and to make these designs or data available to the Secretary. OMB has reviewed these collections and approved them through September 30, 1992. The approval number is 1218–0137.

Public reporting burden for this collection of information is estimated to average .5 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Office of Information Management, Department of Labor, Room N–1301, 200 Constitution Avenue, NW., Washington, DC 20210; and to the Office of Management and Budget Paperwork Reduction Project (1218–0137), Washington, DC 20503.

## VI. State Plan Standards

The 25 states with their own OSHA-approved occupational safety and health plans must adopt a comparable standard within six months of the publication date of the final rule or show OSHA why there is no need for action, e.g. because an existing standard covering this area is already "at least as effective" as the revised federal standard. These states are: Alaska, Arizona, California, Connecticut (for state and local government employees only), Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, New York (for state and local government employees only), North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virginia, Virgin Islands, Washington and Wyoming.

## VII. Federalism

The Final Rule has been reviewed in accordance with Executive Order 12612 (52 FR 41685; October 30, 1987) regarding Federalism. This Order requires that agencies, to the extent possible, refrain from limiting state policy options, consult with states prior to taking any actions that would restrict state policy options, and take such actions only when there is clear constitutional authority and the presence of a problem of national scope. The Order provides for preemption of state law only if there is a clear Congressional intent for the agency to do so. Any such preemption is to be limited to the extent possible.

Section 18 of the Occupational Safety and Health Act (OSH Act), expresses Congress' clear intent to preempt state laws relating to issues with respect to which Federal OSHA has promulgated occupational safety or health standards. Under the OSH Act; a state can avoid preemption only if it submits, and obtains Federal approval of, a plan for the development of such standards and their enforcement. Occupational safety and health standards developed by such Plan States must, among other things, be at least as effective in providing safe and healthful employment and places of employment as the Federal standards. Where such standards are applicable to products distributed or used in interestate commerce, they may not unduly burden commerce and must be justified by compelling local conditions, *see* section 18(c)(2).

The Federal standard on excavations addresses hazards which are not unique to any one state or region of the country. Nonetheless, states with occupational safety and health plans approved under section 18 of the OSH Act will be able to develop their own state standards to deal with any special problems which might be encountered in a particular state. Moreover, because this standard is written in general, performance-oriented terms, there is considerable flexibility for state plans to require, and for affect employers to use, methods of compliance which are appropriate to the working conditions covered by the standard.

In brief, this Final Rule addresses a clear national problem related to occupational safety and health in the construction industry. Those states which have elected to participate under section 18 of the OSH Act are not preempted this standard, and will be able to address any special conditions within the framework of the Federal Act while ensuring that the state standards are at least as effective as that standard.

## VIII. Authority

This document was prepared under the direction of Gerard F. Scannell, Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210.

Accordingly, pursuant to sections 4, 6(b) and 8(c) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657), section 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 333), Secretary of Labor's Order No. 9–83 (48 FR 35736), and 29 CFR part 1911, part 1926 to title 29 of the Code of Federal Regulations is amended as set forth below.

### List of Subjects in 29 CFR Part 1926

Construction safety, Construction industry, Excavations, Occupational safety and health, Protective equipment, Safety.

Signed at Washington, DC, this 20th day of October, 1989.

**Gerard F. Scannell,**

*Assistant Secretary of Labor.*

Part 1926 of 29 CFR is amended as follows:

## PART 1926—[AMENDED]

### Subpart M—[Amended]

1. By revising the authority citation for subpart M of part 1926 to read as follows:

Authority: Sec. 107, Contract Work Hours and Safety Standards Act (Construction Safety Act) (40 U.S.C. 333); Secs. 4, 6, 8, Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Order No. 12–71 (36 FR 8754), 8–76 (41 FR 25059), or 9–83 (48 FR 35736), as applicable, and 29 CFR part 1911.

2. By revising subpart P of part 1926 to read as follows:

**Subpart P—Excavations**



### Subpart P—Excavations

Authority: Sec. 107, Contract Worker Hours and Safety Standards Act (Construction Safety Act) (40 U.S.C. 333); Secs. 4, 6, 8, Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Order No. 12–71 (36 FR 8754), 8–76 (41 FR 25059), or 9–83 (48 FR 35736), as applicable, and 29 CFR part 1911.

**§ 1926.650 Scope, application, and definitions applicable to this subpart.**

(a) *Scope and application.* This subpart applies to all open excavations made in the earth's surface. Excavations are defined to include trenches.

(b) *Definitions applicable to this subpart.*

*Accepted engineering practices* means those requirements which are compatible with standards of practice required by a registered professional engineer.

*Aluminum Hydraulic Shoring* means a pre-engineered shoring system comprised of aluminum hydraulic cylinders (crossbraces) used in conjunction with vertical rails (uprights) or horizontal rails (walers). Such system is designed, specifically to support the sidewalls of an excavation and prevent cave-ins.

*Bell-bottom pier hole* means a type of shaft or footing excavation, the bottom of which is made larger than the cross section above to form a belled shape.

*Benching* (Benching system) means a method of protecting employees from cave-ins by excavating the sides of an excavation to form one or a series of horizontal levels or steps, usually with vertical or near-vertical surfaces between levels.

*Cave-in* means the separation of a mass of soil or rock material from the side of an excavation, or the loss of soil from under a trench shield or support system, and its sudden movement into the excavation, either by falling or sliding, in sufficient quantity so that it could entrap, bury, or otherwise injure and immobilize a person.

*Competent person* means one who is capable of identifying existing and predictable hazards in the surroundings, or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them.

*Cross braces* mean the horizontal members of a shoring system installed perpendicular to the sides of the excavation, the ends of which bear against either uprights or wales.

*Excavation* means any man-made cut, cavity, trench, or depression in an earth surface, formed by earth removal.

*Faces* or *sides* means the vertical or inclined earth surfaces formed as a result of excavation work.

*Failure* means the breakage, displacement, or permanent deformation of a structural member or connection so as to reduce its structural integrity and its supportive capabilities.

*Hazardous atmosphere* means an atmosphere which by reason of being explosive, flammable, poisonous, corrosive, oxidizing, irritating, oxygen deficient, toxic, or otherwise harmful, may cause death, illness, or injury.

*Kickout* means the accidental release or failure of a cross brace.

*Protective system* means a method of protecting employees from cave-ins, from material that could fall or roll from an excavation face or into an excavation, or from the collapse of adjacent structures. Protective systems include support systems, sloping and benching systems, shield systems, and other systems that provide the necessary protection.

*Ramp* means an inclined walking or working surface that is used to gain access to one point from another, and is constructed from earth or from structural materials such as steel or wood.

*Registered Professional Engineer* means a person who is registered as a professional engineer in the state where the work is to be performed. However, a professional engineer, registered in any state is deemed to be a "registered professional engineer" within the meaning of this standard when approving designs for "manufactured protective systems" or "tabulated data" to be used in interstate commerce.

*Sheeting* means the members of a shoring system that retain the earth in position and in turn are supported by other members of the shoring system.

*Shield* (Shield system) means a structure that is able to withstand the forces imposed on it by a cave-in and thereby protect employees within the structure. Shields can be permanent structures or can be designed to be portable and moved along as work progresses. Additionally, shields can be either premanufactured or job-built in accordance with § 1926.652 (c)(3) or (c)(4). Shields used in trenches are usually referred to as "trench boxes" or "trench shields."

*Shoring* (Shoring system) means a structure such as a metal hydraulic, mechanical or timber shoring system that supports the sides of an excavation and which is designed to prevent cave-ins.

*Sides.* See "Faces."

*Sloping* (Sloping system) means a method of protecting employees from cave-ins by excavating to form sides of an excavation that are inclined away from the excavation so as to prevent cave-ins. The angle of incline required to prevent a cave-in varies with differences in such factors as the soil type, environmental conditions of exposure, and application of surcharge loads.

*Stable rock* means natural solid mineral material that can be excavated with vertical sides and will remain intact while exposed. Unstable rock is considered to be stable when the rock material on the side or sides of the excavation is secured against caving-in or movement by rock bolts or by another protective system that has been designed by a registered professional engineer.

*Structural ramp* means a ramp built of steel or wood, usually used for vehicle access. Ramps made of soil or rock are not considered structural ramps.

*Support system* means a structure such as underpinning, bracing, or shoring, which provides support to an adjacent structure, underground

installation, or the sides of an excavation.

*Tabulated data* means tables and charts approved by a registered professional engineer and used to design and construct a protective system.

*Trench* (Trench excavation) means a narrow excavation (in relation to its length) made below the surface of the ground. In general, the depth is greater than the width, but the width of a trench (measured at the bottom) is not greater than 15 feet (4.6 m). If forms or other structures are installed or constructed in an excavation so as to reduce the dimension measured from the forms or structure to the side of the excavation to 15 feet (4.6 m) or less (measured at the bottom of the excavation), the excavation is also considered to be a trench.

*Trench box.* See "Shield."

*Trench shield.* See "Shield."

*Uprights* means the vertical members of a trench shoring system placed in contact with the earth and usually positioned so that individual members do not contact each other. Uprights placed so that individual members are closely spaced, in contact with or interconnected to each other, are often called "sheeting."

*Wales* means horizontal members of a shoring system placed parallel to the excavation face whose sides bear against the vertical members of the shoring system or earth.

**§ 1926.651 General requirements.**

(a) *Surface encumbrances.* All surface encumbrances that are located so as to create a hazard to employees shall be removed or supported, as necessary, to safeguard employees.

(b) *Underground installations.* (1) The estimated location of utility installations, such as sewer, telephone, fuel, electric, water lines, or any other underground installations that reasonably may be expected to be encountered during excavation work, shall be determined prior to opening an excavation.

(2) Utility companies or owners shall be contacted within established or customary local response times, advised of the proposed work, and asked to establish the location of the utility underground installations prior to the start of actual excavation. When utility companies or owners cannot respond to a request to locate underground utility installations within 24 hours (unless a longer period is required by state or local law), or cannot establish the exact location of these installations, the employer may proceed, provided the employer does so with caution, and provided detection equipment or other acceptable means to locate utility installations are used.

(3) When excavation operations approach the estimated location of underground installations, the exact location of the installations shall be determined by safe and acceptable means.

(4) While the excavation is open, underground installations shall be protected, supported or removed as necessary to safeguard employees.

(c) *Access and egress*—(1) *Structural ramps.* (i) Structural ramps that are used solely by employees as a means of access or egress from excavations shall be designed by a competent person. Structural ramps used for access or egress of equipment shall be designed by a competent person qualified in structural design, and shall be constructed in accordance with the design.

(ii) Ramps and runways constructed of two or more structural members shall have the structural members connected together to prevent displacement.

(iii) Structural members used for ramps and runways shall be of uniform thickness.

(iv) Cleats or other appropriate means used to connect runway structural members shall be attached to the bottom of the runway or shall be attached in a manner to prevent tripping.

(v) Structural ramps used in lieu of steps shall be provided with cleats or other surface treatments on the top surface to prevent slipping.

(2) *Means of egress from trench excavations.* A stairway, ladder, ramp or other safe means of egress shall be located in trench excavations that are 4 feet (1.22 m) or more in depth so as to require no more than 25 feet (7.62 m) of lateral travel for employees.

(d) *Exposure to vehicular traffic.* Employees exposed to public vehicular traffic shall be provided with, and shall wear, warning vests or other suitable garments marked with or made of reflectorized or high-visibility material.

(e) *Exposure to falling loads.* No employee shall be permitted underneath loads handled by lifting or digging equipment. Employees shall be required to stand away from any vehicle being loaded or unloaded to avoid being struck by any spillage or falling materials. Operators may remain in the cabs of vehicles being loaded or unloaded when the vehicles are equipped, in accordance with § 1926.601(b)(6), to provide adequate protection for the operator during loading and unloading operations.

(f) *Warning system for mobile equipment.* When mobile equipment is operated adjacent to an excavation, or when such equipment is required to approach the edge of an excavation, and the operator does not have a clear and direct view of the edge of the excavation, a warning system shall be utilized such as barricades, hand or mechanical signals, or stop logs. If possible, the grade should be away from the excavation.

(g) *Hazardous atmospheres*—(1) *Testing and controls.* In addition to the requirements set forth in subparts D and E of this part (29 CFR 1926.50–1926.107) to prevent exposure to harmful levels of atmospheric contaminants and to assure acceptable atmospheric conditions, the following requirements shall apply:

(i) Where oxygen deficiency (atmospheres containing less than 19.5 percent oxygen) or a hazardous atmosphere exists or could reasonably be expected to exist, such as in excavations in landfill areas or excavations in areas where hazardous substances are stored nearby, the atmospheres in the excavation shall be tested before employees enter excavations greater than 4 feet (1.22 m) in depth.

(ii) Adequate precautions shall be taken to prevent employee exposure to atmospheres containing less than 19.5 percent oxygen and other hazardous atmospheres. These precautions include providing proper respiratory protection or ventilation in accordance with subparts D and E of this part respectively.

(iii) Adequate precaution shall be taken such as providing ventilation, to prevent employee exposure to an atmosphere containing a concentration of a flammable gas in excess of 20 percent of the lower flammable limit of the gas.

(iv) When controls are used that are intended to reduce the level of atmospheric contaminants to acceptable levels, testing shall be conducted as often as necessary to ensure that the atmosphere remains safe.

(2) *Emergency rescue equipment.* (i) Emergency rescue equipment, such as breathing apparatus, a safety harness and line, or a basket stretcher, shall be readily available where hazardous atmospheric conditions exist or may reasonably be expected to develop during work in an excavation. This equipment shall be attended when in use.

(ii) Employees entering bell-bottom pier holes, or other similar deep and confined footing excavations, shall wear a harness with a life-line securely attached to it. The lifeline shall be separate from any line used to handle materials, and shall be individually

attended at all times while the employee wearing the lifeline is in the excavation.

(h) *Protection from hazards associated with water accumulation.* (1) Employees shall not work in excavations in which there is accumulated water, or in excavations in which water is accumulating, unless adequate precautions have been taken to protect employees against the hazards posed by water accumulation. The precautions necessary to protect employees adequately vary with each situation, but could include special support or shield systems to protect from cave-ins, water removal to control the level of accumulating water, or use of a safety harness and lifeline.

(2) If water is controlled or prevented from accumulating by the use of water removal equipment, the water removal equipment and operations shall be monitored by a competent person to ensure proper operation.

(3) If excavation work interrupts the natural drainage of surface water (such as streams), diversion ditches, dikes, or other suitable means shall be used to prevent surface water from entering the excavation and to provide adequate drainage of the area adjacent to the excavation. Excavations subject to runoff from heavy rains will require an inspection by a competent person and compliance with paragraphs (h)(1) and (h)(2) of this section.

(i) *Stability of adjacent structures.* (1) Where the stability of adjoining buildings, walls, or other structures is endangered by excavation operations, support systems such as shoring, bracing, or underpinning shall be provided to ensure the stability of such structures for the protection of employees.

(2) Excavation below the level of the base or footing of any foundation or retaining wall that could be reasonably expected to pose a hazard to employees shall not be permitted except when:

(i) A support system, such as underpinning, is provided to ensure the safety of employees and the stability of the structure; or

(ii) The excavation is in stable rock; or

(iii) A registered professional engineer has approved the determination that the structure is sufficently removed from the excavation so as to be unaffected by the excavation activity; or

(iv) A registered professional engineer has approved the determination that such excavation work will not pose a hazard to employees.

(3) Sidewalks, pavements, and appurtenant structure shall not be undermined unless a support system or another method of protection is provided to protect employees from the possible collapse of such structures.

(j) *Protection of employees from loose rock or soil.* (1) Adequate protection shall be provided to protect employees from loose rock or soil that could pose a hazard by falling or rolling from an excavation face. Such protection shall consist of scaling to remove loose material; installation of protective barricades at intervals as necessary on the face to stop and contain falling material; or other means that provide equivalent protection.

(2) Employees shall be protected from excavated or other materials or equipment that could pose a hazard by falling or rolling into excavations. Protection shall be provided by placing and keeping such materials or equipment at least 2 feet (.61 m) from the edge of excavations, or by the use of retaining devices that are sufficient to prevent materials or equipment from falling or rolling into excavations, or by a combination of both if necessary.

(k) *Inspections.* (1) Daily inspections of excavations, the adjacent areas, and protective systems shall be made by a competent person for evidence of a situation that could result in possible cave-ins, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions. An inspection shall be conducted by the competent person prior to the start of work and as needed throughout the shift. Inspections shall also be made after every rainstorm or other hazard increasing occurrence. These inspections are only required when employee exposure can be reasonably anticipated.

(2) Where the competent person finds evidence of a situation that could result in a possible cave-in, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions, exposed employees shall be removed from the hazardous area until the necessary precautions have been taken to ensure their safety.

(l) *Fall protection.* (1) Where employees or equipment are required or permitted to cross over excavations, walkways or bridges with standard guardrails shall be provided.

(2) Adequate barrier physical protection shall be provided at all remotely located excavations. All wells, pits, shafts, etc., shall be barricaded or covered. Upon completion of exploration and similar operations, temporary wells, pits, shafts, etc., shall be backfilled.

**§ 1926.652 Requirements for protective systems.**

(a) *Protection of employees in excavations.* (1) Each employee in an excavation shall be protected from cave-ins by an adequate protective system designed in accordance with paragraph (b) or (c) of this section except when:

(i) Excavations are made entirely in stable rock; or

(ii) Excavations are less than 5 feet (1.52m) in depth and examination of the ground by a competent person provides no indication of a potential cave-in.

(2) Protective systems shall have the capacity to resist without failure all loads that are intended or could reasonably be expected to be applied or transmitted to the system.

(b) *Design of sloping and benching systems.* The slopes and configurations of sloping and benching systems shall be selected and constructed by the employer or his designee and shall be in accordance with the requirements of paragraph (b)(1); or, in the alternative, paragraph (b)(2); or, in the alternative, paragraph (b)(3), or, in the alternative, paragraph (b)(4), as follows:

(1) *Option (1)—Allowable configurations and slopes.* (i) Excavations shall be sloped at an angle not steeper than one and one-half horizontal to one vertical (34 degrees measured from the horizontal), unless the employer uses one of the other options listed below.

(ii) Slopes specified in paragraph (b)(1)(i) of this section, shall be excavated to form configurations that are in accordance with the slopes shown for Type C soil in Appendix B to this subpart.

(2) *Option (2)—Determination of slopes and configurations using Appendices A and B.* Maximum allowable slopes, and allowable configurations for sloping and benching systems, shall be determined in accordance with the conditions and requirements set forth in appendices A and B to this subpart.

(3) *Option (3)—Designs using other tabulated data.* (i) Designs of sloping or benching systems shall be selected from and be in accordance with tabulated data, such as tables and charts.

(ii) The tabulated data shall be in written form and shall include all of the following:

(A) Identification of the parameters that affect the selection of a sloping or benching system drawn from such data;

(B) Identification of the limits of use of the data, to include the magnitude and configuration of slopes determined to be safe;

(C) Explanatory information as may be necessary to aid the user in making a correct selection of a protective system from the data.

(iii) At least one copy of the tabulated data which identifies the registered professional engineer who approved the data, shall be maintained at the jobsite during construction of the protective system. After that time the data may be stored off the jobsite, but a copy of the data shall be made available to the Secretary upon request.

(4) *Option (4)—Design by a registered professional engineer.* (i) Sloping and benching systems not utilizing Option (1) or Option (2) or Option (3) under paragraph (b) of this section shall be approved by a registered professional engineer.

(ii) Designs shall be in written form and shall include at least the following:

(A) The magnitude of the slopes that were determined to be safe for the particular project;

(B) The configurations that were determined to be safe for the particular project; and

(C) The identity of the registered professional engineer approving the design.

(iii) At least one copy of the design shall be maintained at the jobsite while the slope is being constructed. After that time the design need not be at the jobsite, but a copy shall be made available to the Secretary upon request.

(c) *Design of support systems, shield systems, and other protective systems.* Designs of support systems shield systems, and other protective systems shall be selected and constructed by the employer or his designee and shall be in accordance with the requirements of paragraph (c)(1); or, in the alternative, paragraph (c)(2); or, in the alternative, paragraph (c)(3); or, in the alternative, paragraph (c)(4) as follows:

(1) *Option (1)—Designs using appendices A, C and D.* Designs for timber shoring in trenches shall be determined in accordance with the conditions and requirements set forth in appendices A and C to this subpart. Designs for aluminum hydraulic shoring shall be in accordance with paragraph (c)(2) of this section, but if manufacturer's tabulated data cannot be utilized, designs shall be in accordance with appendix D.

(2) *Option (2)—Designs Using Manufacturer's Tabulated Data.* (i) Design of support systems, shield systems, or other protective systems that are drawn from manufacturer's tabulated data shall be in accordance with all specifications, recommendations, and limitations issued or made by the manufacturer.

(ii) Deviation from the specifications, recommendations, and limitations issued or made by the manufacturer shall only be allowed after the manufacturer issues specific written approval.

(iii) Manufacturer's specifications, recommendations, and limitations, and manufacturer's approval to deviate from the specifications, recommendations, and limitations shall be in written form at the jobsite during construction of the protective system. After that time this data may be stored off the jobsite, but a copy shall be made available to the Secretary upon request.

(3) *Option (3)—Designs using other tabulated data.* (i) Designs of support systems, shield systems, or other protective systems shall be selected from and be in accordance with tabulated data, such as tables and charts.

(ii) The tabulated data shall be in written form and include all of the following:

(A) Identification of the parameters that affect the selection of a protective system drawn from such data;

(B) Identification of the limits of use of the data;

(C) Explanatory information as may be necessary to aid the user in making a correct selection of a protective system from the data.

(iii) At least one copy of the tabulated data, which identifies the registered professional engineer who approved the data, shall be maintained at the jobsite during construction of the protective system. After that time the data may be stored off the jobsite, but a copy of the data shall be made available to the Secretary upon request.

(4) *Option (4)—Design by a registered professional engineer.* (i) Support systems, shield systems, and other protective systems not utilizing Option 1, Option 2 or Option 3, above, shall be approved by a registered professional engineer.

(ii) Designs shall be in written form and shall include the following:

(A) A plan indicating the sizes, types, and configurations of the materials to be used in the protective system; and

(B) The identity of the registered professional engineer approving the design.

(iii) At least one copy of the design shall be maintained at the jobsite during construction of the protective system. After that time, the design may be stored off the jobsite, but a copy of the design shall be made available to the Secretary upon request.

(d) *Materials and equipment.* (1) Materials and equipment used for protective systems shall be free from damage or defects that might impair their proper function.

(2) Manufactured materials and equipment used for protective systems shall be used and maintained in a manner that is consistent with the recommendations of the manufacturer, and in a manner that will prevent employee exposure to hazards.

(3) When material or equipment that is used for protective systems is damaged, a competent person shall examine the material or equipment and evaluate its suitability for continued use. If the competent person cannot assure the material or equipment is able to support the intended loads or is otherwise suitable for safe use, then such material or equipment shall be removed from service, and shall be evaluated and approved by a registered professional engineer before being returned to service.

(e) *Installation and removal of support—*(1) *General.* (i) Members of support systems shall be securely connected together to prevent sliding, falling, kickouts, or other predictable failure.

(ii) Support systems shall be installed and removed in a manner that protects employees from cave-ins, structural collapses, or from being struck by members of the support system.

(iii) Individual members of support systems shall not be subjected to loads exceeding those which those members were designed to withstand.

(iv) Before temporary removal of individual members begins, additional precautions shall be taken to ensure the safety of employees, such as installing other structural members to carry the loads imposed on the support system.

(v) Removal shall begin at, and progress from, the bottom of the excavation. Members shall be released slowly so as to note any indication of possible failure of the remaining members of the structure or possible cave-in of the sides of the excavation.

(vi) Backfilling shall progress together with the removal of support systems from excavations.

(2) *Additional requirements for support systems for trench excavations.* (i) Excavation of material to a level no greater than 2 feet (.61 m) below the bottom of the members of a support system shall be permitted, but only if the system is designed to resist the forces calculated for the full depth of the trench, and there are no indications while the trench is open of a possible loss of soil from behind or below the bottom of the support system.

(ii) Installation of a support system shall be closely coordinated with the excavation of trenches.

(f) *Sloping and benching systems.* Employees shall not be permitted to work on the faces of sloped or benched excavations at levels above other employees except when employees at the lower levels are adequately protected from the hazard of falling, rolling, or sliding material or equipment.

(g) *Shield systems*—(1) *General.* (i) Shield systems shall not be subjected to loads exceeding those which the system was designed to withstand.

(ii) Shields shall be installed in a manner to restrict lateral or other hazardous movement of the shield in the event of the application of sudden lateral loads.

(iii) Employees shall be protected from the hazard of cave-ins when entering or exiting the areas protected by shields.

(iv) Employees shall not be allowed in shields when shields are being installed, removed, or moved vertically.

(2) *Additional requirement for shield systems used in trench excavations.* Excavations of earth material to a level not greater than 2 feet (.61 m) below the bottom of a shield shall be permitted, but only if the shield is designed to resist the forces calculated for the full depth of the trench, and there are no indications while the trench is open of a possible loss of soil from behind or below the bottom of the shield.

## Appendix A to Subpart P

*Soil Classification*

(a) *Scope and application*—(1) *Scope.* This appendix describes a method of classifying soil and rock deposits based on site and environmental conditions, and on the structure and composition of the earth deposits. The appendix contains definitions, sets forth requirements, and describes acceptable visual and manual tests for use in classifying soils.

(2) *Application.* This appendix applies when a sloping or benching system is designed in accordance with the requirements set forth in § 1926.652(b)(2) as a method of protection for employees from cave-ins. This appendix also applies when timber shoring for excavations is designed as a method of protection from cave-ins in accordance with appendix C to subpart P of part 1926, and when aluminum hydraulic shoring is designed in accordance with appendix D. This Appendix also applies if other protective systems are designed and selected for use from data prepared in accordance with the requirements set forth in § 1926.652(c), and the use of the data is predicated on the use of the soil classification system set forth in this appendix.

(b) *Definitions.* The definitions and examples given below are based on, in whole or in part, the following: American Society for Testing Materials (ASTM) Standards D653–85 and D2488; The Unified Soils Classification System, The U.S. Department of Agriculture (USDA) Textural Classification Scheme; and The National Bureau of Standards Report BSS–121.

*Cemented soil* means a soil in which the particles are held together by a chemical agent, such as calcium carbonate, such that a hand-size sample cannot be crushed into powder or individual soil particles by finger pressure.

*Cohesive soil* means clay (fine grained soil), or soil with a high clay content, which has cohesive strength. Cohesive soil does not crumble, can be excavated with vertical sideslopes, and is plastic when moist. Cohesive soil is hard to break up when dry, and exhibits significant cohesion when submerged. Cohesive soils include clayey silt, sandy clay, silty clay, clay and organic clay.

*Dry soil* means soil that does not exhibit visible signs of moisture content.

*Fissured* means a soil material that has a tendency to break along definite planes of fracture with little resistance, or a material that exhibits open cracks, such as tension cracks, in an exposed surface.

*Granular soil* means gravel, sand, or silt, (coarse grained soil) with little or no clay content. Granular soil has no cohesive strength. Some moist granular soils exhibit apparent cohesion. Granular soil cannot be molded when moist and crumbles easily when dry.

*Layered system* means two or more distinctly different soil or rock types arranged in layers. Micaceous seams or weakened planes in rock or shale are considered layered.

*Moist soil* means a condition in which a soil looks and feels damp. Moist cohesive soil can easily be shaped into a ball and rolled into small diameter threads before crumbling. Moist granular soil that contains some cohesive material will exhibit signs of cohesion between particles.

*Plastic* means a property of a soil which allows the soil to be deformed or molded without cracking, or appreciable volume change.

*Saturated soil* means a soil in which the voids are filled with water. Saturation does not require flow. Saturation, or near saturation, is necessary for the proper use of instruments such as a pocket penetrometer or sheer vane.

*Soil classification system* means, for the purpose of this subpart, a method of categorizing soil and rock deposits in a hierarchy of Stable Rock, Type A, Type B, and Type C, in decreasing order of stability. The categories are determined based on an analysis of the properties and performance characteristics of the deposits and the environmental conditions of exposure.

*Stable rock* means natural solid mineral matter that can be excavated with vertical sides and remain intact while exposed.

*Submerged soil* means soil which is underwater or is free seeping.

*Type A* means cohesive soils with an unconfined compressive strength of 1.5 ton per square foot (tsf) (144 kPa) or greater. Examples of cohesive soils are: clay, silty clay, sandy clay, clay loam and, in some cases, silty clay loam and sandy clay loam. Cemented soils such as caliche and hardpan are also considered Type A. However, no soil is Type A if:

(i) The soil is fissured; or

(ii) The soil is subject to vibration from heavy traffic, pile driving, or similar effects; or

(iii) The soil has been previously disturbed; or

(iv) The soil is part of a sloped, layered system where the layers dip into the excavation on a slope of four horizontal to one vertical (4H:1V) or greater; or

(v) The material is subject to other factors that would require it to be classified as a less stable material.

*Type B* means:

(i) Cohesive soil with an unconfined compressive strength greater than 0.5 tsf (48 kPa) but less than 1.5 tsf (144 kPa); or

(ii) Granular cohesionless soils including: angular gravel (similar to crushed rock), silt, silt loam, sandy loam and, in some cases, silty clay loam and sandy clay loam.

(iii) Previously disturbed soils except those which would otherwise be classed as Type C soil.

(iv) Soil that meets the unconfined compressive strength or cementation requirements for Type A, but is fissured or subject to vibration; or

(v) Dry rock that is not stable; or

(vi) Material that is part of a sloped, layered system where the layers dip into the excavation on a slope less steep than four horizontal to one vertical (4H:1V), but only if the material would otherwise be classified as Type B.

*Type C* means:

(i) Cohesive soil with an unconfined compressive strength of 0.5 tsf (48 kPa) or less; or

(ii) Granular soils including gravel, sand, and loamy sand; or

(iii) Submerged soil or soil from which water is freely seeping; or

(iv) Submerged rock that is not stable, or

(v) Material in a sloped, layered system where the layers dip into the excavation or a slope of four horizontal to one vertical (4H:1V) or steeper.

*Unconfined compressive strength* means the load per unit area at which a soil will fail in compression. It can be determined by laboratory testing, or estimated in the field using a pocket penetrometer, by thumb penetration tests, and other methods.

*Wet soil* means soil that contains significantly more moisture than moist soil, but in such a range of values that cohesive material will slump or begin to flow when vibrated. Granular material that would exhibit cohesive properties when moist will lose those cohesive properties when wet.

(c) *Requirements*—(1) *Classification of soil and rock deposits.* Each soil and rock deposit shall be classified by a competent person as Stable Rock, Type A, Type B, or Type C in accordance with the definitions set forth in paragraph (b) of this appendix.

(2) *Basis of classification.* The classification of the deposits shall be made based on the results of at least one visual and at least one manual analysis. Such analyses

shall be conducted by a competent person using tests described in paragraph (d) below, or in other recognized methods of soil classification and testing such as those adopted by the America Society for Testing Materials, or the U.S. Department of Agriculture textural classification system.

(3) *Visual and manual analyses.* The visual and manual analyses, such as those noted as being acceptable in paragraph (d) of this appendix, shall be designed and conducted to provide sufficient quantitative and qualitative information as may be necessary to identify properly the properties, factors, and conditions affecting the classification of the deposits.

(4) *Layered systems.* In a layered system, the system shall be classified in accordance with its weakest layer. However, each layer may be classified individually where a more stable layer lies under a less stable layer.

(5) *Reclassification.* If, after classifying a deposit, the properties, factors, or conditions affecting its classification change in any way, the changes shall be evaluated by a competent person. The deposit shall be reclassified as necessary to reflect the changed circumstances.

(d) *Acceptable visual and manual tests.*—(1) *Visual tests.* Visual analysis is conducted to determine qualitative information regarding the excavation site in general, the soil adjacent to the excavation, the soil forming the sides of the open excavation, and the soil taken as samples from excavated material.

(i) Observe samples of soil that are excavated and soil in the sides of the excavation. Estimate the range of particle sizes and the relative amounts of the particle sizes. Soil that is primarily composed of fine-grained material is cohesive material. Soil composed primarily of coarse-grained sand or gravel is granular material.

(ii) Observe soil as it is excavated. Soil that remains in clumps when excavated is cohesive. Soil that breaks up easily and does not stay in clumps is granular.

(iii) Observe the side of the opened excavation and the surface area adjacent to the excavation. Crack-like openings such as tension cracks could indicate fissured material. If chunks of soil spall off a vertical side, the soil could be fissured. Small spalls are evidence of moving ground and are indications of potentially hazardous situations.

(iv) Observe the area adjacent to the excavation and the excavation itself for evidence of existing utility and other underground structures, and to identify previously disturbed soil.

(v) Observe the opened side of the excavation to identify layered systems. Examine layered systems to identify if the layers slope toward the excavation. Estimate the degree of slope of the layers.

(vi) Observe the area adjacent to the excavation and the sides of the opened excavation for evidence of surface water, water seeping from the sides of the excavation, or the location of the level of the water table.

(vii) Observe the area adjacent to the excavation and the area within the excavation for sources of vibration that may affect the stability of the excavation face.

(2) *Manual tests.* Manual analysis of soil samples is conducted to determine quantitative as well as qualitative properties of soil and to provide more information in order to classify soil properly.

(i) *Plasticity.* Mold a moist or wet sample of soil into a ball and attempt to roll it into threads as thin as ⅛-inch in diameter. Cohesive material can be successfully rolled into threads without crumbling. For example, if at least a two inch (50 mm) length of ⅛-inch thread can be held on one end without tearing, the soil is cohesive.

(ii) *Dry strength.* If the soil is dry and crumbles on its own or with moderate pressure into individual grains or fine powder, it is granular (any combination of gravel, sand, or silt). If the soil is dry and falls into clumps which break up into smaller clumps, but the smaller clumps can only be broken up with difficulty, it may be clay in any combination with gravel, sand or silt. If the dry soil breaks into clumps which do not break up into small clumps and which can only be broken with difficulty, and there is no visual indication the soil is fissured, the soil may be considered unfissured.

(iii) *Thumb penetration.* The thumb penetration test can be used to estimate the unconfined compressive strength of cohesive soils. (This test is based on the thumb penetration test described in American Society for Testing and Materials (ASTM) Standard designation D2488—"Standard Recommended Practice for Description of Soils (Visual—Manual Procedure).") Type A soils with an unconfined compressive strength of 1.5 tsf can be readily indented by the thumb; however, they can be penetrated by the thumb only with very great effort. Type C soils with an unconfined compressive strength of 0.5 tsf can be easily penetrated several inches by the thumb, and can be molded by light finger pressure. This test should be conducted on an undisturbed soil sample, such as a large clump of spoil, as soon as practicable after excavation to keep to a miminum the effects of exposure to drying influences. If the excavation is later exposed to wetting influences (rain, flooding), the classification of the soil must be changed accordingly.

(iv) *Other strength tests.* Estimates of unconfined compressive strength of soils can also be obtained by use of a pocket penetrometer or by using a hand-operated shearvane.

(v) *Drying test.* The basic purpose of the drying test is to differentiate between cohesive material with fissures, unfissured cohesive material, and granular material. The procedure for the drying test involves drying a sample of soil that is approximately one inch thick (2.54 cm) and six inches (15.24 cm) in diameter until it is thoroughly dry:

(A) If the sample develops cracks as it dries, significant fissures are indicated.

(B) Samples that dry without cracking are to be broken by hand. If considerable force is necessary to break a sample, the soil has significant cohesive material content. The soil can be classified as a unfissured cohesive material and the unconfined compressive strength should be determined.

(C) If a sample breaks easily by hand, it is either a fissured cohesive material or a granular material. To distinguish between the two, pulverize the dried clumps of the sample by hand or by stepping on them. If the clumps do not pulverize easily, the material is cohesive with fissures. If they pulverize easily into very small fragments, the material is granular.

## Appendix B to Subpart P

*Sloping and Benching*

(a) *Scope and application.* This appendix contains specifications for sloping and benching when used as methods of protecting employees working in excavations from cave-ins. The requirements of this appendix apply when the design of sloping and benching protective systems is to be performed in accordance with the requirements set forth in § 1926.652(b)(2).

(b) *Definitions.*

*Actual slope* means the slope to which an excavation face is excavated.

*Distress* means that the soil is in a condition where a cave-in is imminent or is likely to occur. Distress is evidenced by such phenomena as the development of fissures in the face of or adjacent to an open excavation; the subsidence of the edge of an excavation; the slumping of material from the face or the bulging or heaving of material from the bottom of an excavation; the spalling of material from the face of an excavation; and ravelling, i.e., small amounts of material such as pebbles or little clumps of material suddenly separating from the face of an excavation and trickling or rolling down into the excavation.

*Maximum allowable slope* means the steepest incline of an excavation face that is acceptable for the most favorable site conditions as protection against cave-ins, and is expressed as the ratio of horizontal distance to vertical rise (H:V).

*Short term exposure* means a period of time less than or equal to 24 hours that an excavation is open.

(c) *Requirements*—(1) *Soil classification.* Soil and rock deposits shall be classified in accordance with appendix A to subpart P of part 1926.

(2) *Maximum allowable slope.* The maximum allowable slope for a soil or rock deposit shall be determined from Table B–1 of this appendix.

(3) *Actual slope.* (i) The actual slope shall not be steeper than the maximum allowable slope.

(ii) The actual slope shall be less steep than the maximum allowable slope, when there are signs of distress. If that situation occurs, the slope shall be cut back to an actual slope which is at least ½ horizontal to one vertical (½H:1V) less steep than the maximum allowable slope.

(iii) When surcharge loads from stored material or equipment, operating equipment, or traffic are present, a competent person shall determine the degree to which the actual slope must be reduced below the maximum allowable slope, and shall assure that such reduction is achieved. Surcharge loads from adjacent structures shall be evaluated in accordance with § 1926.651(i).

(4) *Configurations.* Configurations of sloping and benching systems shall be in accordance with Figure B–1.

TABLE B-1

MAXIMUM ALLOWABLE SLOPES

| SOIL OR ROCK TYPE | MAXIMUM ALLOWABLE SLOPES (H:V)[1] FOR EXCAVATIONS LESS THAN 20 FEET DEEP [3] |
|---|---|
| STABLE ROCK<br>TYPE A [2]<br>TYPE B<br>TYPE C | VERTICAL (90°)<br>3/4 : 1 (53°)<br>1:1 (45°)<br>1½: 1 (34°) |

NOTES:

1. Numbers shown in parentheses next to maximum allowable slopes are angles expressed in degrees from the horizontal. Angles have been rounded off.
2. A short-term maximum allowable slope of 1/2H:1V (63°) is allowed in excavations in Type A soil that are 12 feet (3.67 m) or less in depth. Short-term maximum allowable slopes for excavations greater than 12 feet (3.67 m) in depth shall be 3/4H:1V (53°).
3. Sloping or benching for excavations greater than 20 feet deep shall be designed by a registered professional engineer.

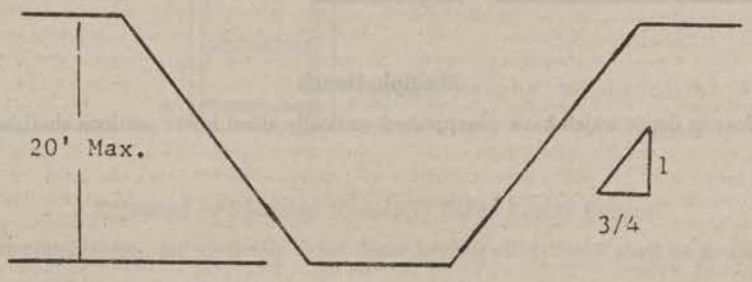
*Figure B-1*

Slope Configurations

(All slopes stated below are in the horizontal to vertical ratio)

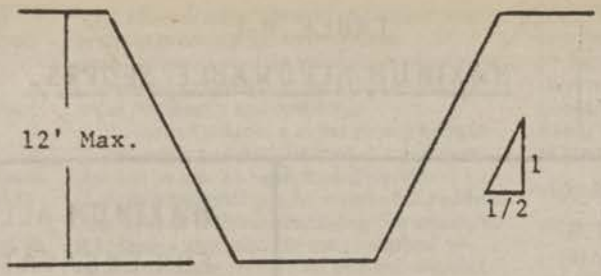
*B-1.1 Excavations made in Type A soil.*

1. All simple slope excavation 20 feet or less in depth shall have a maximum allowable slope of ¾:1.



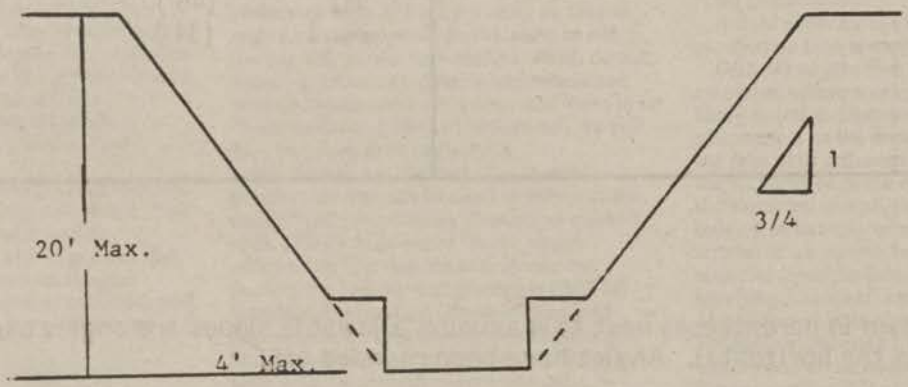

**Simple Slope—General**

Exception: Simple slope excavations which are open 24 hours or less (short term) and which are 12 feet or less in depth shall have a maximum allowable slope of ½:1.

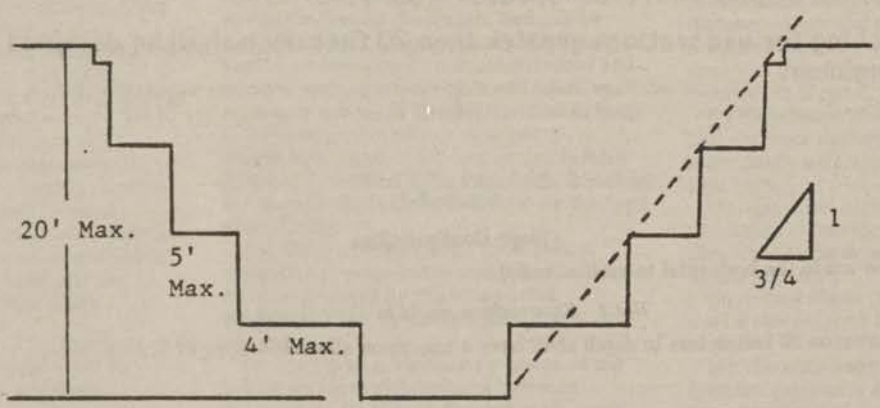



**Simple Slope—Short Term**

2. All benched excavations 20 feet or less in depth shall have a maximum allowable slope of ¾ to 1 and maximum bench dimensions as follows·

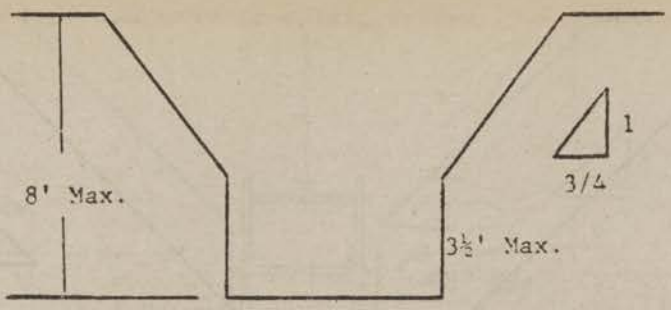



**Simple Bench**



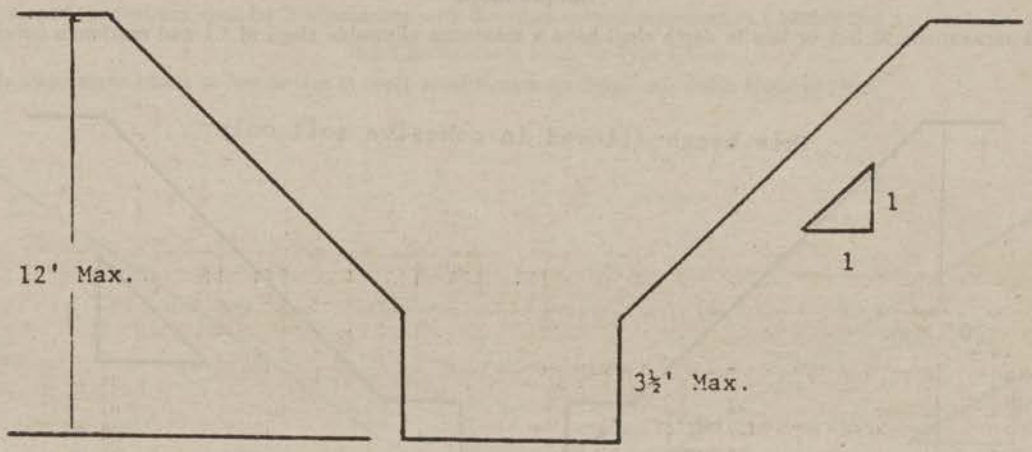

**Multiple Bench**

3. All excavations 8 feet or less in depth which have unsupported vertically sided lower portions shall have a maximum vertical side of 3½ feet.



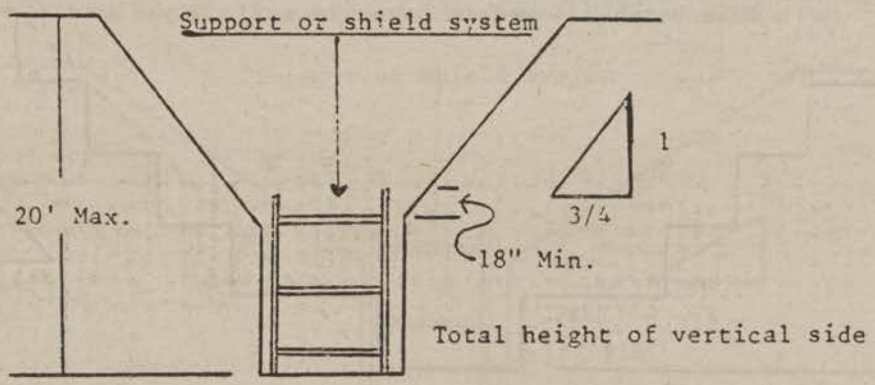

**Unsupported Vertically Sided Lower Portion—Maximum 8 Feet in Depth**

All excavations more than 8 feet but not more than 12 feet in depth which unsupported vertically sided lower portions shall have a maximum allowable slope of 1:1 and a maximum vertical side of 3½ feet.




**Unsupported Vertically Sided Lower Portion—Maximum 12 Feet in Depth**

All excavations 20 feet or less in depth which have vertically sided lower portions that are supported or shielded shall have a maximum allowable slope of ¾:1. The support or shield system must extend at least 18 inches above the top of the vertical side.

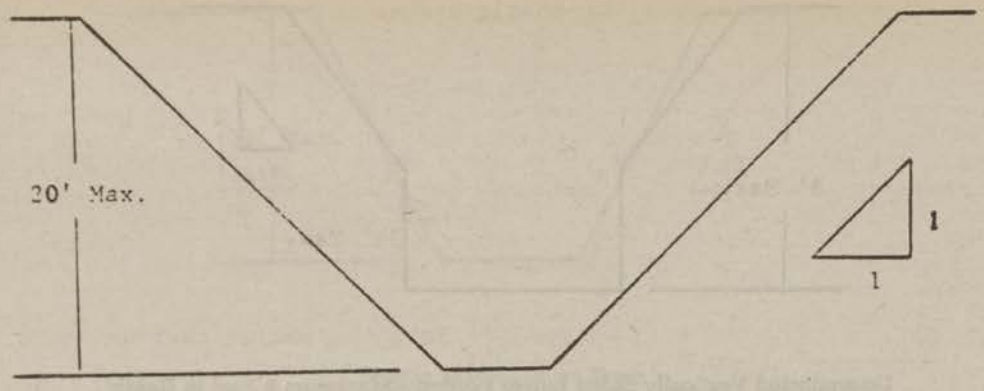



**Suported or Shielded Vertically Sided Lower Portion**

4. All other simple slope, compound slope, and vertically sided lower portion excavations shall be in accordance with the other options permitted under § 1926.652(b).

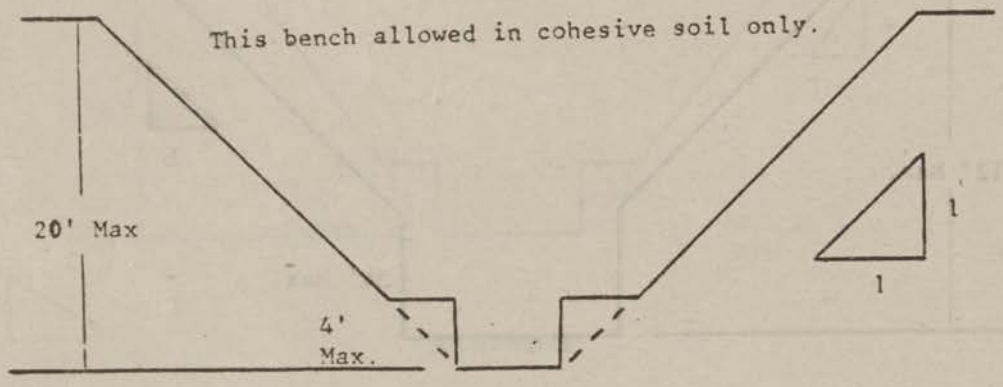
B–1.2 Excavations Made in Type B Soil

1. All simple slope excavations 20 feet or less in depth shall have a maximum allowable slope of 1:1.

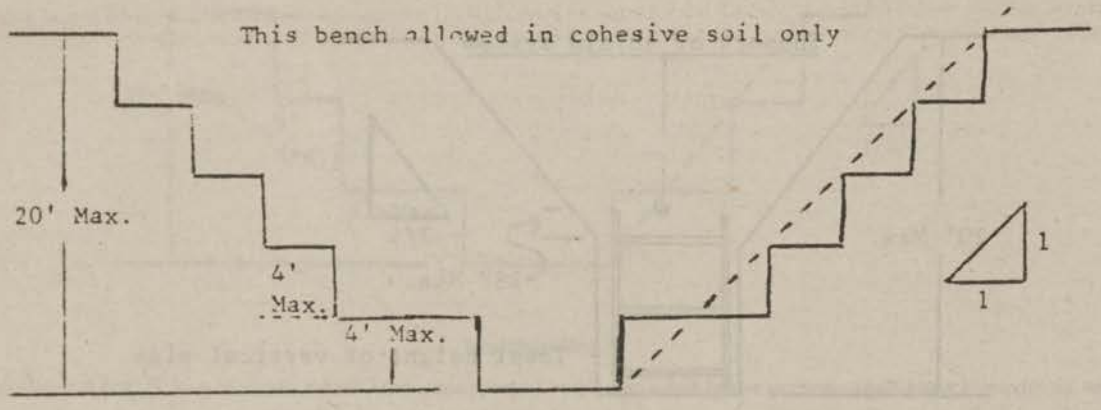



**Simple Slope**

2. All benched excavations 20 feet or less in depth shall have a maximum allowable slope of 1:1 and maximum bench dimensions as follows:

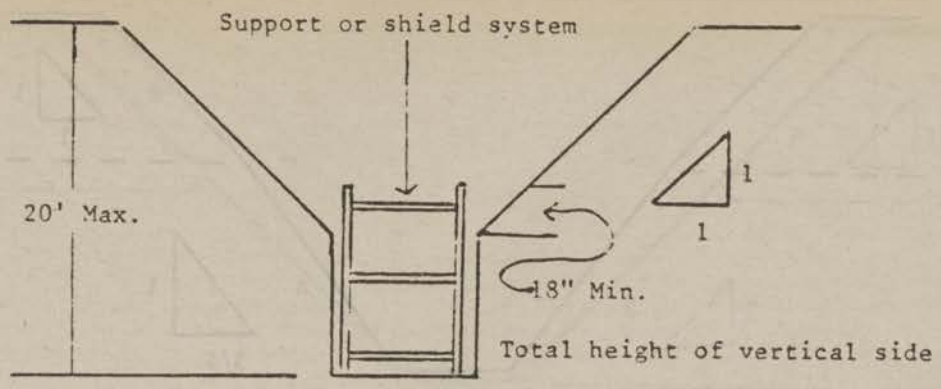



**Single Bench**




**Multiple Bench**

3. All excavations 20 feet or less in depth which have vertically sided lower portions shall be shielded or supported to a height at least 18 inches above the top of the vertical side. All such excavations shall have a maximum allowable slope of 1:1.

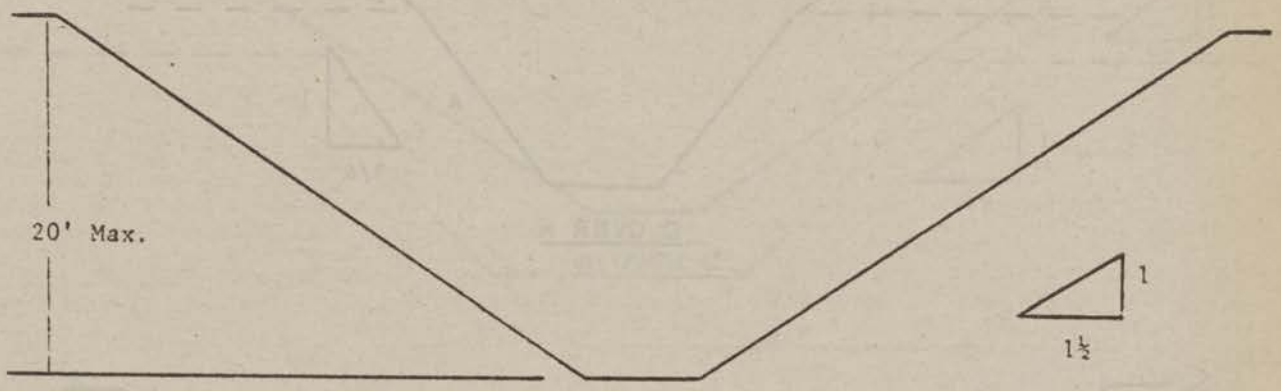



**Vertically Sided Lower Portion**

4. All other sloped excavations shall be in accordance with the other options permitted in § 1926.652(b).

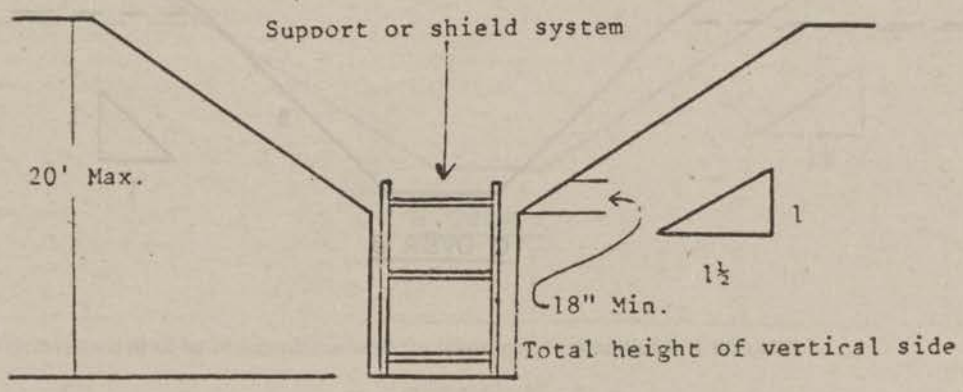
B–1.3 Excavations Made in Type C Soil

1. All simple slope excavations 20 feet or less in depth shall have a maximum allowable slope of 1½:1.




**Simple Slope**

2. All excavations 20 feet or less in depth which have vertically sided lower portions shall be shielded or supported to a height at least 18 inches above the top of the vertical side. All such excavations shall have a maximum allowable slope of 1½:1.

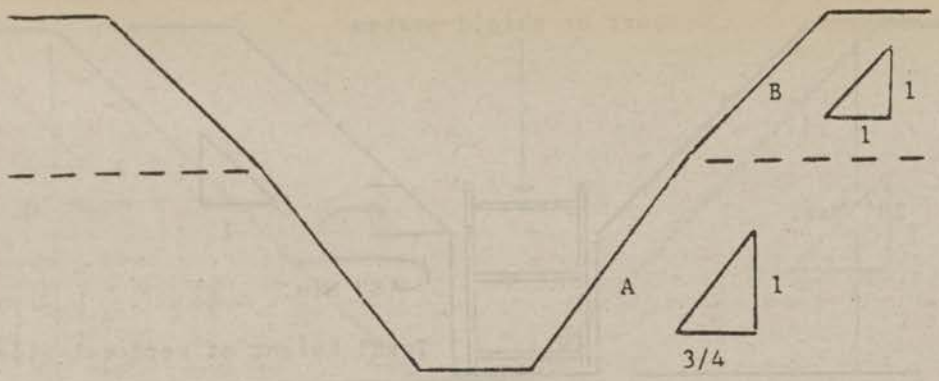



**Vertical Sided Lower Portion**

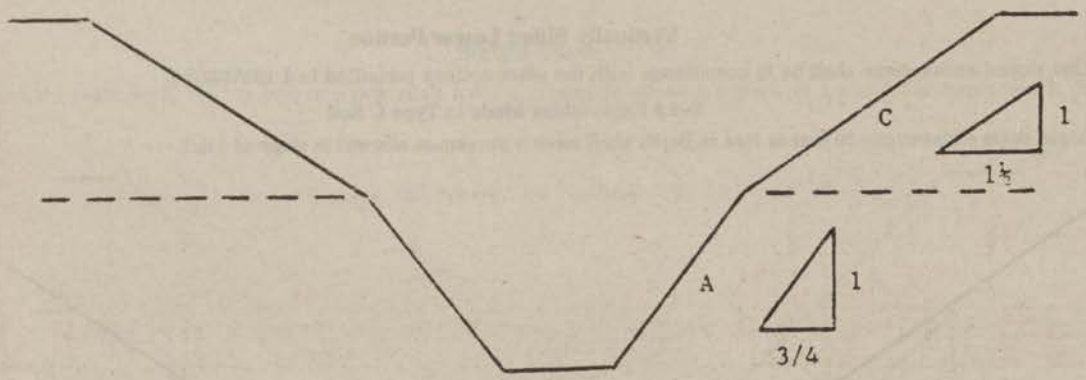
3. All other sloped excavations shall be in accordance with the other options permitted in § 1926.652(b).

B–1.4 Excavations Made in Layered Soils

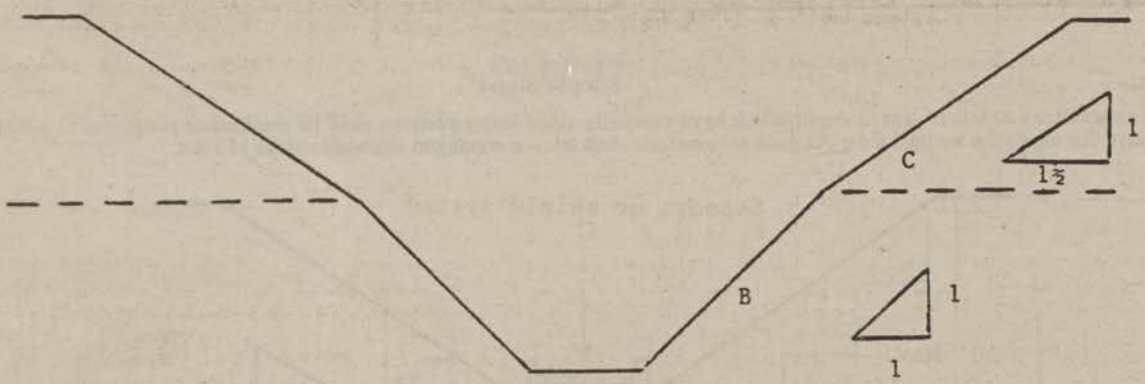
1. All excavations 20 feet or less in depth made in layered soils shall have a maximum allowable slope for each layer as set forth below.



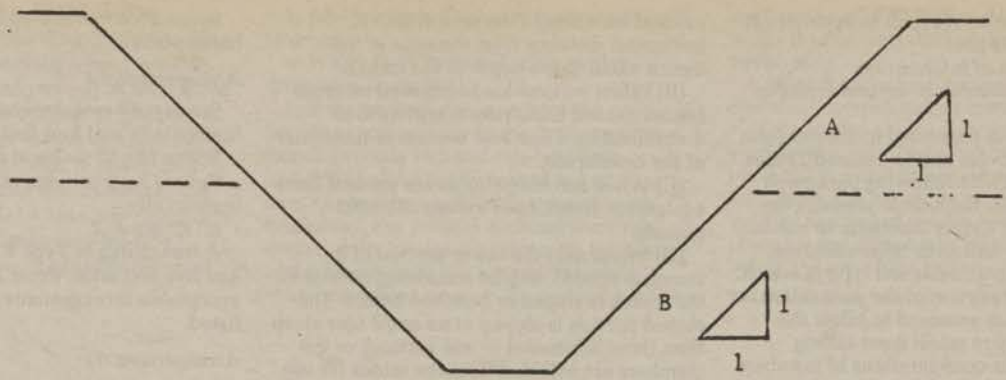

B OVER A



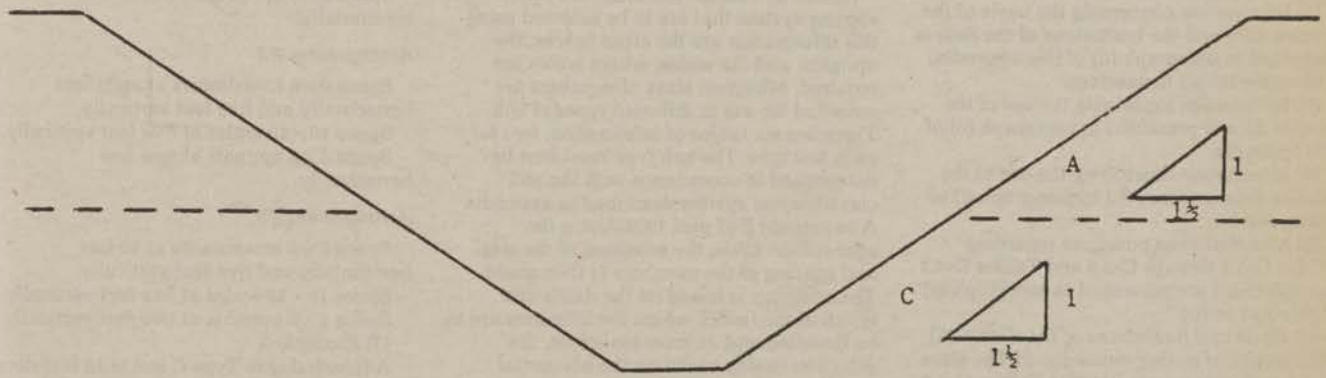

C OVER A



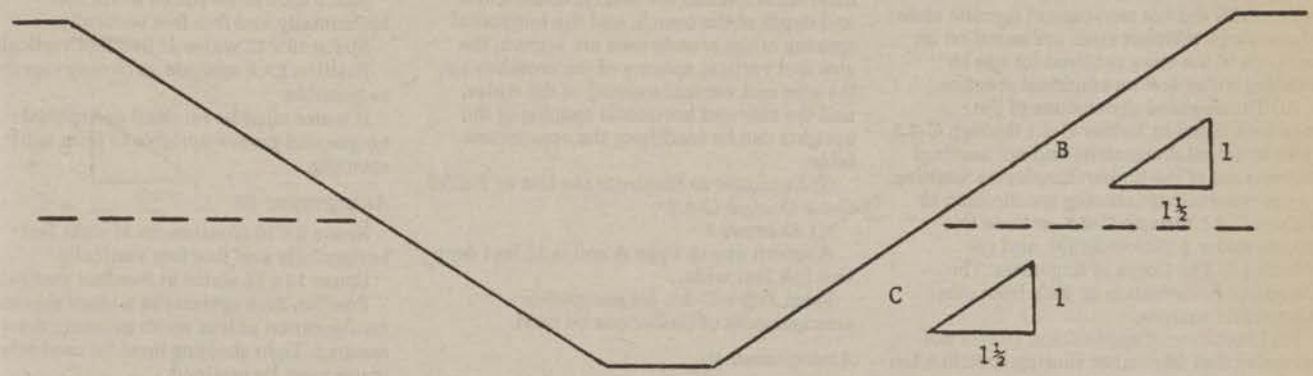

C OVER B




A OVER B




A OVER C




B OVER C

2. All other sloped excavations shall be in accordance with the other options permitted in § 1926.652(b).

## Appendix C to Subpart P

*Timber Shoring for Trenches*

(a) *Scope.* This appendix contains information that can be used timber shoring is provided as a method of protection from cave-ins in trenches that do not exceed 20 feet (6.1 m) in depth. This appendix must be used when design of timber shoring protective systems is to be performed in accordance with § 1926.652(c)(1). Other timber shoring configurations; other systems of support such as hydraulic and pneumatic systems; and other protective systems such as sloping, benching, shielding, and freezing systems must be designed in accordance with the requirements set forth in § 1926.652(b) and § 1926.652(c).

(b) *Soil Classification.* In order to use the data presented in this appendix, the soil type or types in which the excavation is made must first be determined using the soil

classification method set forth in appendix A of subpart P of this part.

(c) *Presentation of Information.* Information is presented in several forms as follows:

(1) Information is presented in tabular form in Tables C–1.1, C–1.2, and C–1.3, and Tables C–2.1, C–2.2 and C–2.3 following paragraph (g) of the appendix. Each table presents the minimum sizes of timber members to use in a shoring system, and each table contains data only for the particular soil type in which the excavation or portion of the excavation is made. The data are arranged to allow the user the flexibility to select from among several acceptable configurations of members based on varying the horizontal spacing of the crossbraces. Stable rock is exempt from shoring requirements and therefore, no data are presented for this condition.

(2) Information concerning the basis of the tabular data and the limitations of the data is presented in paragraph (d) of this appendix, and on the tables themselves.

(3) Information explaining the use of the tabular data is presented in paragraph (e) of this appendix.

(4) Information illustrating the use of the tabular data is presented in paragraph (f) of this appendix.

(5) Miscellaneous notations regarding Tables C–1.1 through C–1.3 and Tables C–2.1 through C–2.3 are presented in paragraph (g) of this Appendix.

(d) *Basis and limitations of the data.*—(1) *Dimensions of timber members.* (i) The sizes of the timber members listed in Tables C–1.1 through C–1.3 are taken from the National Bureau of Standards (NBS) report, "Recommended Technical Provisions for Construction Practice in Shoring and Sloping of Trenches and Excavations." In addition, where NBS did not recommend specific sizes of members, member sizes are based on an analysis of the sizes required for use by existing codes and on empirical practice.

(ii) The required dimensions of the members listed in Tables C–1.1 through C–1.3 refer to actual dimensions and not nominal dimensions of the timber. Employers wanting to use nominal size shoring are directed to Tables C–2.1 through C–2.3, or have this choice under § 1926.652(c)(3), and are referred to The Corps of Engineers, The Bureau of Reclamation or data from other acceptable sources.

(2) *Limitation of application.* (i) It is not intended that the timber shoring specification apply to every situation that may be experienced in the field. These data were developed to apply to the situations that are most commonly experienced in current trenching practice. Shoring systems for use in situations that are not covered by the data in this appendix must be designed as specified in § 1926.652(c).

(ii) When any of the following conditions are present, the members specified in the tables are not considered adequate. Either an alternate timber shoring system must be designed or another type of protective system designed in accordance with § 1926.652.

(A) When loads imposed by structures or by stored material adjacent to the trench weigh in excess of the load imposed by a two-foot soil surcharge. The term "adjacent" as used here means the area within a horizontal distance from the edge of the trench equal to the depth of the trench.

(B) When vertical loads imposed on cross braces exceed a 240-pound gravity load distributed on a one-foot section of the center of the crossbrace.

(C) When surcharge loads are present from equipment weighing in excess of 20,000 pounds.

(D) When only the lower portion of a trench is shored and the remaining portion of the trench is sloped or benched unless: The sloped portion is sloped at an angle less steep than three horizontal to one vertical; or the members are selected from the tables for use at a depth which is determined from the top of the overall trench, and not from the toe of the sloped portion.

(e) *Use of Tables.* The members of the shoring system that are to be selected using this information are the cross braces, the uprights, and the wales, where wales are required. Minimum sizes of members are specified for use in different types of soil. There are six tables of information, two for each soil type. The soil type must first be determined in accordance with the soil classification system described in appendix A to subpart P of part 1926. Using the appropriate table, the selection of the size and spacing of the members is then made. The selection is based on the depth and width of the trench where the members are to be installed and, in most instances, the selection is also based on the horizontal spacing of the crossbraces. Instances where a choice of horizontal spacing of crossbracing is available, the horizontal spacing of the crossbraces must be chosen by the user before the size of any member can be determined. When the soil type, the width and depth of the trench, and the horizontal spacing of the crossbraces are known, the size and vertical spacing of the crossbraces, the size and vertical spacing of the wales, and the size and horizontal spacing of the uprights can be read from the appropriate table.

(f) *Examples to Illustrate the Use of Tables C–1.1 through C–1.3.*

(1) *Example 1.*

A trench dug in Type A soil is 13 feet deep and five feet wide.

From *Table C–1.1,* for acceptable arrangements of timber can be used.

*Arrangement #1*

Space 4×4 crossbraces at six feet horizontally and four feet vertically.

Wales are not required.

Space 3×8 uprights at six feet horizontally. This arrangement is commonly called "skip shoring."

*Arrangement #2*

Space 4×6 crossbraces at eight feet horizontally and four feet vertically.

Space 8×8 wales at four feet vertically.

Space 2×6 uprights at four feet horizontally.

*Arrangement #3*

Space 6×6 crossbraces at 10 feet horizontally and four feet vertically.

Space 8×10 wales at four feet vertically.

Space 2×6 uprights at five feet horizontally.

*Arrangement #4*

Space 6×6 crossbraces at 12 feet horizontally and four feet vertically.

Space 10×10 wales at four feet vertically.

Spaces 3×8 uprights at six feet horizontally.

(2) *Example 2.*

A trench dug in Type B soil in 13 feet deep and five feet wide. From Table C–1.2 three acceptable arrangements of members are listed.

*Arrangement #1*

Space 6×6 crossbraces at six feet horizontally and five feet vertically.

Space 8×8 wales at five feet vertically.

Space 2×6 uprights at two feet horizontally.

*Arrangement #2*

Space 6×8 crossbraces at eight feet horizontally and five feet vertically.

Space 10×10 wales at five feet vertically.

Space 2×6 uprights at two feet horizontally.

*Arrangement #3*

Space 8×8 crossbraces at 10 feet horizontally and five feet vertically.

Space 10×12 wales at five feet vertically.

Space 2×6 uprights at two feet vertically.

(3) *Example 3.*

A trench dug in Type C soil is 13 feet deep and five feet wide.

From Table C–1.3 two acceptable arrangements of members can be used.

*Arrangement #1*

Space 8×8 crossbraces at six feet horizontally and five feet vertically.

Space 10×12 wales at five feet vertically.

Position 2×6 uprights as closely together as possible.

If water must be retained use special tongue and groove uprights to form tight sheeting.

*Arrangement #2*

Space 8×10 crossbraces at eight feet horizontally and five feet vertically.

Space 12×12 wales at five feet vertically.

Position 2×6 uprights in a close sheeting configuration unless water pressure must be resisted. Tight sheeting must be used where water must be retained.

(4) *Example 4.*

A trench dug in Type C soil is 20 feet deep and 11 feet wide. The size and spacing of members for the section of trench that is over 15 feet in depth is determined using Table C–1.3. Only one arrangement of members is provided.

Space 8×10 crossbraces at six feet horizontally and five feet vertically.

Space 12×12 wales at five feet vertically.

Use 3×6 tight sheeting.

Use of Tables C–2.1 through C–2.3 would follow the same procedures.

(g) *Notes for all Tables.*

1. Member sizes at spacings other than indicated are to be determined as specified in § 1926.652(c), "Design of Protective Systems."

2. When conditions are saturated or submerged use Tight Sheeting. Tight Sheeting refers to the use of specially-edged timber planks (e.g., tongue and groove) at least three inches thick, steel sheet piling, or similar construction that when driven or placed in position provide a tight wall to resist the lateral pressure of water and to prevent the loss of backfill material. Close Sheeting refers to the placement of planks side-by-side allowing as little space as possible between them.

3. All spacing indicated is measured center to center.

4. Wales to be installed with greater dimension horizontal.

5. If the vertical distance from the center of the lowest crossbrace to the bottom of the trench exceeds two and one-half feet, uprights shall be firmly embedded or a mudsill shall be used. Where uprights are embedded, the vertical distance from the center of the lowest crossbrace to the bottom of the trench shall not exceed 36 inches. When mudsills are used, the vertical distance shall not exceed 42 inches. Mudsills are wales that are installed at the toe of the trench side.

6. Trench jacks may be used in lieu of or in combination with timber crossbraces.

7. Placement cf crossbraces. When the vertical spacing of crossbraces is four feet, place the top crossbrace no more than two feet below the top of the trench. When the vertical spacing of crossbraces is five feet, place the top crossbrace no more than 2.5 feet below the top of the trench.

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TABLE C-1.1

TIMBER TRENCH SHORING -- MINIMUM TIMBER REQUIREMENTS *

SOIL TYPE A $P_a$ = 25 X H + 72 psf (2 ft Surcharge)

| DEPTH OF TRENCH (FEET) | SIZE (ACTUAL) AND SPACING OF MEMBERS ** | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | CROSS BRACES | | | | | | WALES | | UPRIGHTS | | | | | |
| | HORIZ. SPACING (FEET) | WIDTH OF TRENCH (FEET) | | | | VERT. SPACING (FEET) | SIZE (IN) | VERT. SPACING (FEET) | MAXIMUM ALLOWABLE HORIZONTAL SPACING (FEET) | | | | |
| | | UP TO 4 | UP TO 6 | UP TO 9 | UP TO 12 | UP TO 15 | | | CLOSE | 4 | 5 | 6 | 8 |
| 5 TO 10 | UP TO 6 | 4X4 | 4X4 | 4X6 | 6X6 | 6X6 | 4 | Not Req'd | --- | | | | 2X6 | |
| | UP TO 8 | 4X4 | 4X4 | 4X6 | 6X6 | 6X6 | 4 | Not Req'd | --- | | | | | 2X8 |
| | UP TO 10 | 4X6 | 4X6 | 4X6 | 6X6 | 6X6 | 4 | 8X8 | 4 | | | 2X6 | | |
| | UP TO 12 | 4X6 | 4X6 | 6X6 | 6X6 | 6X6 | 4 | 8X8 | 4 | | | | 2X6 | |
| 10 TO 15 | UP TO 6 | 4X4 | 4X4 | 4X6 | 6X6 | 6X6 | 4 | Not Req'd | --- | | | | 3X8 | |
| | UP TO 8 | 4X6 | 4X6 | 6X6 | 6X6 | 6X6 | 4 | 8X8 | 4 | | 2X6 | | | |
| | UP TO 10 | 6X6 | 6X5 | 6X6 | 6X8 | 6X8 | 4 | 8X10 | 4 | | | 2X6 | | |
| | UP TO 12 | 6X6 | 6X6 | 6X6 | 6X8 | 6X8 | 4 | 10X10 | 4 | | | | 3X8 | |
| 15 TO 20 | UP TO 6 | 6X6 | 6X6 | 6X6 | 6X8 | 6X8 | 4 | 6X8 | 4 | 3X6 | | | | |
| | UP TO 8 | 6X6 | 6X6 | 6X6 | 6X8 | 6X8 | 4 | 8X8 | 4 | 3X6 | | | | |
| | UP TO 10 | 8X8 | 8X8 | 8X8 | 8X8 | 8X10 | 4 | 8X10 | 4 | 3X6 | | | | |
| | UP TO 12 | 8X8 | 8X8 | 8X8 | 8X8 | 8X10 | 4 | 10X10 | 4 | 3X6 | | | | |
| OVER 20 | SEE NOTE 1 | | | | | | | | | | | | | |

* Mixed oak or equivalent with a bending strength not less than 850 psi.
** Manufactured members of equivalent strength may by substituted for wood.

TABLE C-1.2

TIMBER TRENCH SHORING -- MINIMUM TIMBER REQUIREMENTS *

SOIL TYPE B $P_a = 45 \times H + 72$ psf (2 ft. Surcharge)

| DEPTH OF TRENCH (FEET) | SIZE (ACTUAL) AND SPACING OF MEMBERS** | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | CROSS BRACES | | | | | | WALES | | UPRIGHTS | | | | | |
| | HORIZ. SPACING (FEET) | WIDTH OF TRENCH (FEET) | | | | | VERT. SPACING (FEET) | SIZE (IN) | VERT. SPACING (FEET) | MAXIMUM ALLOWABLE HORIZONTAL SPACING (FEET) | | | | |
| | | UP TO 4 | UP TO 6 | UP TO 9 | UP TO 12 | UP TO 15 | | | | CLOSE | 2 | 3 | | |
| 5 TO 10 | UP TO 6 | 4X6 | 4X6 | 6X6 | 6X6 | 6X6 | 5 | 6X8 | 5 | | | 2X6 | | |
| | UP TO 8 | 6X6 | 6X6 | 6X6 | 6X8 | 6X8 | 5 | 8X10 | 5 | | | 2X6 | | |
| | UP TO 10 | 6X6 | 6X6 | 6X6 | 6X8 | 6X8 | 5 | 10X10 | 5 | | | 2X6 | | |
| | See Note 1 | | | | | | | | | | | | | |
| 10 TO 15 | UP TO 6 | 6X6 | 6X6 | 6X6 | 6X8 | 6X8 | 5 | 8X8 | 5 | | 2X6 | | | |
| | UP TO 8 | 6X8 | 6X8 | 6X8 | 8X8 | 8X8 | 5 | 10X10 | 5 | | 2X6 | | | |
| | UP TO 10 | 8X8 | 8X8 | 8X8 | 8X8 | 8X10 | 5 | 10X12 | 5 | | 2X6 | | | |
| | See Note 1 | | | | | | | | | | | | | |
| 15 TO 20 | UP TO 6 | 6X8 | 6X8 | 6X8 | 8X8 | 8X8 | 5 | 8X10 | 5 | 3X6 | | | | |
| | UP TO 8 | 8X8 | 8X8 | 8X8 | 8X8 | 8X10 | 5 | 10X12 | 5 | 3X6 | | | | |
| | UP TO 10 | 8X10 | 8X10 | 8X10 | 8X10 | 10X10 | 5 | 12X12 | 5 | 3X6 | | | | |
| | See Note 1 | | | | | | | | | | | | | |
| OVER 20 | SEE NOTE 1 | | | | | | | | | | | | | |

* Mixed oak or equivalent with a bending strength not less than 850 psi.
** Manufactured members of equivalent strength may by substituted for wood.

TABLE C-1.3

TIMBER TRENCH SHORING -- MINIMUM TIMBER REQUIREMENTS *

SOIL TYPE C $P_a$ = 80 X H + 72 psf (2 ft. Surcharge)

| DEPTH OF TRENCH (FEET) | SIZE (ACTUAL) AND SPACING OF MEMBERS** | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | CROSS BRACES | | | | | | | | UPRIGHTS | | | | | |
| | HORIZ. SPACING (FEET) | WIDTH OF TRENCH (FEET) | | | | | VERT. SPACING (FEET) | SIZE (IN.) | VERT. SPACING (FEET) | MAXIMUM ALLOWABLE HORIZONTAL SPACING (FEET) (See Note 2) | | | | |
| | | UP TO 4 | UP TO 6 | UP TO 9 | UP TO 12 | UP TO 15 | | | | CLOSE | | | | |
| 5 TO 10 | UP TO 6 | 6X8 | 6X8 | 6X8 | 8X8 | 8X8 | 5 | 8X10 | 5 | 2X6 | | | | |
| | UP TO 8 | 8X8 | 8X8 | 8X8 | 8X8 | 8X10 | 5 | 10X12 | 5 | 2X6 | | | | |
| | UP TO 10 | 8X10 | 8X10 | 8X10 | 8X10 | 10X10 | 5 | 12X12 | 5 | 2X6 | | | | |
| | See Note 1 | | | | | | | | | | | | | |
| 10 TO 15 | UP TO 6 | 8X8 | 8X8 | 8X8 | 8X8 | 8X10 | 5 | 10X12 | 5 | 2X6 | | | | |
| | UP TO 8 | 8X10 | 8X10 | 8X10 | 8X10 | 10X10 | 5 | 12X12 | 5 | 2X6 | | | | |
| | See Note 1 | | | | | | | | | | | | | |
| | See Note 1 | | | | | | | | | | | | | |
| 15 TO 20 | UP TO 6 | 8X10 | 8X10 | 8X10 | 8X10 | 10X10 | 5 | 12X12 | 5 | 3X6 | | | | |
| | See Note 1 | | | | | | | | | | | | | |
| | See Note 1 | | | | | | | | | | | | | |
| | See Note 1 | | | | | | | | | | | | | |
| OVER 20 | SEE NOTE 1 | | | | | | | | | | | | | |

* Mixed Oak or equivalent with a bending strength not less than 850 psi.

** Manufactured members of equivalent strength may be substituted for wood.

TABLE C-2.1

TIMBER TRENCH SHORING -- MINIMUM TIMBER REQUIREMENTS *

SOIL TYPE A $P_a$ = 25 X H + 72 psf (2 ft. Surcharge)

| DEPTH OF TRENCH (FEET) | SIZE (S4S) AND SPACING OF MEMBERS ** | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | CROSS BRACES | | | | | | | WALES | | UPRIGHTS | | | | |
| | HORIZ. SPACING (FEET) | WIDTH OF TRENCH (FEET) | | | | | VERT. SPACING (FEET) | SIZE (IN.) | VERT. SPACING (FEET) | MAXIMUM ALLOWABLE HORIZONTAL SPACING (FEET) | | | | |
| | | UP TO 4 | UP TO 6 | UP TO 9 | UP TO 12 | UP TO 15 | | | | CLOSE | 4 | 5 | 6 | 8 |
| 5 TO 10 | UP TO 6 | 4X4 | 4X4 | 4X4 | 4X4 | 4X6 | 4 | Not Req'd | Not Req'd | | | | 4X6 | |
| | UP TO 8 | 4X4 | 4X4 | 4X4 | 4X6 | 4X6 | 4 | Not Req'd | Not Req'd | | | | | 4X8 |
| | UP TO 10 | 4X6 | 4X6 | 4X6 | 6X6 | 6X6 | 4 | 8X8 | 4 | | | 4X6 | | |
| | UP TO 12 | 4X6 | 4X6 | 4X6 | 6X6 | 6X6 | 4 | 8X8 | 4 | | | | 4X6 | |
| 10 TO 15 | UP TO 6 | 4X4 | 4X4 | 4X4 | 6X6 | 6X6 | 4 | Not Req'd | Not Req'd | | | | 4X10 | |
| | UP TO 8 | 4X6 | 4X6 | 4X6 | 6X6 | 6X6 | 4 | 6X8 | 4 | | 4X6 | | | |
| | UP TO 10 | 6X6 | 6X6 | 6X6 | 6X6 | 6X6 | 4 | 8X8 | 4 | | | 4X8 | | |
| | UP TO 12 | 6X6 | 6X6 | 6X6 | 6X6 | 6X6 | 4 | 8X10 | 4 | | 4X6 | | 4X10 | |
| 15 TO 20 | UP TO 6 | 6X6 | 6X6 | 6X6 | 6X6 | 6X6 | 4 | 6X8 | 4 | 3X6 | | | | |
| | UP TO 8 | 6X6 | 6X6 | 6X6 | 6X6 | 6X6 | 4 | 8X8 | 4 | 3X6 | 4X12 | | | |
| | UP TO 10 | 6X6 | 6X6 | 6X6 | 6X6 | 6X8 | 4 | 8X10 | 4 | 3X6 | | | | |
| | UP TO 12 | 6X6 | 6X6 | 6X6 | 6X8 | 6X8 | 4 | 8X12 | 4 | 3X6 | 4X12 | | | |
| OVER 20 | SEE NOTE 1 | | | | | | | | | | | | | |

* Douglas fir or equivalent with a bending strength not less than 1500 psi.

** Manufactured members of equivalent strength may be substituted for wood.

TABLE C-2.2

TIMBER TRENCH SHORING -- MINIMUM TIMBER REQUIREMENTS *

SOIL TYPE B $P_a$ = 45 X H + 72 psf (2 ft. Surcharge)

| DEPTH OF TRENCH (FEET) | SIZE (S4S) AND SPACING OF MEMBERS ** | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | CROSS BRACES | | | | | | WALES | | UPRIGHTS | | | | |
| | HORIZ. SPACING (FEET) | WIDTH OF TRENCH (FEET) | | | | VERT. SPACING (FEET) | SIZE (IN.) | VERT. SPACING (FEET) | MAXIMUM ALLOWABLE HORIZONTAL SPACING (FEET) | | | | |
| | | UP TO 4 | UP TO 6 | UP TO 9 | UP TO 12 | UP TO 15 | | | CLOSE | 2 | 3 | 4 | 6 |
| 5 TO 10 | UP TO 6 | 4X6 | 4X6 | 4X6 | 6X6 | 6X6 | 5 | 6X8 | 5 | | | 3X12 4X8 | | 4X12 |
| | UP TO 8 | 4X6 | 4X6 | 6X6 | 6X6 | 6X6 | 5 | 8X8 | 5 | | 3X8 | | 4X8 | |
| | UP TO 10 | 4X6 | 4X6 | 6X6 | 6X6 | 6X8 | 5 | 8X10 | 5 | | | 4X8 | | |
| | See Note 1 | | | | | | | | | | | | | |
| 10 TO 15 | UP TO 6 | 6X6 | 6X6 | 6X6 | 6X8 | 6X8 | 5 | 8X8 | 5 | 3X6 | 4X10 | | | |
| | UP TO 8 | 6X8 | 6X8 | 6X8 | 8X8 | 8X8 | 5 | 10X10 | 5 | 3X6 | 4X10 | | | |
| | UP TO 10 | 6X8 | 6X8 | 8X8 | 8X8 | 8X8 | 5 | 10X12 | 5 | 3X6 | 4X10 | | | |
| | See Note 1 | | | | | | | | | | | | | |
| 15 TO 20 | UP TO 6 | 6X8 | 6X8 | 6X8 | 6X8 | 8X8 | 5 | 8X10 | 5 | 4X6 | | | | |
| | UP TO 8 | 6X8 | 6X8 | 6X8 | 8X8 | 8X8 | 5 | 10X12 | 5 | 4X6 | | | | |
| | UP TO 10 | 8X8 | 8X8 | 8X8 | 8X8 | 8X8 | 5 | 12X12 | 5 | 4X6 | | | | |
| | See Note 1 | | | | | | | | | | | | | |
| OVER 20 | SEE NOTE 1 | | | | | | | | | | | | | |

* Douglas fir or equivalent with a bending strength not less than 1500 psi.

** Manufactured members of equivalent strength may be substituted for wood.

TABLE C-2.3

TIMBER TRENCH SHORING -- MINIMUM TIMBER REQUIREMENTS *

SOIL TYPE C $P_a$ = 80 X H + 72 psf (2 ft. Surcharge)

| DEPTH OF TRENCH (FEET) | SIZE (S4S) AND SPACING OF MEMBERS ** | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | CROSS BRACES | | | | | | WALES | | UPRIGHTS | | | | | |
| | HORIZ. SPACING (FEET) | WIDTH OF TRENCH (FEET) | | | | VERT. SPACING (FEET) | SIZE (IN.) | VERT. SPACING (FEET) | MAXIMUM ALLOWABLE HORIZONTAL SPACING (FEET) | | | | | |
| | | UP TO 4 | UP TO 6 | UP TO 9 | UP TO 12 | UP TO 15 | | | CLOSE | | | | | |
| 5 TO 10 | UP TO 6 | 6X6 | 6X6 | 6X6 | 6X6 | 8X8 | 5 | 8X8 | 5 | 3X6 | | | | |
| | UP TO 8 | 6X6 | 6X6 | 6X6 | 8X8 | 8X8 | 5 | 10X10 | 5 | 3X6 | | | | |
| | UP TO 10 | 6X6 | 6X6 | 8X8 | 8X8 | 8X8 | 5 | 10X12 | 5 | 3X6 | | | | |
| | See Note 1 | | | | | | | | | | | | | |
| 10 TO 15 | UP TO 6 | 6X8 | 6X8 | 6X8 | 8X8 | 8X8 | 5 | 10X10 | 5 | 4X6 | | | | |
| | UP TO 8 | 8X8 | 8X8 | 8X8 | 8X8 | 8X8 | 5 | 12X12 | 5 | 4X6 | | | | |
| | See Note 1 | | | | | | | | | | | | | |
| | See Note 1 | | | | | | | | | | | | | |
| 15 TO 20 | UP TO 6 | 8X8 | 8X8 | 8X8 | 8X10 | 8X10 | 5 | 10X12 | 5 | 4X6 | | | | |
| | See Note 1 | | | | | | | | | | | | | |
| | See Note 1 | | | | | | | | | | | | | |
| | See Note 1 | | | | | | | | | | | | | |
| OVER 20 | SEE NOTE 1 | | | | | | | | | | | | | |

* Douglas fir or equivalent with a bending strength not less than 1500 psi.

** Manufactured members of equivalent strength may be substituted for wood.

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## Appendix D to Subpart P

### *Aluminum Hydraulic Shoring for Trenches*

(a) *Scope.* This appendix contains information that can be used when aluminum hydraulic shoring is provided as a method of protection against cave-ins in trenches that do not exceed 20 feet (6.1m) in depth. This appendix must be used when design of the aluminum hydraulic protective system cannot be performed in accordance with § 1926.652(c)(2).

(b) *Soil Classification.* In order to use data presented in this appendix, the soil type or types in which the excavation is made must first be determined using the soil classification method set forth in appendix A of subpart P of part 1926.

(c) *Presentation of Information.* Information is presented in several forms as follows:

(1) Information is presented in tabular form in Tables D–1.1, D–1.2, D–1.3 and E–1.4. Each table presents the maximum vertical and horizontal spacings that may be used with various aluminum member sizes and various hydraulic cylinder sizes. Each table contains data only for the particular soil type in which the excavation or portion of the excavation is made. Tables D–1.1 and D–1.2 are for vertical shores in Types A and B soil. Tables D–1.3 and D1.4 are for horizontal waler systems in Types B and C soil.

(2) Information concerning the basis of the tabular data and the limitations of the data is presented in paragraph (d) of this appendix.

(3) Information explaining the use of the tabular data is presented in paragraph (e) of this appendix.

(4) Information illustrating the use of the tabular data is presented in paragraph (f) of this appendix.

(5) Miscellaneous notations (footnotes) regarding Table D–1.1 through D–1.4 are presented in paragraph (g) of this appendix.

(6) Figures, illustrating typical installations of hydraulic shoring, are included just prior to the Tables. The illustrations page is entitled "Aluminum Hydraulic Shoring; Typical Installations."

(d) *Basis and limitations of the data.*

(1) Vertical shore rails and horizontal wales are those that meet the Section Modulus requirements in the D–1 Tables. Aluminum material is 6061–T6 or material of equivalent strength and properties.

(2) Hydraulic cylinders specifications. (i) 2-inch cylinders shall be a minimum 2-inch inside diameter with a minimum safe working capacity of no less than 18,000 pounds axial compressive load at maximum extension. Maximum extension is to include full range of cylinder extensions as recommended by product manufaturer.

(ii) 3-inch cylinders shall be a minimum 3-inch inside diameter with a safe working capacity of not less than 30,000 pounds axial compressive load at extensions as recommended by product manufacturer.

(3) Limitation of application.

(i) It is not intended that the aluminum hydraulic specification apply to every situation that may be experienced in the field. These data were developed to apply to the situations that are most commonly experienced in current trenching practice. Shoring systems for use in situations that are not covered by the data in this appendix must be otherwise designed as specified in § 1926.652(c).

(ii) When any of the following conditions are present, the members specified in the Tables are not considered adequate. In this case, an alternative aluminum hydraulic shoring system or other type of protective system must be designed in accordance with § 1926.652.

(A) When vertical loads imposed on cross braces exceed a 100 Pound gravity load distributed on a one foot section of the center of the hydraulic cylinder.

(B) When surcharge loads are present from equipment weighing in excess of 20,000 pounds.

(C) When only the lower portion or a trench is shored and the remaining portion of the trench is sloped or benched unless: The sloped portion is sloped at an angle less steep than three horizontal to one vertical; or the members are selected from the tables for use at a depth which is determined from the top of the overall trench, and not from the toe of the sloped portion.

(e) *Use of Tables D–1.1, D–1.2, D–1.3 and D–1.4.* The members of the shoring system that are to be selected using this information are the hydraulic cylinders, and either the vertical shores or the horizontal wales. When a waler system is used the vertical timber sheeting to be used is also selected from these tables. The Tables D–1.1 and D–1.2 for vertical shores are used in Type A and B soils that do not require sheeting. Type B soils that may require sheeting, and Type C soils that always require sheeting are found in the horizontal wale Tables D–1.3 and D–1.4. The soil type must first be determined in accordance with the soil classification system described in appendix A to subpart P of part 1926. Using the appropriate table, the selection of the size and spacing of the members is made. The selection is based on the depth and width of the trench where the members are to be installed. In these tables the vertical spacing is held constant at four feet on center. The tables show the maximum horizontal spacing of cylinders allowed for each size of wale in the waler system tables, and in the vertical shore tables, the hydraulic cylinder horizontal spacing is the same as the vertical shore spacing.

(f) *Example to Illustrate the Use of the Tables:*

(1) Example 1:

A trench dug in Type A soil is 6 feet deep and 3 feet wide. From Table D–1.1: Find vertical shores and 2 inch diameter cylinders spaced 8 feet on center (o.c.) horizontally and 4 feet on center (o.c.) vertically. (See Figures 1 & 3 for typical installations.)

(2) Example 2:

A trench is dug in Type B soil that does not require sheeting, 13 feet deep and 5 feet wide. From Table D–1.2: Find vertical shores and 2 inch diameter cylinders spaced 6.5 feet o.c. horizontally and 4 feet o.c. vertically. (See Figures 1 & 3 for typical installations.)

(3) A trench is dug in Type B soil that does not require sheeting, but does experience some minor raveling of the trench face. The trench is 16 feet deep and 9 feet wide. From Table D–1.2: Find vertical shores and 2 inch diameter cylinder (with special oversleeves as designated by footnote #2) spaced 5.5 feet o.c. horizontally and 4 feet o.c. vertically, plywood (per footnote (g)(7) to the D–1 Table) should be used behind the shores. (See Figures 2 & 3 for typical installations.)

(4) Example 4: A trench is dug in previously disturbed Type B soil, with characteristics of a Type C soil, and will require sheeting. The trench is 18 feet deep and 12 feet wide. 8 foot horizontal spacing between cylinders is desired for working space. From Table D–1.3: Find horizontal wale with a section modulus of 14.0 spaced at 4 feet o.c. vertically and 3 inch diameter cylinder spaced at 9 feet maximum o.c. horizontally. 3×12 timber sheeting is required at close spacing vertically. (See Figure 4 for typical installation.)

(5) Example 5: A trench is dug in Type C soil, 9 feet deep and 4 feet wide. Horizontal cylinder spacing in excess of 6 feet is desired for working space. From Table D–1.4: Find horizontal wale with a section modulus of 7.0 and 2 inch diameter cylinders spaced at 6.5 feet o.c. horizontally. Or, find horizontal wale with a 14.0 section modulus and 3 inch diameter cylinder spaced at 10 feet o.c. horizontally. Both wales are spaced 4 feet o.c. vertically. 3×12 timber sheeting is required at close spacing vertically. (See Figure 4 for typical installation.)

(g) *Footnotes, and general notes, for Tables D–1.1, D–1.2, D–1.3, and D–1.4.*

(1) For applications other than those listed in the tables, refer to § 1926.652(c)(2) for use of manufacturer's tabulated data. For trench depths in excess of 20 feet, refer to § 1926.652(c)(2) and § 1926.652(c)(3).

(2) 2 inch diameter cylinders, at this width, shall have structural steel tube (3.5×3.5×0.1875) oversleeves, or structural oversleeves of manufacturer's specification, extending the full, collapsed length.

(3) Hydraulic cylinders capacities. (i) 2 inch cylinders shall be a minimum 2-inch inside diameter with a safe working capacity of not less than 18,000 pounds axial compressive load at maximum extension. Maximum extension is to include full range of cylinder extensions as recommended by product manufacturer.

(ii) 3-inch cylinders shall be a minimum 3-inch inside diameter with a safe work capacity of not less than 30,000 pounds axial compressive load at maximum extension. Maximum extension is to include full range of cylinder extensions as recommended by product manufacturer.

(4) All spacing indicated is measured center to center.

(5) Vertical shoring rails shall have a minimum section modulus of 0.40 inch.

(6) When vertical shores are used, there must be a minimum of three shores spaced equally, horizontally, in a group.

(7) Plywood shall be 1.125 in. thick softwood or 0.75 inch. thick, 14 ply, arctic white birch (Finland form). Please note that plywood is not intended as a structural member, but only for prevention of local raveling (sloughing of the trench face) between shores.

(8) See appendix C for timber specifications.

(9) Wales are calculated for simple span conditions.

(10) See appendix D, item (d), for basis and limitations of the data.

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# ALUMINUM HYDRAULIC SHORING
# TYPICAL INSTALLATIONS

FIGURE NO. 1
VERTICAL ALUMINUM HYDRAULIC SHORING (SPOT BRACING)

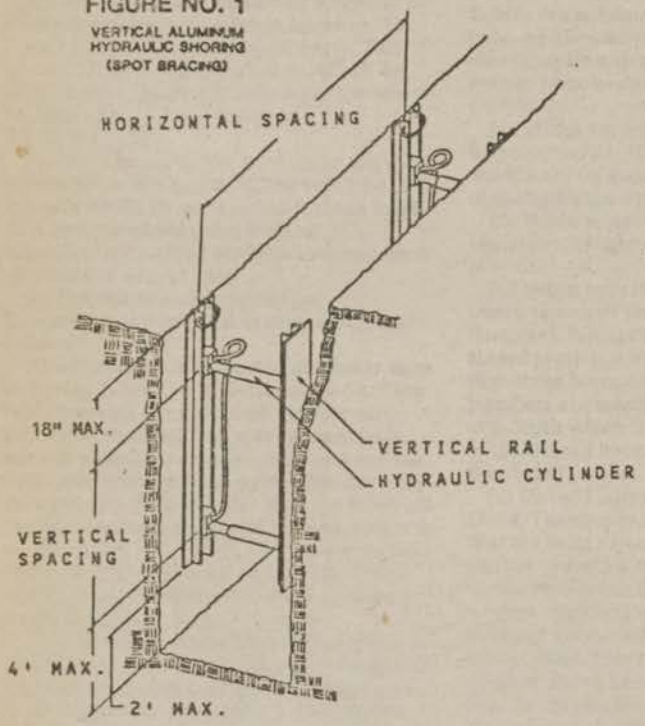



FIGURE NO. 2
VERTICAL ALUMINUM HYDRAULIC SHORING (WITH PLYWOOD)

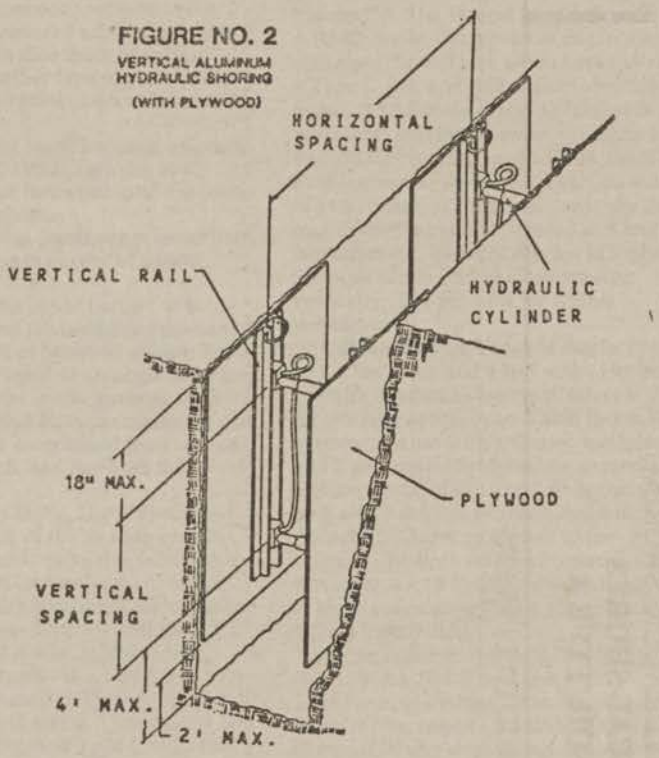



FIGURE NO. 3
VERTICAL ALUMINUM HYDRAULIC SHORING (STACKED)

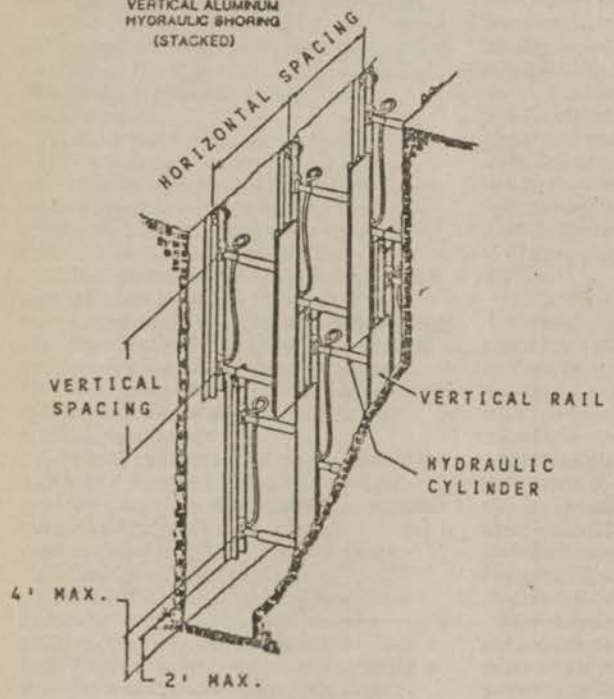



FIGURE NO. 4
ALUMINUM HYDRAULIC SHORING WALER SYSTEM (TYPICAL)

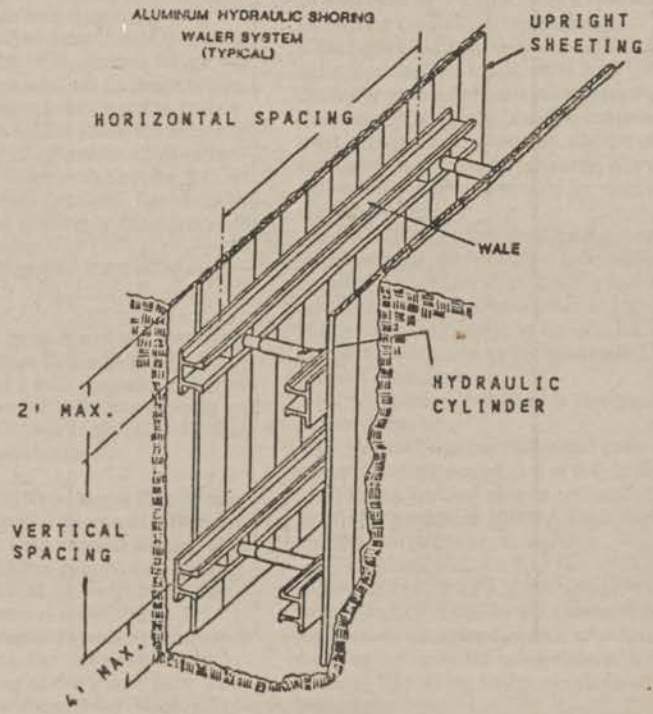


TABLE D - 1.1
ALUMINUM HYDRAULIC SHORING
**VERTICAL SHORES**
**FOR SOIL TYPE A**

| DEPTH OF TRENCH (FEET) | HYDRAULIC CYLINDERS | | | | |
|---|---|---|---|---|---|
| | MAXIMUM HORIZONTAL SPACING (FEET) | MAXIMUM VERTICAL SPACING (FEET) | WIDTH OF TRENCH (FEET) | | |
| | | | UP TO 8 | OVER 8 UP TO 12 | OVER 12 UP TO 15 |
| OVER 5 UP TO 10 | 8 | 4 | 2 INCH DIAMETER | 2 INCH DIAMETER NOTE (2) | 3 INCH DIAMETER |
| OVER 10 UP TO 15 | 8 | | | | |
| OVER 15 UP TO 20 | 7 | | | | |
| OVER 20 | NOTE (1) | | | | |

Footnotes to tables, and general notes on hydraulic shoring, are found in Appendix D, Item (g)
Note (**1**): See Appendix D, Item (g) (1)
Note (**2**): See Appendix D, Item (g) (2)

TABLE D - 1.2
ALUMINUM HYDRAULIC SHORING
**VERTICAL SHORES**
**FOR SOIL TYPE B**

| DEPTH OF TRENCH (FEET) | HYDRAULIC CYLINDERS | | | | |
|---|---|---|---|---|---|
| | MAXIMUM HORIZONTAL SPACING (FEET) | MAXIMUM VERTICAL SPACING (FEET) | WIDTH OF TRENCH (FEET) | | |
| | | | UP TO 8 | OVER 8 UP TO 12 | OVER 12 UP TO 15 |
| OVER 5 UP TO 10 | 8 | 4 | 2 INCH DIAMETER | 2 INCH DIAMETER NOTE (2) | 3 INCH DIAMETER |
| OVER 10 UP TO 15 | 6.5 | | | | |
| OVER 15 UP TO 20 | 5.5 | | | | |
| OVER 20 | NOTE (1) | | | | |

Footnotes to tables, and general notes on hydraulic shoring, are found in Appendix D, Item (g)
Note (1): See Appendix D, Item (g) (1)
Note (2): See Appendix D, Item (g) (2)

TABLE D - 1.3

ALUMINUM HYDRAULIC SHORING

**WALER SYSTEMS**

**FOR SOIL TYPE B**

| DEPTH OF TRENCH (FEET) | WALES | | HYDRAULIC CYLINDERS | | | | | | TIMBER UPRIGHTS | | |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | WIDTH OF TRENCH (FEET) | | | | | | MAX.HORIZ.SPACING (ON CENTER) | | |
| | VERTICAL SPACING (FEET) | * SECTION MODULUS ($IN^3$) | UP TO 8 | | OVER 8 UP TO 12 | | OVER 12 UP TO15 | | SOLID SHEET | 2 FT. | 3 FT. |
| | | | HORIZ. SPACING | CYLINDER DIAMETER | HORIZ. SPACING | CYLINDER DIAMETER | HORIZ. SPACING | CYLINDER DIAMETER | | | |
| OVER 5 UP TO 10 | 4 | 3.5 | 8.0 | 2 IN | 8.0 | 2 IN NOTE(2) | 8.0 | 3 IN | — | — | 3x12 |
| | | 7.0 | 9.0 | 2 IN | 9.0 | 2 IN NOTE(2) | 9.0 | 3 IN | | | |
| | | 14.0 | 12.0 | 3 IN | 12.0 | 3 IN | 12.0 | 3 IN | | | |
| OVER 10 UP TO 15 | 4 | 3.5 | 6.0 | 2 IN | 6.0 | 2 IN NOTE(2) | 6.0 | 3 IN | — | 3x12 | — |
| | | 7.0 | 8.0 | 3 IN | 8.0 | 3 IN | 8.0 | 3 IN | | | |
| | | 14.0 | 10.0 | 3 IN | 10.0 | 3 IN | 10.0 | 3 IN | | | |
| OVER 15 UP TO 20 | 4 | 3.5 | 5.5 | 2 IN | 5.5 | 2 IN NOTE(2) | 5.5 | 3 IN | 3x12 | — | — |
| | | 7.0 | 6.0 | 3 IN | 6.0 | 3 IN | 6.0 | 3 IN | | | |
| | | 14.0 | 9.0 | 3 IN | 9.0 | 3 IN | 9.0 | 3 IN | | | |
| OVER 20 | NOTE (1) | | | | | | | | | | |

Footnotes to tables, and general notes on hydraulic shoring, are found in Appendix D, Item (g)

Notes (1): See Appendix D, item (g) (1)

Notes (2): See Appendix D, Item (g) (2)

* Consult product manufacturer and/or qualified engineer for Section Modulus of available wales.

TABLE D - 1.4
ALUMINUM HYDRAULIC SHORING
**WALER SYSTEMS**
**FOR SOIL TYPE C**

| DEPTH OF TRENCH (FEET) | WALES | | HYDRAULIC CYLINDERS | | | | | | TIMBER UPRIGHTS | | |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | WIDTH OF TRENCH (FEET) | | | | | | MAX.HORIZ SPACING (ON CENTER) | | |
| | VERTICAL SPACING (FEET) | * SECTION MODULUS ($IN^3$) | UP TO 8 | | OVER 8 UP TO 12 | | OVER 12 UP TO 15 | | SOLID SHEET | 2 FT. | 3 FT. |
| | | | HORIZ. SPACING | CYLINDER DIAMETER | HORIZ. SPACING | CYLINDER DIAMETER | HORIZ. SPACING | CYLINDER DIAMETER | | | |
| OVER 5 UP TO 10 | 4 | 3.5 | 6.0 | 2 IN | 6.0 | 2 IN NOTE(2) | 6.0 | 3 IN | 3x12 | — | — |
| | | 7.0 | 6.5 | 2 IN | 6.5 | 2 IN NOTE(2) | 6.5 | 3 IN | | | |
| | | 14.0 | 10.0 | 3 IN | 10.0 | 3 IN | 10.0 | 3 IN | | | |
| OVER 10 UP TO 15 | 4 | 3.5 | 4.0 | 2 IN | 4.0 | 2 IN NOTE(2) | 4.0 | 3 IN | 3x12 | — | — |
| | | 7.0 | 5.5 | 3 IN | 5.5 | 3 IN | 5.5 | 3 IN | | | |
| | | 14.0 | 8.0 | 3 IN | 8.0 | 3 IN | 8.0 | 3 IN | | | |
| OVER 15 UP TO 20 | 4 | 3.5 | 3.5 | 2 IN | 3.5 | 2 IN NOTE(2) | 3.5 | 3 IN | 3x12 | — | — |
| | | 7.0 | 5.0 | 3 IN | 5.0 | 3 IN | 5.0 | 3 IN | | | |
| | | 14.0 | 6.0 | 3 IN | 6.0 | 3 IN | 6.0 | 3 IN | | | |
| OVER 20 | NOTE (1) | | | | | | | | | | |

Footnotes to tables, and general notes on hydraulic shoring, are found in Appendix D, Item (g)
Notes (**1**): See Appendix D, item (g) (1)
Notes (**2**): See Appendix D, Item (g) (2)
* Consult product manufacturer and/or qualified engineer for Section Modulus of available wales.

BILLING CODE 4510-26-C

## Appendix E to Subpart P—Alternatives to Timber Shoring

Figure 1. Aluminum Hydraulic Shoring

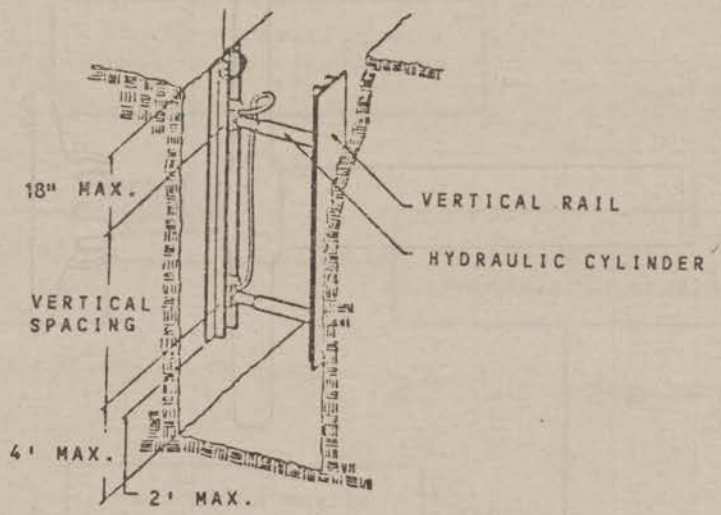
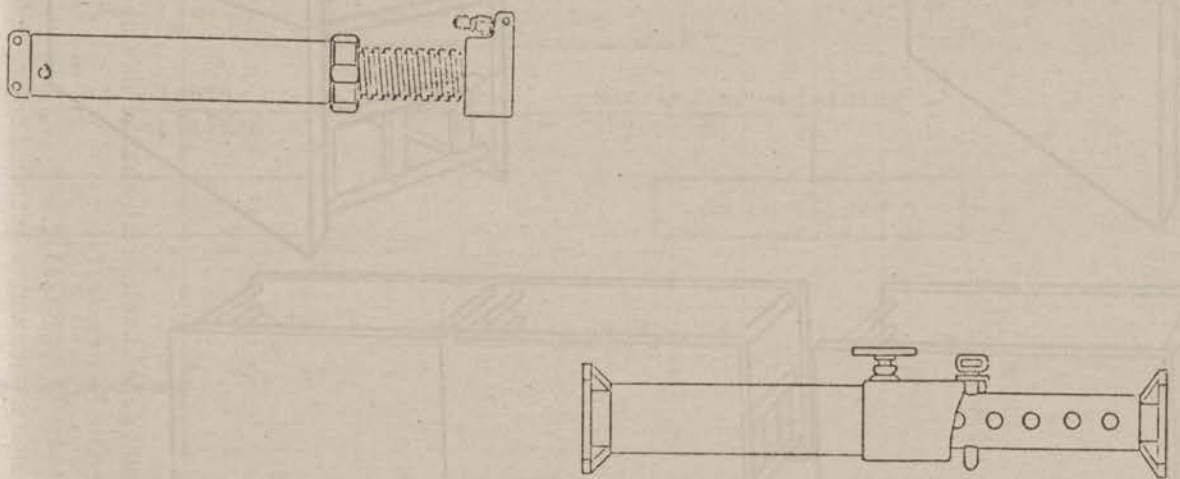



Figure 2. Pneumatic/hydraulic Shoring



BILLING CODE 4510-26-M

Figure 3. Trench Jacks (Screw Jacks)

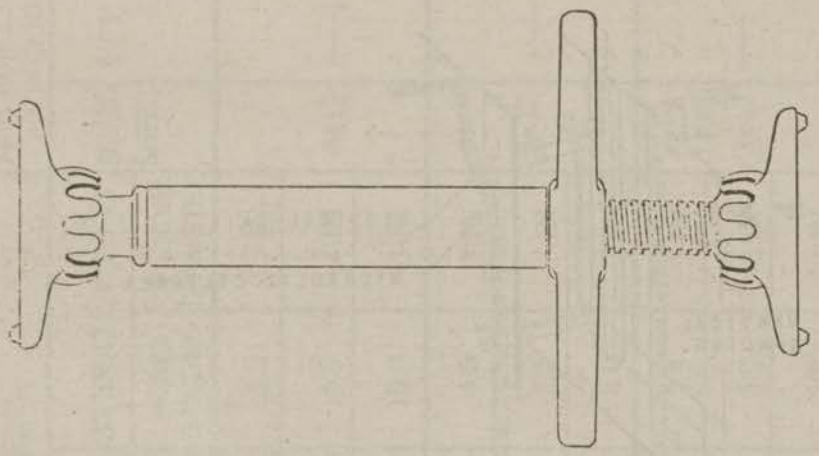
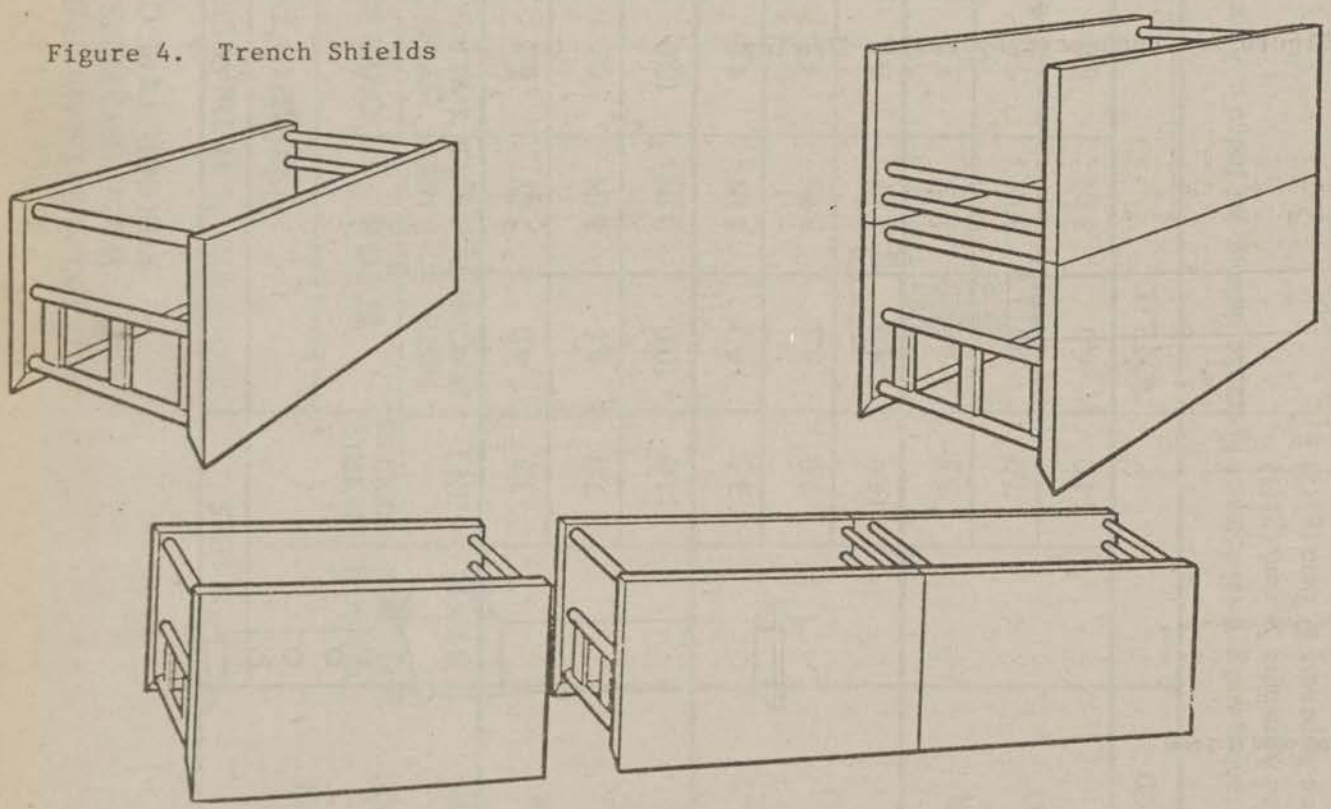


Figure 4. Trench Shields



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## Appendix F to Subpart P—Selection of Protective Systems

The following figures are a graphic summary of the requirements contained in subpart P for excavations 20 feet or less in depth. Protective systems for use in excavations more than 20 feet in depth must be designed by a registered professional engineer in accordance with § 1926.652 (b) and (c).

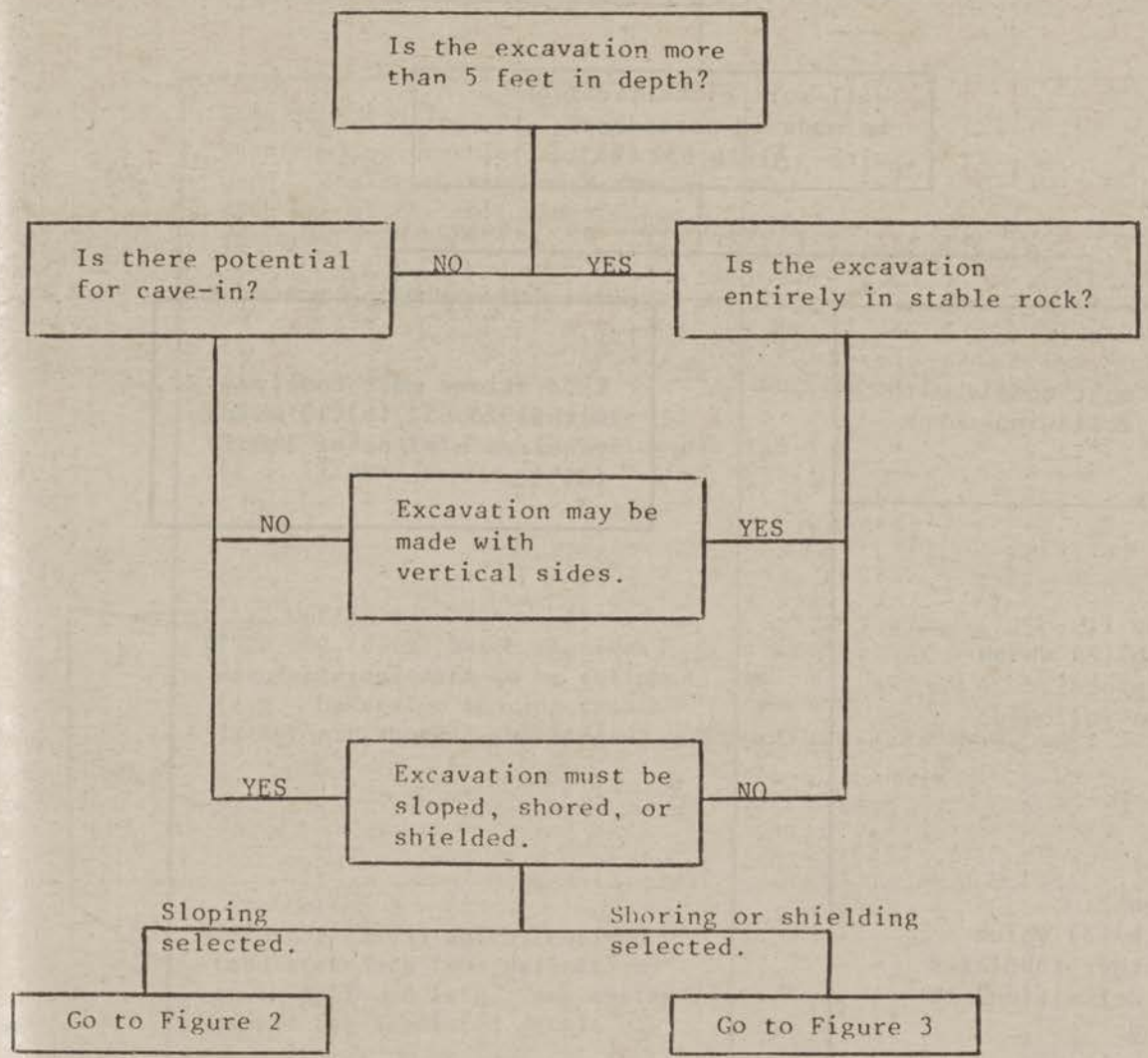


FIGURE 1 - PRELIMINARY DECISIONS

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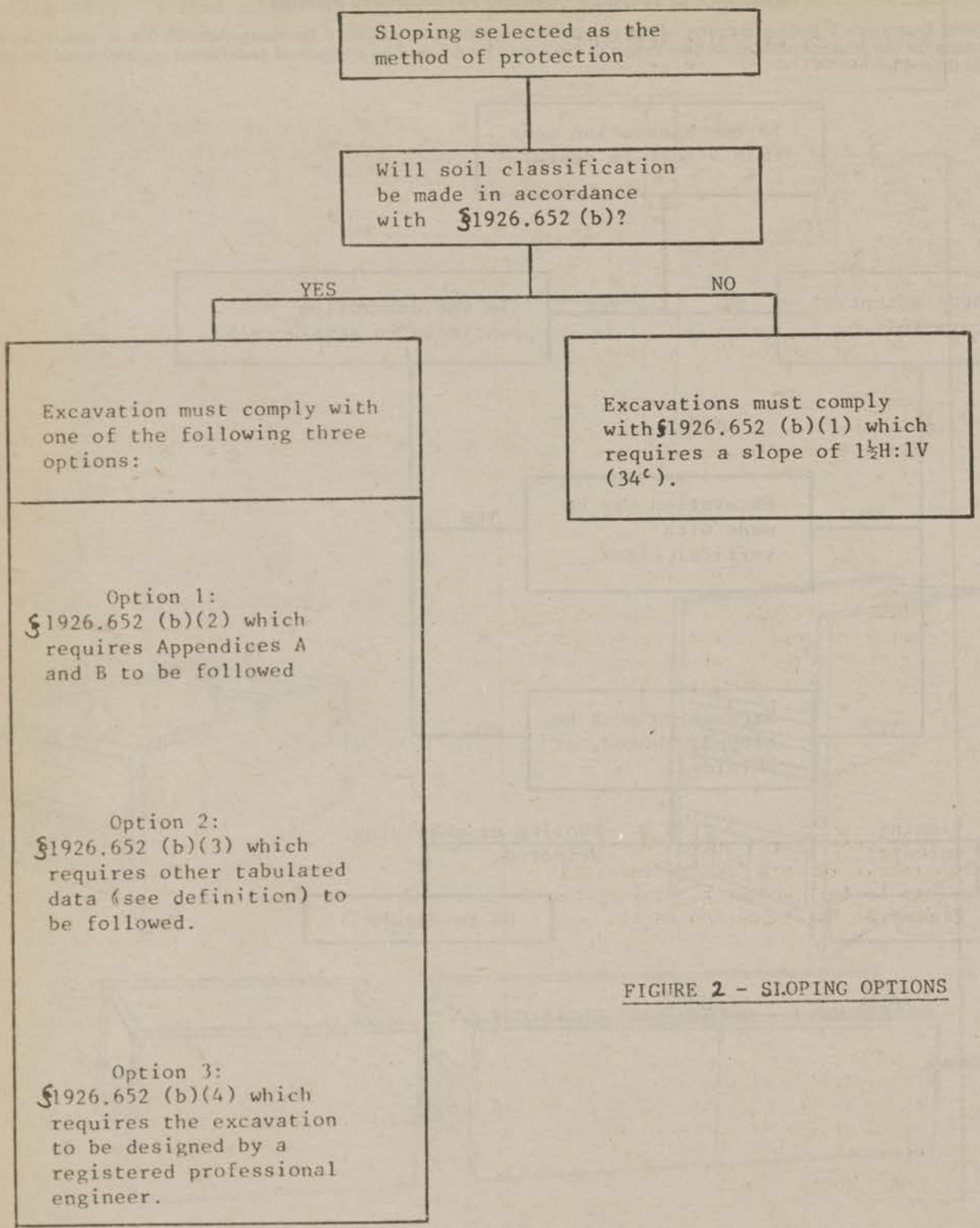


FIGURE 2 - SLOPING OPTIONS

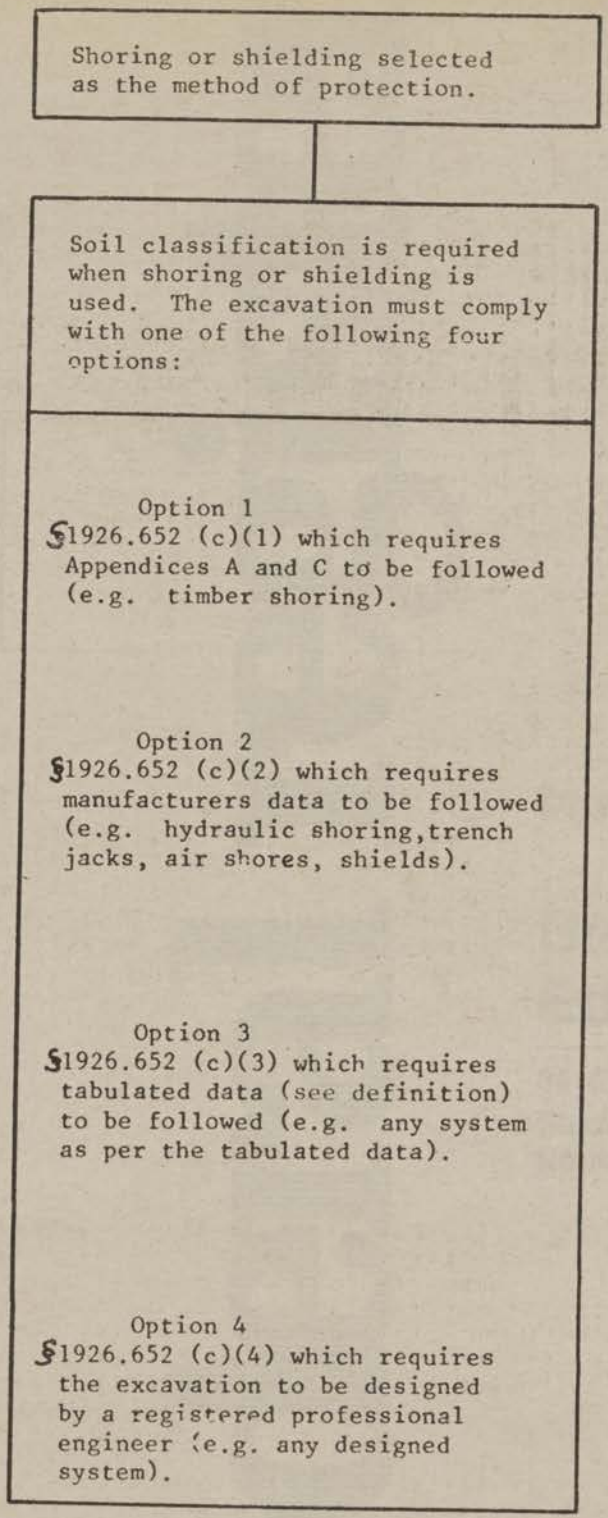


FIGURE 3 - SHORING AND SHIELDING OPTIONS

[FR Doc. 89-25217 Filed 10-30-89; 8:45 am]
BILLING CODE 4510-26-C

Federal Register

Tuesday
October 31, 1989

Part III

# Department of Education

34 CFR Part 668

Student Assistance General Provisions; Notice of Proposed Rulemaking

## DEPARTMENT OF EDUCATION

### 34 CFR Part 668

**RIN 1840-AB07**

### Student Assistance General Provisions

**AGENCY:** Department of Education.

**ACTION:** Notice of Proposed Rulemaking.

**SUMMARY:** The Secretary proposes to amend the verification regulations contained in Subpart E of the Student Assistance General Provisions Regulations, 34 CFR Part 668, to conform them to certain new provisions in the Tax Reform Act of 1986 (Pub. L. 99-514), the Higher Education Amendments of 1986 (Pub. L. 99-498), the Higher Education Technical Amendments Act of 1987 (Pub. L. 100-50), Public Law 100-369, and the Compact of Free Association (Pub. L. 99-239), and to update data reporting requirements to reduce the administrative burden associated with verification requirements on applicants and schools. The verification regulations require institutions to have a system for verifying student aid application information reported by applicants for use in calculating expected family contributions (EFCs) for the Pell Grant, campus-based (Perkins Loan [National Defense/Direct Student Loan], College Work-Study (CWS), Supplemental Educational Opportunity Grant (SEOG)), need-based Income Contingent Loan (ICL), and Guaranteed Student Loan (GSL) programs.

**DATE:** Comments must be received on or before January 2, 1990.

**ADDRESSES:** All comments concerning these proposed regulations should be addressed to Paula Husselmann, Chief, Verification Development Section, Student Verification Branch, Division of Policy and Program Development, U.S. Department of Education, 400 Maryland Avenue SW., [Regional Office Building 3, Room 4613] Washington, DC 20202. A copy of any comments that concern information collection requirements should also be sent to the Office of Management and Budget at the address listed in the Paperwork Reduction Act section of this preamble.

**FOR FURTHER INFORMATION CONTACT:** Lorraine Kennedy, Program Analyst, Telephone (202) 732-5579.

**SUPPLEMENTARY INFORMATION:** The Secretary is proposing these revised regulations to conform to certain new provisions in the Tax Reform Act of 1986, the Higher Education Act of 1965, as amended by the Higher Education Amendments of 1986, the Higher Education Amendments of 1987, and Public Law 100-369, snd the Compact of Free Association. Each applicant's information, which is subject to the verification regulations, is used to calculate an EFC. The EFC is the amount that an applicant and the applicant's family can reasonably be expected to contribute toward the cost of attendance at an institution of higher education and is used to determine the applicant's financial need for assistance. The applicant's financial need is defined as the difference between the applicant's cost of attendance and the EFC. The applicant may receive assistance under most Title IV Higher Education Act programs upon demonstrating financial need for such assistance.

The Secretary proposes to amend Section s668.53(a)(3) to reduce burden placed on institutions to notify each applicant that completes the verification process of the results of verification. Instead, institutions would be required to notify verified applicants of the results of verification only if the applicant's expected family contribution and award or loan amount changes as a result of verification. An applicant's award letter may serve as this notification.

The Secretary proposes to amend § 668.54(a) to provide that an institution is not required to verify the information from more than 30 percent of its applicants for assistance under the Pell Grant, campus-based, need-based ICL, and GSL Programs in any award year. This proposed change is required by section 484(f) of the Higher Education Act of 1965, as amended.

Currently, the regulations give an institution the authority to require an applicant, selected for verification, to provide documentation to verify any data element it specifies. The Secretary proposes to amend § 668.54 and § 668.60 to require an applicant to provide the necessary documentation to verify any data element required by an institution or the Secretary.

Previously, citizens of the Trust Territory of the Pacific Islands were excluded from verification requirements, unless an institution had information conflicting with information reported by an applicant or otherwise had reason to believe information reported by an applicant to be incorrect. The Compact of Free Association (Pub. L. 99-239) conferred independent nation status on certain entities, formerly trust territories of the United States; these entities are now known as the Federated States of Micronesia and the Republic of the Marshall Islands. Therefore, the Secretary proposes to amend § 668.54 to update the references to these entities so that eligible Title IV aid applicants from these entities continue to be excluded from verification requirements. In anticipation of the enactment of a similar compact to create the Republic of Palau, these provisions are prospectively extended to eligible students of that Republic.

Section 668.54(b)(2)(vii) currently provides that under certain conditions a student transferring from one institution to another may be excluded from verifying data at the second school. The Secretary requests comment on how to notify the second school that it is not required to verify the student's data. The purpose of this notification is to relieve burden and improve delivery of aid. The Secretary requests comments on the use of the Electronic Student Aid Report (ESAR) to achieve this goal.

Section 668.55 is being amended to simplify and clarify the updating requirements. Currently, applicants must update or verify information as to the number of household members and the number of household members enrolled in postsecondary institutions, except for changes in marital status.

Currently, the regulations require an applicant to update information as to dependency status, except for changes in marital status, throughout the year. Also, an applicant is not permitted to update dependency status on a GSL application, if the institution has previously certified that application. To simplify the regulations and to make the updating requirements more consistent, the Secretary proposes to eliminate the marital status exception and require all applicants to update dependency status, including applicants for whom a loan has been certified. In the proposed regulations, applicants would be required to update information as to their household size, number of family members enrolled in a postsecondary educational institution, and dependency status throughout the year regardless of the reason for a change in the applicant's dependency status, for all Title IV programs. Household size, number of family members enrolled in a postsecondary educational institution, and dependency status, under these proposed regulations, must be updated as a result of an actual change in an applicant's marital status and may not be updated or changed because of a projected change in marital status.

Title IV Quality Control Studies indicate that there is significant misreporting by applicants of the number of family members enrolled in postsecondary educational institutions. These errors have resulted in incorrect awards and loans to students. Therefore, the Secretary proposes to

amend § 668.56 to provide that an institution must require an applicant selected for verification to verify the number of family members enrolled in postsecondary educational institutions, even though there was no change from information verified in the previous award year.

Section 668.56(a)(5) (formerly § 668.56(a)(6)) would be amended to delete data elements, listed in the verification regulations, that are no longer considered untaxed income as a result of the Tax Reform Act of 1986. Untaxed income is income that is excluded from Federal taxation by provisions of the Internal Revenue Code.

For the purpose of Title IV student financial assistance, untaxed income is considered in the formula used to determine the EFC toward the costs of postsecondary education. Except for Social Security benefits and child support, the Secretary relies on the information applicants, their spouses, and their parents report on their Federal tax returns to verify the receipt of untaxed income that is subject to the verification requirements. The Secretary intends to maintain untaxed income verification requirements that are consistent with Federal income tax reporting requirements for untaxed income items listed on the Federal tax return, except for Social Security benefits and child support.

To avoid publishing new regulations each time Federal income tax reporting requirements for untaxed income change, the Secretary proposes to follow Federal income tax reporting requirements in determining elements of untaxed income subject to verification. The Secretary, in § 668.56(a)(5)(vii), would require verification of all elements of untaxed income listed on the tax return without the use of additional schedules or attachments, beginning with the 1990–91 award year. The Secretary would publish in the Federal Register a list of categories of untaxed income subject to verification whenever Internal Revenue Service reporting requirements for untaxed income change.

Because of recent changes in Federal tax reporting requirements, § 668.56(a)(5) would be amended to delete references to unemployment compensation, which is now fully taxable, and to delete references to the married couple deduction and dividend exclusion, which have been discontinued. Similarly, references to capital gains would be deleted since these are now treated as taxable income and therefore no longer require a separate verification requirement. This section would also be amended to require interest on tax-free bonds to be verified as a part of untaxed income. Prior to 1987, taxpayers were not required to report interest on tax-free bonds on the 1040 and 1040A tax forms. The new IRS Forms 1040 and 1040A include these data as a line item.

Section 668.56(c) of the current Verification Regulations provides an exclusion for the verification of a dependent Pell applicant's base year income because, under the previous Student Aid Index (SAI) formula, estimated year earnings were often used to calculate the applicant's EFC, instead of base year adjusted gross income. The Higher Education Act of 1965, as amended, now requires the use of the dependent Pell applicant's base year income as a fixed data element in the current SAI formula used in calculating an applicant's EFC, unless the dependent student is classified as a dislocated worker by the appropriate State agency in accordance with Title III of the Job Training Partnership Act. Consequently, the Secretary is proposing to delete § 668.56(c) to, in effect, require verification of dependent student base year income. This change does not result in significant additional burden to financial aid administrators because dependent student base year income must already be verified beginning with the 1988–89 award year for the campus-based and Guaranteed Student Loan programs.

Public Law 100–369 requires income tax returns filed with the Commonwealth of Puerto Rico, the government of another U.S. territory or commonwealth, or the central government of a foreign country to be treated the same as U.S. income tax returns. Therefore, § 668.57 would be amended to consider an income tax return filed with a government of a U.S. territory or commonwealth, the Commonwealth of Puerto Rico, or a foreign government in the same manner as a U.S. income tax return.

Section 668.57(d), independent student status, would be deleted. The Higher Education Act requires that, for independent students within certain categories, no disbursal of an award may be made without documentation of independent student status. The Secretary has previously issued guidance on this subject in a "Dear Colleague Letter" and will not prescribe requirements to document independent student status in these regulations.

Section 668.59 is being amended to change the amount of the dollar tolerance option for the GSL and campus-based programs and also to delete one of the Pell Grant specific tolerance options: SAI Recalculation Option. A tolerance option is a dollar error level allowed on an applicant's application for which the recalculation of an applicant's EFC or SAI will not be required.

A $200 tolerance option would be proposed for all Title IV programs in place of the current $200 Pell and $800 GSL/campus-based programs tolerance options. It is appropriate to apply the tolerance previously used only for the Pell Grant Program to the campus-based, need-based ICL, and GSL programs because the Higher Education Act now provides a single formula for establishing need for campus-based and need-based ICL aid and Guaranteed Student Loans, similar to the formula for the Pell Grant Program. Previously, under the Uniform Methodology, allowable variances in calculating the EFC warranted a more liberal tolerance. Additionally, the use of a single tolerance amount will increase consistency among the Title IV programs. Therefore, the Secretary proposes to use the Pell Grant $200 tolerance figure to make all Title IV programs consistent.

Because changes in the Pell Grant formula made the Zero SAI Charts too complex, reference to the Zero SAI Charts would be deleted. An institution may continue to process the application of any applicant with a reported SAI of zero on his or her SAR without submitting that SAR to the Secretary for recalculation, if the institution determines that the applicant's SAI remains at zero on the basis of the verified information.

Section 668.58 is being amended to specify that a CWS recipient may be employed for the first sixty (60) consecutive days of the award year, prior to verification being completed, provided the institution has no information indicating that the aid application is inaccurate.

Several other minor changes have been made to the verification regulations to reflect changes in verification requirements resulting from the Higher Education Amendments of 1986.

### Executive Order 12291

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

### Regulatory Flexibility Act Certification

The Secretary certifies that these proposed regulations would not have a significant economic impact on a

substantial number of small entities. Small entities affected by these regulations are small institutions of higher education. The proposed regulations revise the verification items used to calculate an applicant's financial need. These changes are required by statutory amendments. There are several other minor changes in the regulations to update present policy.

**Paperwork Reduction Act of 1980**

Sections 668.53, 668.54, 668.55, 668.56, 668.57, and 668.59 contain information collection requirements. As required by the Paperwork Reduction Act of 1980, the Department of Education will submit a copy of these sections to the Office of Management and Budget (OMB) for its review.

Organizations and individuals desiring to submit comments on the information collection requirements should direct them to the Office of Information and Regulatory Affairs, Room 3002, New Executive Office Building, Washington, DC 20503; Attention: James D. Houser.

**Invitation to Comment**

Interested persons are invited to submit comments and recommendations regarding these proposed regulations.

All comments submitted in response to these proposed regulations will be available for public inspection, during and after the comment period, in Room 4613, ROB–3, 7th and D Streets, SW., Washington, DC 20202, between the hours of 8:30 a.m. and 4:00 p.m., Monday through Friday of each week except Federal holidays.

To assist the Department in complying with the specific requirements of Executive Order 12291 and the Paperwork Reduction Act of 1980 and their overall requirement of reducing regulatory burden, the Secretary invites comment on whether there may be further opportunities to reduce any regulatory burdens found in these proposed regulations.

**Assessment of Educational Impact**

The Secretary particularly requests comments on whether the proposed regulations in this document would require transmission of information that is being gathered by or is available from any other agency or authority of the United States.

**List of Subjects in 34 CFR Part 668**

Administrative practice and procedure, Colleges and universities, Consumer protection, Education loan programs—education, Grant programs—education, Report and recordkeeping requirements, Student aid.

Dated: October 23, 1989.

**Lauro F. Cavazos,**

*Secretary of Education.*

The Secretary proposes to amend part 668 of title 34 of the Code of Federal Regulations as follows:

## PART 668—STUDENT ASSISTANCE GENERAL PROVISIONS

1. The authority citation for part 668 continues to read as follows:

**Authority:** 20 U.S.C. 1085, 1088, 1091, 1092, 1094, and 1141, unless otherwise noted.

2. Subpart E of part 668 is revised to read as follows:

**Subpart E—Verification of Student Aid Application Information**

Sec.



## Subpart E—Verification of Student Aid Application Information

### § 668.51 General.

(a) *Scope and purpose.* The regulations in this subpart govern the verification by institutions of information submitted by applicants for student financial assistance in connection with the calculation of their expected family contributions (EFC) for the Pell Grant, campus-based, need-based Income Contingent Loan (ICL) and Guaranteed Student Loan (GSL) programs.

(b) *Applicant responsibility.* If the Secretary or the institution requests documents or information from an applicant under this subpart, the applicant shall provide the specified documents or information.

(c) *Institutional Quality Control Pilot Project.* (1) For the 1988–89, 1989–90, and 1990–91 award years, the Secretary exempts institutions selected to participate in the institutional Quality Control Pilot Project from the requirements contained in the following sections:

(i) Section 668.53(a) (1) through (4).

(ii) Section 668.54(a) (2), (3), and (5).

(iii) Section 668.56.

(iv) Section 668.57, except that an institution shall require an applicant that it has selected for verification to submit to it a copy of the income tax return, if filed, of the applicant, his or her spouse, and his or her parents, if the income reported on the income tax return was used in determining the expected family contribution.

(v) Section 668.60(a).

(2) For the purpose of this section, the Institutional Quality Control Pilot Project is an experiment under which a participating institution develops and implements a quality control system in connection with its administration of the title IV, HEA programs. Under such a quality control system, the institution must evaluate its current procedures for administering the title IV, HEA programs ("management assessment component"), identify the errors that result from its current procedures ("error measurement process component") and design corrections to its procedures that will enable it to eliminate or significantly reduce those errors ("corrective actions process component").

(d) *Foreign schools.* The Secretary exempts from the provisions of this subpart institutions participating in the GSL Program that are not located in a State.

(Authority: 20 U.S.C. 1094)

### § 668.52 Definitions.

The following definitions apply to this subpart:

"Base year" means the calendar year preceding the first calendar year of an award year.

"Edits" means a set of pre-established factors for identifying—

(a) Student aid applications that may contain incorrect, missing, illogical, or inconsistent information; and

(b) Randomly selected student aid applications.

"Expected family contribution (EFC)" means the amount an applicant and his or her spouse and family are expected to contribute toward the applicant's cost of attendance.

"Need analysis servicer" means an agency or organization who has had its system for determining EFCs under the campus-based, GSL and need-based ICL programs certified by the Secretary for the applicable award year.

"Student aid application" means an application submitted by a person to have his or her EFC determined under the Pell Grant, campus-based, need-based ICL, or GSL programs.

(Authority: 20 U.S.C. 1094)

**§ 668.53 Policies and procedures.**

(a) An institution shall establish and use written policies and procedures for verifying information contained in a student aid application in accordance with the provisions of this subpart. These policies and procedures must include—

(1) The time period within which an applicant shall provide the documentation;

(2) The consequences of an applicant's failure to provide required documentation within the specified time period;

(3) The method by which the institution notifies an applicant of the results of verification if, as a result of verification, the applicant's EFC changes and results in a change in the applicant's award or loan;

(4) The procedures the institution requires an applicant to follow to correct application information determined to be in error; and

(5) The procedures for making referrals under § 668.14(g).

(b) The institution's procedures must provide that it furnish, in a timely manner, to each applicant selected for verification a clear explanation of—

(1) The documentation needed to satisfy the verification requirements; and

(2) The applicant's responsibilities with respect to the verification of application information, including the deadlines for completing any actions required under this subpart and the consequences of failing to complete any required action.

(Authority: 20 U.S.C. 1094)

**§ 668.54 Selection of applications for verification.**

(a) *General requirements.* (1) Except as provided in paragraph (b) of this section, an institution shall require an applicant to verify application information as specified in this paragraph.

(2) An institution shall require each applicant whose application is selected for verification on the basis of edits specified by the Secretary, to verify all of the applicable items specified in § 668.56, except that no institution is required to verify the applications of more than thirty (30) percent of its applicants for assistance under the Pell Grant, campus-based, need-based ICL, and GSL Programs in an award year. The Secretary may enter into agreements with need analysis servicers under which the Secretary provides the edits to the servicer and the servicer, once certified by the Secretary, indicates to institutions the applications selected for verification.

(3) The institution shall require each applicant to verify the applicable items specified in § 668.56 (except that no eligible institution is required to verify more than thirty (30) percent of the applications submitted in any award year), if—

(i) The applicant is selected by the institution to receive an award under the campus-based programs or requests the institution to certify his or her application for a GSL or need-based ICL loan; and

(ii) The institution does not receive—

(A) A Student Aid Report (SAR) for the applicant; or

(B) The output document generated on behalf of the applicant submitting an application to a certified need analysis servicer that has an agreement with the Secretary as described under paragraph (a)(2) of this section.

(4) If an institution has reason to believe that any information on an application used to calculate an EFC is inaccurate, it shall require that the applicant verify the information that it has reason to believe is inaccurate.

(5) If an applicant is selected to verify the information on his or her application under paragraph (a)(2) of this section, the institution shall require the applicant to verify the information as specified in § 668.56 on each additional application he or she submits for that award year, except for information already verified under a previous application submitted for the applicable award year.

(6) An institution or the Secretary may require an applicant to verify any data elements that the institution or the Secretary specifies.

(b) *Exclusions from verification.* (1) An institution need not verify an application submitted for an award year if the applicant dies during the award year.

(2) Unless the institution has reason to believe that the information reported by the applicant may be incorrect, it need not verify applications of the following applicants:

(i) An applicant who is—

(A) A legal resident of and, in the case of a dependent student, whose parents are also legal residents of the Commonwealth of the Northern Mariana Islands, Guam, or American Samoa; or

(B) A citizen of and, in the case of a dependent student, whose parents are also citizens of the Republic of the Marshall Islands, the Federated States of Micronesia, or the Republic of Palau.

(ii) An applicant who is incarcerated at the time at which verification would occur.

(iii) An applicant who is a dependent student, whose parents are residing in a country other than the United States and cannot be contacted by normal means of communication.

(iv) An applicant who is an immigrant and who arrived in the United States during either calendar year of the award year.

(v) An applicant who is a dependent student, both of whose parents are deceased or are physically or mentally incapacitated, or whose parents' address is unknown.

(vi) An applicant who does not receive assistance for reasons other than his or her failure to verify the information on the application.

(vii) An applicant who transfers to the institution, had previously completed the verification process at the institution from which he or she transferred, and applies for assistance on the same application used at the previous institution, if the current institution obtains—

(A) A letter from the previous institution stating that it has verified the applicant's information and, if relevant, the provision used in § 668.59 for not recalculating the applicant's EFC; and

(B) A copy of the verified application and, if the applicant applied for a Pell Grant, pages 1 and 3 of the applicant's SAR.

(3) An institution need not require an applicant to document spouse information or provide a spouse's signature if—

(i) The spouse is deceased;

(ii) The spouse is mentally or physically incapacitated;

(iii) The spouse is residing in a country other than the United States and cannot be contacted by normal means of communication; or

(iv) The spouse cannot be located because his or her address is unknown and cannot be obtained by the applicant.

(Authority: 20 U.S.C. 1091, 1094)

**§ 668.55 Updating information.**

(a) (1) Unless the provisions of paragraph (a)(2) of this section apply, an applicant is required to update the information contained in his or her application for assistance in an award year to reflect the applicant's current circumstances regarding—

(i) The number of family members in the applicant's household and the number of those household members attending postsecondary educational institutions, in accordance with provisions of paragraph (b) of this section; and

(ii) His or her dependency status in accordance with the provisions of paragraph (d) of this section.

(2) An institution need not require an applicant to verify the information contained in his or her application for assistance in an award year if—

(i) The applicant previously submitted an application for assistance for that award year;

(ii) The applicant updated and verified the information contained in that application; and

(iii) No change in the information to be updated has taken place since the last update.

(b) If the number of family members in the applicant's household or the number of such household members attending postsecondary educational institutions changes—

(1) An applicant who is selected for verification shall update the information contained in his or her application regarding those factors so that the information is correct as of the day the applicant verifies the information; and

(2) An applicant for a Pell Grant who is not selected for verification shall update the information contained in his or her application regarding those factors and shall certify that the information is correct as of the day that the applicant submits his or her first SAR to the institution.

(c) If an applicant has received Pell Grant, campus-based, need-based ICL, or GSL program assistance for an award year, the applicant subsequently submits another application for assistance under any of those programs for that award year, and the applicant is required to update household size and number attending postsecondary educational institutions on the subsequent application, the institution—

(1) Is required to take that newly updated information into account when awarding for that award year further Pell Grant, campus-based, or need-based ICL program assistance or certifying a GSL loan application; and

(2) Is not required to adjust the Pell Grant, campus-based or need-based ICL program assistance previously awarded to the applicant for that award year, or any previously certified GSL loan application for that award year, to reflect the newly updated information unless the applicant would otherwise receive an overaward.

(d) If an applicant's dependency status changes after the applicant applies to have his or her EFC calculated for an award year, the applicant shall file a new application for that award year reflecting the applicant's new dependency status regardless of whether the applicant is selected for verification.

(Authority: 20 U.S.C. 1094)

**§ 668.56 Items to be verified.**

(a) Except as provided in paragraphs (b), (c), (d), and (e) of this section, an institution shall require an applicant selected for verification under § 668.54 (a) (1) or (2) to submit acceptable documentation described in § 668.57 that will verify or update the following information used to determine the applicant's EFC:

(1) Adjusted gross income (AGI) for the base year if base year data was used in determining eligibility, or income earned from work if a non-tax filer.

(2) U.S. income tax paid for the base year.

(3)(i) For an applicant who is a dependent student, the aggregate number of family members in the household or households of the applicant's parents if—

(A) The applicant's parent is single, divorced, separated or widowed and the aggregate number of family members is greater than two; or

(B) The applicant's parents are married and the aggregate number of family members is greater than three.

(ii) For an applicant who is an independent student, the number of family members in the household of the applicant if—

(A) The applicant is single, divorced, separated, or widowed and the number of family members is greater than one; or

(B) The applicant is married and the number of family members is greater than two.

(4) The number of family members in the household who are enrolled as at least half-time students in postsecondary educational institutions if that number is greater than one.

(5) The following untaxed income and benefits for the base year—

(i) Social security benefits if—

(A) Verification is required by a comment on the applicant's SAR; or

(B) The applicant does not receive an SAR and the institution has reason to believe that those benefits were received;

(ii) Child support if the institution has reason to believe that child support was received;

(iii) U.S. income tax deduction for a payment made to an individual retirement account (IRA) or Keogh account;

(iv) Interest on tax-free bonds;

(v) Foreign income excluded from U.S. income taxation if the institution has reason to believe that foreign income was received;

(vi) The earned income credit taken on the applicant's tax return.

(vii) All other untaxed income subject to U.S. income tax reporting requirements in the base year which are included on the tax return form without the use of additional schedules or attachments.

(b) If an applicant selected for verification submits a SAR to the institution, or the institution receives an output document as described in § 668.54(a)(3)(ii)(B) within 90 days of the date the applicant signed his or her application, or if an applicant is selected for verification under § 668.54(a)(2), the institution need not require the applicant to verify—

(1) The number of family members in the household; or

(2) The number of family members in the household who are enrolled as at least half-time students in postsecondary educational institutions.

(c) If the number of family members in the household, the independent student status, or the amount of child support reported by an applicant selected for verification is the same as that verified by the institution in the previous award year, the institution need not require the applicant to verify that information.

(d) If the family members who are enrolled as at least half-time students in postsecondary educational institutions are enrolled at the same institution as the applicant, and the institution verifies their enrollment from its own records, the institution need not require the applicant to verify this information.

(e) If the applicant or the applicant's spouse, or in the case of a dependent student, the applicant's parents receive untaxed income or benefits from a Federal, State, or local government agency determining their eligibility for that income or benefits by means of a financial needs test, the institution need not require the untaxed income and benefits to be verified.

(Authority: 20 U.S.C. 1094, 1095)

**§ 668.57 Acceptable documentation.**

(a) *Adjusted Gross Income (AGI) and U.S. income tax paid.* (1) Except as provided in paragraphs (a)(2), (a)(3), and (a)(4) of this section, an institution shall require an applicant selected for verification to verify AGI and U.S. income tax paid by submitting to it, if relevant—

(i) A copy of the income tax return of the applicant, his or her spouse, and his or her parents. The copy of the return must be signed by the filer of the return or by one of the filers of a joint return;

(ii) For a dependent student, a copy of each Internal Revenue Service (IRS) Form W–2 received by the parent whose income is being taken into account if—

(A) The parents filed a joint return; and

(B) The parents are divorced or separated or one of the parents has died; and

(iii) For an independent student, a copy of each IRS Form W–2 he or she received if the independent student—

(A) Filed a joint return; and

(B) Is a widow or widower, or is divorced or separated.

(2) If an individual who filed a U.S. tax return and who is required by paragraph (a)(1) of this section to provide a copy of his or her tax return does not have a copy of that return, the institution may require that individual to submit, in lieu of a copy of the tax return, a copy of the "IRS Listing of Tax Account Information."

(3) An institution shall accept, in lieu of an income tax return or an IRS Listing of Tax Account Information of a relevant individual, the documentation set forth in paragraph (a)(4) of this section if the relevant individual for the base year—

(i) Has not filed and is not required to file an income tax return;

(ii) Is required to file a U.S. tax return and has been granted a filing extension by the IRS; or

(iii) Has requested a copy of the tax return or a Listing of Tax Account Information and the IRS or a government of a U.S. territory or commonwealth or a foreign central government cannot locate the return or provide a Listing of Tax Account Information.

(4) An institution shall accept—

(i) For an individual described in paragraph (a)(3)(i) of this section, a statement signed by that individual certifying that he or she has not filed nor is required to file an income tax return for the base year and certifying for that year that individual's—

(A) Sources of income earned from work as stated on the application; and

(B) Amounts of income from each source;

(ii) For an individual described in paragraph (a)(3)(ii) of this section—

(A) A copy of the IRS Form 4868, "Application for Automatic Extension of Time to File U.S. Individual Income Tax Return," that the individual filed with the IRS for the base year, or a copy of the IRS's approval of an extension beyond the automatic four-month extension if the individual requested an additional extension of the filing time; and

(B) A copy of each IRS Form W–2 that the individual received for the base year, or for a self-employed individual, a statement signed by the individual certifying the amount of adjusted gross income for the base year; and

(iii) For an individual described in paragraph (a)(3)(iii) of this section—

(A) A copy of each IRS Form W–2 that the individual received for the base year; or

(B) For an individual who is self-employed or has filed an income tax return with a government of a U.S. territory or commonwealth, or a foreign central government, a statement signed by the individual certifying the amount of adjusted gross income for the base year.

(5) An institution shall require an individual described in paragraph (a)(3)(ii) of this section to provide to it a copy of his or her completed income tax return when filed. When an institution receives the copy of the return, it may re-verify the adjusted gross income and taxes paid by the applicant and his or her spouse or parents.

(6) If an individual who is required to submit an IRS Form W–2 under this paragraph is unable to obtain one in a timely manner, the institution may permit that individual to set forth, in a statement signed by the individual, the amount of income earned from work as stated on the application, the source of that income, and the reason that the IRS Form W–2 is not available in a timely manner.

(7) For the purpose of this section, an institution may accept in lieu of a copy of an income tax return signed by the filer of the return or one of the filers of a joint return, a copy of the filer's return that has been signed by the preparer of the return or stamped with the name and address of the preparer of the return.

(b) *Number of family members in household.* An institution shall require an applicant selected for verification to verify the number of family members in the household by submitting to it a statement signed by the applicant and the applicant's parent if the applicant is a dependent student, or the applicant and the applicant's spouse if the applicant is an independent student, listing the name and age of each family member in the household and the relationship of each household member to the applicant.

(c) *Number of family household members enrolled in postsecondary institutions.* (1) Unless the institution has reason to believe that the information included on the application regarding the number of household members in the applicant's family enrolled on at least half-time basis in postsecondary institutions is inaccurate, the institution shall require an applicant selected for verification to verify that information by submitting to it a statement signed by the applicant and the applicant's parents if the applicant is a dependent student, or by the applicant and the applicant's spouse if the applicant is an independent student, listing—

(i) The name of each family member who is or will be attending a postsecondary educational institution as at least a half-time student in the award year;

(ii) The age of each student; and

(iii) The name of the institution attended by each student.

(2) If the institution has reason to believe that the information included on the application regarding the number of family household members enrolled in postsecondary institutions is inaccurate, the institution shall require—

(i) The statement required in paragraph (c)(1) of this section from the individuals described in paragraph (c)(1) of this section; and

(ii) A statement from each institution named by the applicant in response to the requirement of paragraph (c)(1)(iii) of this section that the household member in question is or will be attending the institution on at least a half-time basis, unless the institution the student is attending determines that such a statement is not available because the household member in question has not yet registered at the institution he or she plans to attend.

(d) *Untaxed income and benefits.* An institution shall require an applicant selected for verification to verify—

(1) Untaxed income and benefits described in § 668.56(a)(5) (iii), (iv), (v), and (vi) by submitting to it—

(i) A copy of the U.S. income tax return signed by the filer or one of the filers if a joint return, if collected under paragraph (a) of this section, or the IRS listing of tax account information if collected by the institution to verify adjusted gross income; or

(ii) If no tax return was filed or is required to be filed, a statement signed by the relevant individuals certifying that no tax return was filed or is required to be filed and providing the sources and amount of untaxed income and benefits specified in § 668.56(a)(5) (iii), (iv), (v), and (vi);

(2) Social security benefits—

(i) If an edit comment appears on the applicant's SAR indicating incorrect Social Security benefits, the applicant shall verify Social Security benefits, by submitting a document from the Social Security Administration showing the amount of benefits received in the appropriate calendar year by the applicant, applicant's parents, and any other children of the applicant's parents who are members of the applicant's

household, in the case of a dependent student, or by the applicant, the applicant's spouse, and the applicant's children in the case of an independent student; or

(ii) If the applicant does not receive an SAR and the institution has reason to believe that the applicant has incorrectly reported Social Security benefits received by the applicant or any individual described in paragraph (d)(2)(i), the applicant shall verify Social Security benefits by submitting either the document described in paragraph (d)(2)(i) or, at the institution's option, a statement signed by both the applicant and the applicant's parent in the case of a dependent student or by the applicant in the case of an independent student certifying that the amount listed on the applicant's aid application is correct; and

(3) Child support received by submitting to it—

(i) A written statement signed by the applicant and the applicant's parent in the case of a dependent student, or by the applicant and the applicant's spouse in the case of an independent student, certifying the amount of child support received; and

(ii) If the institution has reason to believe that the information provided is inaccurate, the applicant must verify the amount of child support received by providing a document such as—

(A) A copy of the separation agreement or divorce decree showing the amount of child support to be provided;

(B) A statement from the parent providing the child support showing the amount provided; or

(C) Copies of the child support checks or money order receipts.

(Authority: 20 U.S.C. 1094)

**§ 668.58 Interim disbursements.**

(a)(1) If an institution has reason to believe that the information included on the application is inaccurate, until the applicant verifies or corrects the information included on his or her application, the institution may not—

(i) Disburse any Pell Grant or campus-based program funds to the applicant;

(ii) Employ the applicant in its CWS Program; or

(iii) Certify the applicant's GSL application or process GSL proceeds for any previously certified GSL application.

(2) If an institution does not have reason to believe that the information included on an application is inaccurate prior to verification, the institution—

(i) May withhold payment of Pell Grant, campus-based, and need-based ICL funds; or

(ii)(A) May make one disbursement of any combination of Pell Grant, Perkins Loan, NDSL, SEOG or need-based ICL funds for the applicant's first payment period; and

(B) May employ or allow an employer to employ an eligible student under the CWS Program for the first sixty (60) consecutive days of the award year in any award year; and

(iii)(A) May withhold certification of the applicant's GSL application; or

(B) May certify the GSL application provided that the institution does not process GSL proceeds.

(b) If an institution chooses to make disbursement under paragraph (a)(2)(ii)(A) or (B) of this section, it is liable for any overpayment discovered as a result of the verification process.

(c) An institution may not withhold any GSL proceeds from a student under paragraph (a)(2) of this section for more than forty-five (45) days. If the applicant does not complete the verification process within the forty-five day period, the institution shall return the proceeds to the lender.

(d) (1) If the institution receives GSL proceeds in an amount which exceeds the student's need for the loan based upon the verified information and the excess funds can be eliminated by reducing subsequent disbursements for the applicable loan period, the institution shall process the proceeds and advise the lender to reduce the subsequent disbursements.

(2) If the institution receives GSL proceeds in an amount which exceed the student's need for the loan based upon the verified information and the excess funds cannot be eliminated in subsequent disbursements for the applicable loan period, the institution shall return the excess proceeds to the lender.

(Authority: 20 U.S.C. 1094)

**§ 668.59 Consequences of a change in application information.**

(a) Except as provided in paragraph (b) of this section, if the information on an application used to determine Pell Grant eligibility changes as a result of the verification process, the institution shall require the applicant to resubmit his or her SAR to the Secretary if—

(1) The institution recalculates the applicant's SAI (student aid index), determines that the applicant's EFC changes, and determines that the change in the EFC changes the applicant's Pell Grant award; or

(2) The institution does not recalculate the applicant's EFC.

(b) An institution need not require an applicant to resubmit his or her SAR to the Secretary, need not recalculate his or her EFC, and need not adjust his or her Title IV award if, as a result of the verification process, the institution finds no errors in dollar items or finds errors reflecting a cumulative change in dollar items of $200 or less.

(c) If the applicant has received funds based on information that may be incorrect and the institution has made a reasonable effort to resolve the alleged discrepancy, but cannot, the institution shall forward the applicant's name, Social Security number, and other relevant information to the Secretary.

(Authority: 20 U.S.C. 1094)

**§ 668.60 Deadlines for submitting documentation and the consequences of failing to provide documentation.**

(a) An institution shall require an applicant selected for verification to submit to it, within the period of time it or the Secretary specifies, the documents set forth in § 668.57 that are requested by the institution or the Secretary.

(b) For purposes of the campus-based, GSL and need-based ICL programs—

(1) If an applicant fails to provide the requested documentation within a reasonable time period established by the institution or by the Secretary—

(i) The institution may not—

(A) Disburse any additional Perkins Loan, NDSL, SEOG or need-based ICL funds to the applicant;

(B) Continue to employ or allow an employer to employ the applicant under CWS;

(C) Certify the applicant's GSL application; or

(D) Process GSL proceeds for the applicant;

(ii) The institution shall return to the lender any GSL proceeds payable to the applicant; and

(iii) The applicant shall repay to the institution any Perkins Loan, NDSL, or SEOG, or need-based ICL payments received for that award year;

(2) If the applicant provides the requested documentation after the time period established by the institution, the institution may, at its option, award aid to the applicant notwithstanding the guidelines listed in paragraph (b)(1)(i) of this section; and

(3) An institution may not withhold any GSL proceeds from a student under paragraph (b)(1)(i)(D) of this section for more than forty-five (45) days. If the applicant does not complete verification within the forty-five (45) day period, the institution shall return the GSL proceeds to the lender.

(c) For purposes of the Pell Grant Program—

(1) An applicant may submit a verified SAR to the institution after the applicable deadline specified in 34 CFR 690.61 but within an established additional time period set by the Secretary through publication of a notice in the **Federal Register**. If a verified SAR is submitted to the institution during the established additional time period, and the SAIs on the two SARs are different, payment must be based on the higher of the two SAIs.

(2) If the applicant does not provide the requested documentation, and if necessary, a reprocessed verified SAR, within the additional time period referenced in paragraph (c)(1) of this section, the applicant—

(i) Forfeits the Pell Grant for the award year; and

(ii) Shall return any Pell Grant payments previously received for that award year to the Secretary.

(d) The Secretary may determine not to process any subsequent Pell Grant application, and an institution, if directed by the Secretary, may not process any subsequent application for campus-based, need-based ICL or GSL program assistance of an applicant who has been requested to provide information until the applicant provides the documentation or the Secretary decides that there is no 1onger a need for the documentation.

(e) If an applicant selected for verification for an award year dies before the deadline for completing the verification process without completing that process, and the deadline is in the subsequent award year, the institution may not—

(1) Make any further disbursements on behalf of that applicant;

(2) Certify that applicant's GSL loan application or process that applicant's GSL proceeds; or

(3) Consider any funds it disbursed to that applicant under § 668.58(a)(2) as an overpayment.

(Authority: 20 U.S.C. 1094)

**§ 668.61 Recovery of funds.**

(a) If an institution discovers, as a result of the verification process, that an applicant received under § 668.58(a)(2)(ii)(A) more than he or she was eligible to receive, the institution shall eliminate the overpayment by—

(1) Adjusting subsequent financial aid payments in the award year in which the overpayment occurred; or

(2) Reimbursing the appropriate program account by—

(i) Requiring the applicant to return the overpayment to the institution if the institution cannot correct the overpayment under paragraph (a)(1) of this section; or

(ii) Making restitution from its own funds, if the applicant does not return the overpayment, by the earlier of the following dates:

(A) Sixty days after the applicant's last day of enrollment.

(B) The last day of the award year in which the institution disbursed Pell Grant, Perkins Loan, NDSL, SEOG or need-based ICL funds to the applicant.

(b) If the institution determines as a result of the verification process that an applicant received for an award year a GSL of $200 or more in excess of the student's financial need for the loan, the institution shall notify the student and the lender of the excess amount within thirty (30) days of the institution's determination that the borrower is ineligible for the excess amounts.

(Authority: 20 U.S.C. 1094)

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October 31, 1989

Part IV

# Department of Defense
# General Services Administration
# National Aeronautics and Space Administration

48 CFR Parts 5, 6, 19, and 52
Federal Acquisition Regulation (FAR); Competitive Thresholds; Final Rule

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 5, 6, 19, and 52

[Federal Acquisition Circ. 84-52]

RIN AD 31

## Federal Acquisition Regulation (FAR); Competitive Thresholds

**AGENCIES:** Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

**ACTION:** Final rule.

**SUMMARY:** Federal Acquisition Circular (FAC) 84-52 amends Federal Acquisition Regulation (FAR) Parts 5, 6, 19, and 52 to implement sections 303(b) and 303(d) of the Business Opportunity Development Reform Act of 1988, Pub. L. 100-656.

**EFFECTIVE DATE:** November 30, 1989.

**FOR FURTHER INFORMATION CONTACT:** Margaret A. Willis, FAR Secretariat, Room 4041, GS Building, Washington, DC 20405, (202) 523-4755. Please cite FAC 84-52.

**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 were addressed by the Small Business Administration in the development of its regulations implementing the Business Opportunity Development Reform Act of 1988, Pub. L. 100-656, published in the **Federal Register** on August 21, 1989 (54 FR 34692).

### C. Paperwork Reduction Act

The Paperwork Reduction Act (Pub. L. 96-511) does not apply because this rule does not impose any reporting or recordkeeping requirements or collection of information from offerors, contractors, or members of the public which require the approval of OMB under 44 U.S.C. 3501, et seq.

### D. Public Comments

On June 28, 1989, a proposed rule was published in the **Federal Register** (54 FR 27310). Comments received were considered by the Councils in the development of this final rule.

### List of Subjects in 48 CFR Parts 5, 6, 19, and 52

Government procurement.

Dated: October 25, 1989.

**Albert A. Vicchiolla,**

*Director, Office of Federal Acquisition Policy.*

### Federal Acquisition Circular

[Number 84-52]

Unless otherwise specified, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC 84-52 is effective October 31, 1989.

Richard H. Hopf III,

*Associate Director for Acquisition Policy*

S.J. Evans,

*Associate Administrator for Procurement, National Aeronautics and Space Administration.*

Eleanor Spector,

*Assistant Secretary of Defense for Procurement, Department of Defense.*

Federal Acquisition Circular (FAC) 84-52 amends the Federal Acquisition Regulation as specified below:

### Item-Competitive Thresholds

FAR parts 5, 6, subparts 19.2 and 19.8, and part 52 are amended to implement subsection 303(b) of the Business Opportunity Development Reform Act of 1988, Pub. L. 100-656, which 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) 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. In addition, Part 19 is revised to implement subsection 303(d) of Pub. L. 100-656 to permit appeals by SBA 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.

Therefore, 48 CFR Parts 5, 6, 19, and 52 are amended as set forth below:

1. The authority citation for 48 CFR Parts 5, 6, 19, and 52 continues to read as follows:

**Authority:** 40 U.S.C. 486(c); 10 U.S.C. Chapter 137; and 42 U.S.C. 2473(c).

## PART 5—PUBLICIZING CONTRACT ACTIONS

2. Section 5.202 is amended by revising paragraph (a)(4) to read as follows:

**5.202 Exceptions.**

(a) * * *

(4) The contract action is expressly authorized or required by a statute to be made through another Government agency, including acquisitions from the Small Business Administration (SBA) using the authority of section 8(a) of the Small Business Act (but see 5.205(e)), or from a specific source such as a workshop for the blind under the rules of the Committee for the Purchase from the Blind and Other Severely Handicapped;

* * * * *

3. Section 5.205 is admended by adding paragraph (e) to read as follows:

**5.205 Special situations.**

* * * * *

(e) *Section 8(a) competitive acquisition.* When a national buy requirement is being considered for competitive acquisition limited to eligible 8(a) concerns under Supart 19.8, the contracting officer shall transmit a synopsis of the proposed contract action to the CBD in accordance with 5.207. The synopsis may be transmitted to the CDB concurrent with submission of the agency offering (see 19.804-2) to the Small Business Administration (SBA). The synopsis should also include information—

(1) Advising that the acquisition is being offered for competition limited to eligible 8(a) concerns;

(2) Specifying the Standard Industrial Classification (SIC) code;

(3) Advising that eligibility to participate may be restricted to firms in either the developmental or transitional stage; and

(4) Encouraging interested 8(a) firms to request a copy of the solicitation as expeditiously as possible since the solicitation will be issued without further notice upon SBA acceptance of the requirement for the section 8(a) Program.

## PART 6—COMPETITION REQUIREMENTS

4. Section 6.204 is added to read as follows:

**6.204 Section 8(a) competition.**

(a) To fulfill statutory requirements relating to section 8(a) of the Small Business Act, as amended by Pub. L. 100-656, contracting officers may limit competition to eligible 8(a) contractors (see Subpart 19.8).

(b) No separate justification or determination and findings is required under this part to limit competition to eligible 8(a) contractors.

5. Section 6.302-5 is amended by revising paragraph (b)(4) to read as follows:

**6.302-5 Authorized or required by statute.**

(b) * * *

(4) Sole source awards under the 8(a) Program—15 U.S.C. 637 (see subpart 19.8).

* * * * *

## PART 19—SMALL BUSINESS AND SMALL DISADVANTAGED BUSINESS CONCERNS

6. Section 19.202-6 is amended by revising paragraph (b) to read as follows:

**19.202-6 Determination of fair market price.**

* * * * *

(b) For 8(a) contracts, both with respect to meeting the requirement at 19.806(b) and in order to accurately estimate the current fair market price, contracting officers shall follow the procedures at 19.807.

7. Subpart 19.8 is revised to read as follows:

**Subpart 19.8—Contracting With the Small Business Administration (The 8(a) Program)**

Sec.



**Subpart 19.8—Contracting With the Small Business Administration (the 8(a) Program)**

**19.800 General.**

(a) Section 8(a) of the Small Busines Act (15 U.S.C. 637(a)) established a program that authorizes the Small Business Administration (SBA) to enter into all types of contracts with other agencies and let subcontracts for performing those contracts to firms eligible for program participation. The SBA's subcontractors are referred to as "8(a) contractors."

(b) Contracts may be awarded to the SBA for performance by eligible 8(a) firms on either a sole source or competitive basis.

(c) When, acting under the authority of the program, the SBA certifies to an agency that the SBA is competent and responsible to perform a specific contract, the contracting officer is authorized, in the contracting officer's discretion, to award the contract to the SBA based upon mutually agreeable terms and conditions.

**19.801 Definitions.**

*Local buy requirement,* as used in this subpart, means a supply or service purchased to meet the specific needs of one user in one location.

*National buy requirement,* as used in this subpart, means a supply or service purchased to meet the needs of one or more users in two or more locations where supply control, inventory management, or acquisition responsibility have been assigned to a central contracting activity.

**19.802 Selecting concerns for the 8(a) Program.**

Selecting concerns for the 8(a) Program is the responsibility of the SBA and is based on the criteria established in 13 CFR 124.101-113.

**19.803 Selecting acquisitions for the 8(a) Program.**

Through their cooperative efforts, the SBA and an agency match the agency's requirements with the capabilities of 8(a) concerns to establish a basis for the agency to contract with the SBA under the program. Selection is initiated in one of three ways—

(a) The SBA advises an agency contracting activity through a search letter of an 8(a) firm's capabilities and asks the agency to identify acquisitions to support the firm's business plans. In these instances, the SBA will provide at least the following information in order to enable the agency to match an acquisition to the firm's capabilities.

(1) Identification of the concern and its owners.

(2) Background information on the concern, including any and all information pertaining to the concern's technical ability and capacity to perform.

(3) The firm's present production capacity and related facilities.

(4) The extent to which contracting assistance is needed in the present and the future, described in terms that will enable the agency to relate the concern's plans to present and future agency requirements.

(5) If construction is involved, the request shall also include the following:

(i) The concern's capabilities in and qualifications for accomplishing various categories of maintenance, repair, alteration, and construction work in specific categories such as mechanical, electrical, heating and air conditioning, demolition, building, painting, paving, earth work, waterfront work, and general construction work.

(ii) The concern's capacity in each construction category in terms of estimated dollar value (e.g., electrical, up to $100,000).

(b) The SBA identifies a specific requirement for a particular 8(a) firm or firms and asks the agency contracting activity to offer the acquisition to the 8(a) Program for the firm(s). In these instances, in addition to the information in paragraph (a) of this section, the SBA will provide—

(1) A clear identification of the acquisition sought; e.g., project name or number;

(2) A statement as to how any additional needed facilities will be provided in order to ensure that the firm will be fully capable of satisfying the agency's requirements;

(3) If construction, information as to the bonding capability of the firm(s); and

(4) Either—

(i) If sole source request—

(A) The reasons why the firm is considered suitable for this particular acquisition; e.g., previous contracts for the same or similar supply or service; and

(B) A statement that the firm is eligible in terms of SIC code, business support levels, and business activity targets; or,

(ii) If competitive, a statement that at least two 8(a) firms are considered capable of satisfying the agency's requirements and a statement that the firms are also eligible in terms of the SIC code, business support levels, and business activity targets. If requested by the contracting activity, SBA will identify at least two such firms and provide information concerning the firms' capabilities.

(c) Agencies may also review other proposed acquisitions for the purpose of identifying requirements which may be offered to the SBA. Where agencies independently, or through the self marketing efforts of an 8(a) firm, identify a requirement for the 8(a) Program, they may offer on behalf of a specific 8(a) firm, for the 8(a) Program in general, or for 8(a) competition.

**19.804 Evaluation, offering, and acceptance.**

**19.804-1 Agency evaluation.**

In determining the extent to which a requirement should be offered in support of the 8(a) Program, the agency should evaluate—

(a) Its current and future plans to acquire the specific items or work that 8(a) contractors are seeking to provide, identified in terms of—

(1) Quantities required or the number of construction projects planned; and

(2) Performance or delivery requirements, including required monthly production rates, when applicable.

(b) Its current and future plans to acquire items or work similar in nature and complexity to that specified in the business plan;

(c) Problems encountered in previous acquisitions of the items or work from the 8(a) contractors and/or other contractors;

(d) The impact of any delay in delivery;

(e) Whether the items or work have previously been acquired using small business set-asides; and

(f) Any other pertinent information about known 8(a) contractors, the items, or the work. This includes any information concerning the firms' capabilities. When necessary, the contracting agency shall make an independent review of the factors in 19.803(a) and other aspects of the firms' capabilities which would ensure the satisfactory performance of the requirement being considered for commitment to the 8(a) Program.

**19.804-2 Agency offering.**

(a) After completing its evaluation, the agency shall notify the SBA of the extent of its plans to place 8(a) contracts with the SBA for specific quantities of items or work. The notification must identify the timeframes within which prime contract and subcontract actions must be completed in order for the agency to meet its responsibilities. The notification must also contain the following information applicable to each prospective contract:

(1) A description of the work to be performed or items to be delivered, and a copy of the statement of work, if available.

(2) The estimated period of performance.

(3) The SIC code that applies to the principal nature of the acquisition.

(4) The anticipated dollar value of the requirement, including options, if any.

(5) Any special restrictions or geographical limitations on the requirement (for construction and services include the location of the work to be performed).

(6) Any special capabilities or disciplines needed for contract performance.

(7) The type of contract anticipated.

(8) The acquisition history, if any, of the requirement, including the names and addresses of any small business contractors which have performed this requirement during the previous 24 months.

(9) A statement that no solicitation for this specific acquisition has been issued as a small business set-aside or a small disadvantaged business set-aside, and that no other public communication (such as a notice in the Commerce Business Daily) has been made evidencing the contracting agency's clear intention to set aside the acquisition for small business or small disadvantaged business.

(10) Identification of any particular 8(a) concern designated for consideration, including a brief justification, such as—

(i) The 8(a) concern, through its own efforts, marketed the requirement and caused it to be reserved for the 8(a) Program; or

(ii) The acquisition is a follow-on or renewal contract and the nominated concern is the incumbent.

(11) Bonding requirements, if applicable.

(12) Identification of all known 8(a) concerns which have expressed an interest in this specific requirement as a result of self-marketing, response to sources sought, or publication of advanced acquisition requirements.

(13) Identification of all SBA district or regional offices which have asked for the acquisition for the 8(a) Program.

(14) A recommendation, if appropriate, as to whether the acquisition should be competitive or sole source; and

(15) Any other pertinent and reasonably available data.

(b) An agency offering a local buy requirement should submit it to the SBA Regional Office for the geographical area where the user is located. An agency offering a national buy requirement should submit it to the Office of Program Development, Office of Minority Small Business and Capital Ownership Development, Small Business Administration, 1441 L Street, NW., Washington, DC 20416.

**19.804-3 SBA acceptance.**

(a) Upon receipt of the contracting agency's offer, the SBA will determine whether to accept the requirement for the 8(a) Program. The SBA's decision whether to accept the requirement will be transmitted to the contracting agency in writing within 15 working days of receipt of the offer, unless the SBA requests, and the contracting agency grants, an extension.

(b) If the acquisition is accepted as a sole source, the SBA will advise the contracting activity of the 8(a) firm selected for negotiation. Generally, the SBA will accept a contracting activity's recommended source.

(c) If the acquisition is accepted for competition—(1) as a local buy requirement, the SBA will advise as to which of the SBA districts or regions the competition is restricted and provide the list of the 8(a) firms in those districts or regions which are eligible for the designated SIC code; or (2) as a national buy requirement, the SBA, if requested by the contracting activity, will identify at least two eligible sources and the contracting officer, in coordination with the small business specialist, will augment the source list based on results of the synopsis (see 5.205(e)) and other available information. The SBA will advise of any program participation stage restrictions. The SBA may limit competition to 8(a) concerns in the developmental stage of program participation; may limit competition to 8(a) concerns in the transitional stage; or may permit competition among firms in either stage.

**19.804-4 Repetitive acquisitions.**

In order for repetitive acquisitions to be awarded through the 8(a) Program, there must be separate offers and acceptances. This allows the SBA to revalidate a firm's eligibility, to evaluate the suitability of each acquisition as a competitive 8(a), and to determine whether the requirement should continue under the 8(a) Program.

**19.805 Competitive 8(a).**

**19.805-1 General.**

(a) Except as provided in paragraph (b) of this subsection, an acquisition offered to the SBA under the 8(a) Program shall be awarded on the basis of competition limited to eligible 8(a) firms if—

(1) There is a reasonable expectation that at least two eligible and responsible 8(a) firms will submit offers and that award can be made at a fair market price; and

(2) The anticipated award price of the contract, including options, will exceed $5,000,000 for acquisitions assigned manufacturing standard industrial classification (SIC) codes and $3,000,000 for all other acquisitions.

(b) Where an acquisition exceeds the competitive threshold, the SBA may accept the requirement for a sole source 8(a) award if—

(1) There is not a reasonable expectation that at least two eligible and responsible 8(a) firms will submit offers at a fair market price; or

(2) The SBA determines that an 8(a) concern owned and controlled by an economically disadvantaged Indian tribe is eligible and responsible and needs the acquisition for its business development.

(c) The SBA Association Administrator for Minority Small Business and Capital Ownership Development (AA/MSB&COD) may approve an agency recommendation for a competitive 8(a) award below the competitive thresholds. Such recommendations will be approved only on a limited basis and will be primarily granted where technical competitions are appropriate or where a large number of responsible 8(a) firms are available for competition. In determining whether a recommendation to compete below the threshold will be approved, AA/MSB&COD will, in part, consider the extent to which the requesting agency is supporting the 8(a) Program on a noncompetitive basis. Agency recommendations for competition below the threshold may be included in the offering letter or may be submitted by separate correspondence through the SBA region or headquarters, depending upon whether the acquisition is a local or national buy requirement.

**19.805-2 Procedures.**

(a) Competitive 8(a) acquisitions shall be conducted by contracting agencies by using sealed bids (see Part 14) or competitive proposals (see Part 15).

(b) Offers shall be solicited from those sources identified in accordance with the SBA instructions provided under 19.804-3.

(c) The SBA will determine the eligibility of the firms for award of the contract. Eligibility will be determined by the SBA as of the time of submission of initial offers which include price. Eligibility is based on section 8(a) Program criteria, e.g., whether the firm has the SIC code for the acquisition in its approved business plan, whether the firm is currently a small business under the SIC code, whether the firm is in the developmental or transitional stage (if the acquisition is restricted by stage), whether the firm is in conformance with the 8(a) support limitation set forth in its business plan, and whether the firm is in conformance with its 8(a) business activity targets.

(1) In sealed bid acquisitions, upon receipt of offers, the contracting officer will provide the SBA a copy of the solicitation, the estimated fair market price, and a list of offerors ranked in the order of their standing for award (i.e., first low, second low, etc.) with the total evaluated price for each offer, differentiating between basic requirements and any options. The SBA will consider the eligibility of the first low offeror. If the first low offeror is not determined to be eligible, the SBA will consider the eligibility of the next low offeror until an eligible offeror is identified. The SBA will determine the eligibility of the firms and advise the contracting officer within 5 working days after its receipt of the list of bidders. Once eligibility has been established by the SBA, the successful offeror will be determined by the contracting activity in accordance with normal contracting procedures.

(2) In negotiated acquisition, the SBA will determine eligibility when the successful offeror has been established by the agency and the contract transmitted for signature unless a referral has been made under 19.809, in which case the SBA will determine eligibility at that point.

(d) In any case in which a firm is determined to be ineligible, the SBA will notify the firm of that determination.

(e) The eligibility of an 8(a) firm for a competitive 8(a) award may not be challenged or protested by another 8(a) firm or any other party as part of a solicitation or proposed contract award. Any party with information concerning the eligibility of an 8(a) firm to continue participation in the 8(a) Program may submit such information to the SBA in accordance with 13 CFR 124.111(c).

**19.806 Pricing the 8(a) contract.**

(a) The contracting officer shall price the 8(a) contract in accordance with Subpart 15.8. If required by Subpart 15.8, the SBA shall obtain certified cost or pricing data from the 8(a) contractor. If the SBA requests audit assistance to determine the reasonableness of the proposed price in a sole source acquisition, the contracting activity shall furnish it to the extent it is available.

(b) An 8(a) contract, sole source or competitive, may not be awarded if the price of the contract results in a cost to the contracting agency which exceeds a fair market price.

(c) If requested by the SBA, the contracting officer shall make available the data used to estimate the fair market price.

(d) The negotiated contract price and the estimated fair market price are subject to the concurrence of the SBA. In the event of a disagreement between the contracting officer and the SBA, the SBA may appeal in accordance with 19.810.

**19.807 Estimating fair market price.**

(a) The contracting officer shall estimate the fair market price of the work to be performed by the 8(a) contractor.

(b) In estimating the fair market price for an acquisition other than those covered in paragraph (c) of this section, the contracting officer shall use cost or price analysis and consider commercial prices for similar products and services, available in-house cost estimates, data (including cost or pricing data) submitted by the SBA or the 8(a) contractor, and data obtained from any other Government agency.

(c) In estimating a fair market price for a repeat purchase, the contracting officer shall consider recent award prices for the same items or work if there is comparability in quantities, conditions, terms, and performance times. The estimated price should be adjusted to reflect differences in specifications, plans, transportation costs, packaging and packing costs, and other circumstances. Price indices may be used as guides to determine the changes in labor and material costs. Comparison of commercial prices for similar items may also be used.

**19.808 Contract negotiation.**

**19.808-1 Sole source.**

(a) The SBA is responsible for initiating negotiations with the agency within the time established by the agency. If the SBA does not initiate negotiations within the agreed time and the agency cannot allow additional time, the agency may, after notifying the SBA, proceed with the acquisition from other sources.

(b) The 8(a) contractor should participate, whenever practicable, in negotiating the contract terms. When mutually agreeable, the SBA may authorize the contracting activity to negotiate directly with the 8(a) contractor. Whether or not direct negotiations take place, the SBA is responsible for approving the resulting contract before award and determining whether the 8(a) contractor shall be required to provide a performance bond.

**19.808-2 Competitive.**

In competitive 8(a) acquisitions subject to Part 15, the contracting officer conducts negotiations directly with the competing 8(a) firms.

**19.809 Preaward considerations.**

The contracting officer should request a preaward survey of the 8(a) contractor whenever considered useful. If the results of the preaward survey or other information available to the contracting officer raise substantial doubt as to the firm's ability to perform, the contracting officer should refer the matter to the SBA for its consideration in deciding whether SBA should certify that it is competent and responsible to perform. This is not a referral for Certificate of Competency consideration under Subpart 19.6. Within 15 working days of the receipt of the referral or a longer period agreed to by the SBA and the contracting activity, the SBA Assistant Regional Administrator for Minority Small Business and Capital Ownership Development in the regional office which services the 8(a) firm will advise the contracting officer as to the SBA's willingness to certify its competency to perform the contract using the 8(a) concern in question as its subcontractor. The contracting officer shall proceed with the acquisition and award the contract to another appropriately selected 8(a) offeror if the SBA has not certified its competency within 15 working days (or a longer mutually agreeable period.)

**19.810 SBA appeals.**

(a) The following matters may be submitted by the SBA Administrator for determination to the agency head if the SBA and the contracting officer fail to agree on them:

(1) The decision not to make a particular acquisition available for award under the 8(a) Program.

(2) The terms and conditions of a particular sole source acquisition to be awarded under the 8(a) Program.

(3) The estimated fair market price.

(b) Notification of a proposed referral to the agency head by the SBA must be received by the contracting officer within 5 working days after the SBA is formally notified of the contracting officer's decision. The SBA shall provide the agency Director for Small and Disadvantaged Business Utilization a copy of this notification. The SBA must provide the request for determination to the agency head within 20 working days of the SBA's receipt of the adverse decision. Pending issuance of a decision by the agency head, the contracting officer shall suspend action on the acquisition. Action on the acquisition need not be suspended if the contracting officer makes a written determination that urgent and compelling circumstances which significantly affect the interests of the United States will not permit waiting for a decision.

(c) If the SBA appeal is denied, the decision of the agency head shall specify the reasons for the denial, including the reasons why the selected firm was determined incapable of performance, if appropriate. The decision shall be made a part of the contract file.

**19.811 Preparing the contracts.**

**19.811-1 Sole source.**

(a) The contract to be awarded by the agency to the SBA shall be prepared in accordance with agency procedures and in the same detail as would be required in a contract with a business concern. The contracting officer shall use the Standard Form 26 as the award form, except for construction contracts, in which case the Standard Form 1442 shall be used as required in 36.701(b).

(b) The agency shall prepare the contract that the SBA will award to the 8(a) contractor in accordance with agency procedures, as if the agency were awarding the contract directly to the 8(a) contractor, except for the following.

(1) The award form shall cite 41 U.S.C. 253(c)(5) or 10 U.S.C. 2304(c)(5) (as appropriate) as the authority for use of other than full and open competition.

(2) Appropriate clauses shall be included, as necessary, to reflect that the contract is between the SBA and the 8(a) contractor.

(3) The following items shall be inserted by the SBA—

(i) The SBA contract number.

(ii) The effective date.

(iii) The typed name of the SBA's contracting officer.

(iv) The signature of the SBA's contracting officer.

(v) The date signed.

(4) The SBA will obtain the signature of the 8(a) contractor prior to signing and returning the prime contract to the contracting officer for signature. The SBA will make every effort to obtain signatures and return the contract, and any subsequent bilateral modification, to the contracting officer within a maximum of 10 working days.

(5) If the contract is for construction work, it shall include requirements of the Miller Act with respect to performance and payment bonds (see part 28).

(c) Except in procurements where the SBA will make advance payments to its 8(a) contractor, the agency contracting officer may, as an alternative to the procedures in 19.811-1(a) and (b), use a single contract document for both the prime contract between the agency and the SBA and its 8(a) contractor. The single contract document shall contain the information in 19.811-1(b) (1), (2), (3), and (5). Appropriate blocks on the Standard Form (SF) 26 or 1442 will be asterisked and a continuation sheet appended which includes the following:

(1) Agency acquisition office, prime contract number, name of agency contracting officer and lines for signature, date signed, and effective date.

(2) The SBA office, the SBA contract number, name of the SBA contracting officer, and lines for signature and date signed.

(3) Name and lines for the 8(a) contractor's signature and date signed.

(d) Prior to award of contract actions in excess of $100,000, the SBA shall provide the contracting activity with the competing contractor certifications required by 3.104-9 from its 8(a) contractor. The contracting activity's contracting officer shall maintain the list required by 3.104-9 and complete the contracting officer certification.

**19.811-2 Competitive.**

(a) The contract will be prepared in accordance with 14.407-1(d), except that appropriate blocks on the Standard Form 26 or 1442 will be asterisked and a continuation sheet appended which includes the following:

(1) The agency contracting activity, prime contract number, name of agency contracting officer, and lines for

signature, date signed, and effective date.

(2) The SBA office, the SBA subcontract number, name of the SBA contracting officer and lines for signature and date signed.

(b) For contract actions in excess of $100,000, the contracting activity's contracting officer shall obtain the competing contractor certifications as required by 3.104–9 directly from the 8(a) firm(s). The contracting activity's contracting officer shall maintain the list required by 3.104–9 and complete the contracting officer certification.

(c) The process for obtaining signatures shall be as specified in 19.811–1(b)(4).

**19.811–3 Contract clauses.**

(a) The contracting officer shall insert the clause at 52.219–11, Special 8(a) Contract Conditions, in contracts between the SBA and the agency when the acquisition is accomplished using the procedures of 19.811–1(a) and (b).

(b) The contracting officer shall insert the clause at 52.219–12, Special 8(a) Subcontract Conditions, in contracts between the SBA and its 8(a) contractor when the acquisition is accomplished using the procedures of 19.811–1 (a) and (b).

(c) The contracting officer shall insert the clause at 52.219–17, Section 8(a) Award, in competitive solicitations and contracts when the acquisition is accomplished using the procedures of 19.805 and in sole source awards which utilize the alternative procedure in 19.811–1(c).

(d) The contracting officer shall insert the clause at 52.219–18, Notification of Competition Limited to Eligible 8(a) Concerns, in competitive solicitations and contracts when the acquisition is accomplished using the procedures of 19.805.

(1) The clause at 52.219–18 with its Alternate I will be used when competition is to be limited to 8(a) concerns within one or more specific SBA districts/regions pursuant to 19.804–3.

(2) The clause at 52.219–18 with its Alternate II will be used when competition is to be limited to 8(a) concerns within a specific stage of 8(a) Program participation (i.e., developmental or transitional) pursuant to 19.804–3.

(e) the contracting officer shall insert the clause at 52.219–14, Limitations or Subcontracting, in any solicitation and contract resulting from this subpart.

**19.812 Contract administration.**

(a) The contracting officer shall assign contract administration functions, as required, based on the location of the 8(a) contractor (see DoD Directory of Contract Administration Services Components (DoD 4105.59–H)).

(b) The agency shall distribute copies of the contract(s) in accordance with Part 4. All contracts and modifications, if any, shall be distributed to both the SBA and the firm in accordance with the timeframes set forth in 4.201.

(c) To the extent consistent with the contracting activity's capability and resources, 8(a) contractors furnishing requirements shall be afforded production and technical assistance, including, when appropriate, identification of causes of deficiencies in their products and suggested corrective action to make such products acceptable.

## PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

8. Section 52.219–11 is amended by revising the introductory text; by removing in the title of the clause the date "(APR 1984)" and inserting in its place "(OCT 1989)"; by removing the words "Delegates to the . . . " and inserting "Except for novation agreements and advance payments, delegates to the . . ." in paragraph (c) of the clause; and by removing the derivation line following "(End of clause)" to read as follows:

**52.219–11 Special 8(a) Contract Conditions.**

As prescribed in 19.811–3(a), insert the following clause:

* * * * *

9. Section 52.219–12 is amended by revising the introductory text; by removing in the title of the clause the date "(APR 1984)" and inserting in its place "(OCT 1989)"; by revising paragraph (b)(2) of the clause; by removing the derivation line following "(End of clause)"; and by removing Alternate I to read as follows:

**52.219–12 Special 8(a) Subcontract Conditions.**

As prescribed in 19.811–3(b), insert the following clause:

* * * * *

(b)(2) That the SBA has delegated responsibility, except for novation agreements and advance payments, for the administration of this subcontract to the ..... [*insert name of contracting agency*] with complete authority to take any action on behalf of the Government under the terms and conditions of this contract.

* * * * *

10. Section 52.219–17 is added to read as follows:

**52.219–17 Section 8(a) Award.**

As prescribed in 19.811–3(c), insert the following clause:

**Section 8(a) Award (Oct 1989)**

(a) By execution of a contract, the Small Business Administration (SBA) agrees to the following:

(1) To furnish the supplies or services set forth in the contract according to the specifications and the terms and conditions by subcontracting with the Offeror who has been determined an eligible concern pursuant to the provisions of section 8(a) of the Small Business Act, as amended (15 U.S.C. 637(a)).

(2) Except for novation agreements and advance payments, delegates to the ..... (*insert name of contracting activity*) the responsibility for administering the contract with complete authority to take any action on behalf of the Government under the terms and conditions of the contract; *provided, however* that the contracting agency shall give advance notice to the SBA before it issues a final notice terminating the right of the subcontractor to proceed with further performance, either in whole or in part, under the contract.

(3) That payments to be made under the contract will be made directly to the subcontractor by the contracting activity.

(b) The offeror/subcontractor agrees and acknowledges that it will, for and on behalf of the SBA, fulfill and perform all of the requirements of the contract.

(End of clause)

11. Section 52.219–18 is added to read as follows:

**52.219–18 Notification of Competition Limited to Eligible 8(a) Concerns.**

As prescribed in 19.811–3(d), insert the following clause:

**NOTIFICATION OF COMPETITION LIMITED TO ELIGIBLE 8(A) CONCERNS (OCT 1989)**

(a) Offers are solicited only from small business concerns expressly certified by the Small Business Administration (SBA) for participation in the SBA's 8(a) Program and which meet the following criteria at the time of submission of offer—

(1) SIC code _____*_____ is specifically included in the Offeror's approved business plan;

(2) The Offeror is in conformance with the 8(a) support limitation set forth in its approved business plan; and

(3) The Offeror is in conformance with the Business Activity Targets set forth in its approved business plan or any remedial action directed by the SBA.

(b) By submission of its offer, the Offeror certifies that it meets all of the criteria set forth in paragraph (a) of this clause.

(c) Any award resulting from this solicitation will be made to the Small Business Administration, which will subcontract performance to the successful 8(a) offeror selected through the evaluation criteria set forth in this solicitation.

(d) *Agreement.* A manufacturer or regular dealer submitting an offer in its own name

agrees to furnish, in performing the contract, only end items manufactured or produced by small business concerns inside the United States, its territories or possessions, the Commonwealth of Puerto Rico, or the Trust Territory of the Pacific Islands. However, this requirement does not apply in connection with construction or service contracts.

(End of clause)

(*Insert SIC code assigned to the acquisition by the contracting activity.)

*Alternate I* (OCT 1989). If the competition is to be limited to 8(a) concerns within one or more specific SBA regions or districts, add the following subparagraph (a)(4) to paragraph (a) of the clause:

(4) The offeror's approved business plan is on the file and serviced by _____* _____ (**Contracting Officer completes by inserting the appropriate SBA District and/or Regional Office(s) as identified by the SBA*).

*Alternate II* (OCT 1989). If the competition is to be limited to 8(a) concerns within a particular program participation stage, add the following subparagraph (a)(4) to paragraph (a) of the clause. When used in conjunction with Alternate I, this subparagraph should be renumbered (a)(5).

(4) The offeror is in the _____ *_____ stage of 8(a) Program participation. (**Contracting Officer completes by inserting the appropriate stage of participation as identified by SBA (i.e., developmental or transitional).)*

*Alternate III* (OCT 1989). When the acquisition is for a product in a class for which the Small Business Administration has determined that there are not small business manufacturers in the Federal market in accordance with 19.502(b), substitute the following paragraph (d) for paragraph (d) of the basic clause:

(d) *Agreement.* A regular dealer submitting an offer in its own name agrees to furnish, in performing the contract, only end items manufactured or produced in the United States, its territories or possessions, the Commonwealth of Puerto Rico, or the Trust Territory of the Pacific Islands.

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Part V

# Environmental Protection Agency

**Superfund Response Action Contractor Indemnification; Proposed Policy; Request for Public Comment**

## ENVIRONMENTAL PROTECTION AGENCY

[FRL-3566-3]

## Superfund Response Action Contractor Indemnification

**AGENCY:** Environmental Protection Agency.

**ACTION:** Proposed policy; request for public comment.

**SUMMARY:** The Environmental Protection Agency (EPA) is issuing a proposed guidance document to implement section 119 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended by the Superfund Amendments and Reauthorization Act of 1986 (42 U.S.C. 9619). Section 119 provides the President with discretionary authority to indemnify response action contractors (RACs) for negligent releases arising out of response action activities at sites on the National Priorities List (NPL) and removal action sites, and to indemnify certain other persons as provided expressly by statute. As delegated by the President, EPA may extend indemnification to RACs working at NPL or removal action sites for EPA, states (or a political subdivision), and potentially responsible parties (PRPs). EPA is publishing the proposed section 119 guidance document to solicit public comments.

**DATES:** Comments must be submitted on or before January 2, 1990.

**ADDRESSES:** An original and two copies of comments must be sent to Tom Gillis, U.S. Environmental Protection Agency, OS-510, 401 M Street SW., Washington, DC 20460.

**FOR FURTHER INFORMATION CONTACT:** Tom Gillis, 202-475-6771.

**SUPPLEMENTARY INFORMATION:** Pursuant to section 119 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), 42 U.S.C. 9619, (CERCLA), and E.O. 12580, the Environmental Protection Agency (EPA) is proposing guidelines to implement EPA's discretionary authority to indemnify Response Action Contractors (RACs) for negligent releases arising from response action activities conducted under CERCLA.

### 1.0 Background

This background section describes the pollution liability insurance availability problem that contributed to the impetus for enactment of section 119. Section 119 is summarized, and EPA interim guidance which has implemented section 119 since date of enactment of SARA is summarized. Sections two and three of this document outline the four general policy approaches considered by EPA, and the policy proposed in this Notice.

#### *1.1 Background Information on the Pollution Liability Insurance Problem*

The perceived need for EPA indemnification of Superfund RACs arose from the contractors' inability to purchase adequate and affordable pollution liability insurance. During the past few years, the Property & Casualty (P&C) insurance industry has been generally unwilling, with a few exceptions, to provide affordable and adequate pollution liability insurance coverage to businesses engaged in hazardous waste management or that have a potential for pollution liability. In addition to pollution liability, several other insurance lines have experienced similar availability and affordability problems during the recent restricted insurance market. For example, entities seeking coverage for directors' and officers' liability, municipal liability, professional liability, product liability, daycare liability, excess liability, etc., have experienced availability, affordability, and adequacy problems in the last four years.

The availability, affordability, and adequacy of commercial liability insurance is affected directly by internal and external economic forces that influence the P&C insurance industry. The P&C market, like other markets, is subject to business cycles. The business cycle in the insurance industry is known as the underwriting cycle. The P&C underwriting cycle behaved fairly predictably until the mid 1980s, with a normal cyclic duration of approximately six years. During the late 1970s and early 1980s, however, the U.S. economy experienced unprecedented high interest rates, altering the behavior of the underwriting cycle. The commercial liability insurance shortage that began in late 1984 was caused primarily by the high interest rates of the late 1970s and early 1980s.

From 1978 to 1983, many P&C insurers experienced record profits derived primarily from investment income. Insurers' profits arise from two sources: underwriting income and investment income. Underwriting income is the difference between premiums collected and claims paid by insurers. Investment income arises when insurers invest premium dollars prior to the payment of future claims. In response to the high interest rates of this period, many insurers abandoned traditional underwriting practices and instead relied more on investment income from increasing premium volume. During this period, insurance rates in many of the long-tail commercial liability insurance lines (i.e., insurance lines in which underwriting losses are expected many years after premiums are collected) did not adequately reflect the insured's loss potential, because of the insurer's practice of cashflow underwriting (that is, underwriting to maximize premium volume rather than underwriting income). Primary insurers and reinsures, competing for limited premium dollars, reduced insurance rates in many commercial liability insurance lines in order to increase their premium volume (i.e., cash flow). Insurers sought increased premium volume to increase their investment income, by investing premiums at high interest rates.

While they were practicing cashflow underwriting, many insurers experienced increasing insurance capacity (i.e., the financial ability to write insurance). This increased capacity was provided primarily by capital investors during the early eighties, and caused even further competition between insurers, resulting in further reductions in premium rates for insurance. The reduced rates and lax underwriting practices eventually led to record pretax underwriting losses in 1984 and 1985 ($21.5 and $24.7 billion respectively) for the P&C insurance industry.

Record P&C industry underwriting losses in 1984 and 1985, and withdrawal of the world reinsurance industry from perceived high risk liability lines, were the primary causes of the insurance capacity shortage in many different commercial liability insurance lines. When their financial capacity is limited, P&C insurers tend to withdraw from high risk liability lines (for example, pollution liability) and save their limited financial capacity for more traditionally profitable (and predictable) insurance lines. P&C insurers that perceived pollution liability insurance to be a high risk insurance line abandoned the pollution liability insurance market in 1984 and generally incorporated broad pollution exclusions into all commercial insurance lines. Even though the P&C insurance industry had become more stable by 1987, the market for pollution liability insurance has remained very limited.

In addition to the reasons cited above, insurers contend that several other problems have exacerbated the decline of the pollution liability insurance market. In October, 1985, an All-Industry

Research Advisory Council (AIRAC) report ("Pollution Liability: The Evolution of a Difficult Insurance Market") indicated that the pollution liability insurance market has declined because of the following developments:

- Some provisions and interpretations of Federal pollution laws make it difficult for the insurance mechanism to work. State pollution laws create similar difficulties in a few instances.
- Courts in key jurisdictions have imposed retroactive liabilities on insurers for pollution damages and cleanup costs that were never intended to be covered. Insurers are concerned that the courts will not respect the intent of future pollution contracts, no matter what language they use to describe the terms and limitations.
- The reinsurance market for gradual pollution insurance has virtually disappeared because of adverse loss experience and concerns over legal trends in the U.S.
- Demand for gradual pollution insurance has been confined mostly to entities with a high probability of sustaining large losses, causing problems for insurers in developing enough insurance capacity to handle the catastrophic risks involved. Insurers have yet to see the kind of broad demand that would be enable them to build and sustain a robust market for the coverage.
- The pollution hazard has turned out to be much more complex and expensive to underwrite than anticipated. Gearing up to underwrite this liability risk requires major commitments of time, dollars, as well as specialized expertise which typically is not available.

The problems of cashflow underwriting and those raised by the AIRAC combined to create a situation where reasonably priced pollution liability insurance was generally unavailable, and, for some contractors, unavailable at any price. Today, limited (although expensive) insurance coverage is available for most contractors at most sites.

*1.2 Pre-1986 Indemnification of Superfund RACS*

RACs have traditionally relied upon commercial liability insurance to offset their potential liability stemming from participation in the Superfund program. In addition, prior to the enactment of SARA, EPA provided indemnification to EPA RACs involved in the Superfund cleanup program (see 48 CFR 1528.3). Such indemnification was intended to be a supplement to commercially provided liability insurance. EPA's pre-SARA indemnification covered third party liability and cleanup costs not otherwise covered by commercial liability insurance or self-insurance, except for cases involving gross negligence or willful misconduct, and was based upon EPA's inherent contract authority (the contractor was required to maintain at least $1 million of comprehensive general liability coverage which, by 1986, generally excluded all pollution liability coverage). The RAC community viewed this EPA indemnification as inadequate because:

(1) EPA lacked explicit statutory authority to indemnify RACs;

(2) No source of indemnification funding was identified by statute; therefore indemnification was subject to availability of funds in the EPA budget; and

(3) The scope of coverage of EPA indemnification was inadequate (for example, EPA's indemnification extended only to RACs employed by EPA, and not to RACs employed by other parties such as other federal agencies, potentially responsible parties, and states).

During the Superfund reauthorization, the RAC community sought explicit indemnification assistance from Congress. They contended that their ability to participate in the Superfund cleanup program was impaired because the commercial insurance market was no longer willing to provide them affordable liability insurance coverage, and existing EPA indemnification was not an adequate substitute for commercial pollution liability insurance. They contended that the unavailability of pollution liability insurance for RACs may cause prudent qualified RACs to withdraw from the Superfund cleanup program.[1] In response to this concern, Congress incorporated section 119 into CERCLA to mitigate the potential withdrawal of qualified RACs from the Superfund program and to prevent delays and quality reductions in Superfund site cleanups.

*1.3 Section 119*

Section 119 of CERCLA addresses many of the concerns raised by the RAC community during the Superfund reauthorization debate. Section 119 includes the following major provisions:

- Exempts RACs from liability under all Federal laws for injuries, costs, damages, expenses, or other liability with respect to any release or threatened release of a hazardous substance or pollutant or contaminant from a vessel or facility except in cases of negligence, gross negligence, or intentional misconduct (i.e., no strict liability under Federal law).
- Provides EPA and other Federal agencies with discretionary authority to indemnify RACs who meet the requirements of section 119 against liability for releases arising out of the RAC's negligent performance in carrying out response activities unless such liability was caused by conduct of the contractor which was grossly negligent or which constituted intentional misconduct.
- Authorizes indemnification of RACs working for EPA, other Federal agencies, a state or political subdivision under a contract or cooperative agreement, or any potentially responsible party (PRP) carrying out an agreement under section 106 or section 122 of CERCLA.
- Indemnification can be provided only:

—For liability related to releases of hazardous substances or pollutants or contaminants as a result of RAC activities conducted under the Superfund program.

—When a RAC has made a diligent effort to obtain insurance from non-federal sources and has found that it is unavailable, inadequate, or unreasonably priced.

—As a comparable supplement or substitute for commercial insurance, to include deductibles and limits of indemnity, for adequate insurance when such insurance is either unavailable, insufficient, or unreasonably priced.

—As a comparable supplement or substitute for commercial insurance, to include deductibles and limits of indemnity, for adequate indemnification of RACs by PRPs, when such indemnification, as determined by EPA, is either unavailable or insufficient.

- Indemnification cannot be provided to owners or operators of facilities regulated under the Resource Conservation and Recovery Act (RCRA).
- Indemnification payments will be made from the Hazardous Substance Superfund (the Fund). If sufficient funds are unavailable from the Fund, or if the Fund is repealed, authorization is provided for such amounts to be appropriated as may be necessary to make such payments.
- Amounts expended under section 119 are considered governmental response costs for purposes of cost recovery.

[1] For example, see Poirot, James W., Chairman CH2M Hill, Testimony before the Committee on Environment and Public Works, U.S. Senate, April 3, 1985, pg. 212.

• Indemnification claim payments are exempted from the Anti-Deficiency Act.

• Payment of a claim under section 119 indemnification agreements for an RAC working for a PRP may be made only if the RAC exhausts all administrative, judicial, and common law claims for indemnification against PRPs participating in the response.

Section 119 is a discretionary temporary vehicle by which EPA and other Federal agencies can provide indemnification to RACs participating in the Superfund program if market conditions indicate the need for such indemnification.

*1.4 Section 119 Indemnification Objectives*

EPA's primary goal in the Superfund program is to protect human health and the environment by expeditiously and effectively cleaning up the maximum possible number of NPL and removal sites. To meet this primary EPA objective, Congress enacted section 119 to assure that qualified RACs would be available to keep the Superfund program operative during the commercial liability insurance crisis of the mid-eighties. EPA indemnification of Superfund program RACs under the authority of section 119 was clearly intended as an interim vehicle to assure that the Superfund program remained operative until the commercial liability insurance crisis of the mideighties was resolved. A review of the legislative history of SARA indicates that section 119 indemnification was never intended to be a permanent government solution or a complete risk transfer mechanism for RAC liability risk. For example, the Judiciary Committee of the House of Representatives in its Report on Superfund Amendments of 1985 states:

> The indemnification authority provided by this section may be offered in the discretion of the Administrator (EPA). The Committee strongly believes that such authority should be discretionary because:
>
> • Discretionary indemnification allows EPA to provide an interim solution to the lack of insurance until the insurance community restores financial stability and is capable and willing to provide prospective insurance for these contractors.
>
> • Discretionary indemnification, as opposed to mandatory indemnification, does not create a disincentive for insurers to provide prospective insurance by establishing the equivalent of a Federally intrusive insurance program.
>
> • Discretionary indemnification allows EPA to provide Federal indemnification with appropriate limits (i.e., to provide it in amounts equivalent to, but not in excess of, adequate insurance coverage; to include deductibles; to set limits of coverage; to require payment by contractors of a premium for indemnification coverage; and/or to offer it only as a supplement to available insurance, if available insurance is not adequate).[2]

The legislative history of section 119 reflects several objectives for section 119 indemnification:

• Provide RACs with a temporary comparable substitute for commercial pollution insurance, in the absence of affordable and adequate commercial insurance coverage or other viable private sector risk transfer mechanisms;

• Encourage the P&C insurance industry to provide RACs with adequate and affordable pollution insurance products;

• Encourage the development of other private sector mechanisms that provide RACs with adequate and affordable prospective pollution risk transfer mechanisms;

• Maintain EPA's fiduciary responsibility to ensure that Superfund monies are used to clean up sites to the maximum extent possible;

• Assure that an adequate pool of qualified RACs will be available to keep the Superfund program operative at SARA funding levels;

• Maintain strong RAC incentive to prevent and reduce RAC induced release incidents throughout a given Superfund response action contract; and

• Maintain strong RAC incentive to continue to seek commercial insurance coverages and/or develop alternative risk transfer mechanisms

EPA specifically incorporated those objectives into the development of section 119 guidelines.

*1.5 EPA Interim Section 119 Indemnification Policy*

Because of the complexity of section 119 indemnification issues, EPA has proceeded deliberately in implementing section 119. During this period from enactment of SARA on October 17, 1986, to issuance of final section 119 guidelines, EPA has provided and will continue to provide RACs with section 119 indemnification on an interim basis, using procedures outlined in its "Interim Guidance on Indemnification of Superfund Response Action Contractors Under section 119 of SARA" (OSWER Directive # 9835.5), which was issued on October 6, 1987. The Interim Guidance contains general policy guidelines, procedural guidance for EPA's contracting officers, and model indemnification agreements to be used with various classes of contractors. Interim section 119 guidelines and contract modifications were necessary to keep the Superfund program operative during the period when EPA analyzed the complex RAC indemnification issue, proposed, and finalized section 119 guidelines. An interim guideline approach, consistent with section 119 requirements, allowed EPA to comprehensively study the entire indemnification subject and to subject this proposal to public review, while the Superfund program remained operative. Ultimately, the interim guidance indemnification coverage offered by EPA to RACs will be amended to reflect the final guidelines.

In summary, the interim section 119 guidance was intended to provide a temporary indemnification policy, to be replaced in its entirety by policy reflected in more detailed guidelines, subject to public review and comment before finalization. The policy guidelines which are the subject of today's proposal, when released in final form, will supplant completely, not simply amend, the policy reflected in OSWER Directive 9835.5.

**2.0 Proposed EPA Section 119 Indemnification Policy: Discussion of Alternative Approaches Considered**

*2.1 Alternatives Considered*

EPA considered four broad options during development of the proposed indemnification policy. This section presents those four broad policy options, along with pro/con arguments for each.

The four options are:

A. No indemnification;

B. Provide indemnification subject to statutory requirements;

C. Offer indemnification with market incentives to purchase commercial insurance;

D. Provide reinsurance for a commercial insurance pool.

A. Provide No Indemnification

*Summary.* EPA's use of Option A would be based on the conclusion that indemnification of Superfund RACs may be neither appropriate nor necessary. EPA's goal in the Superfund program is to protect human health and the environment by expeditiously and effectively cleaning up the maximum number of NPL sites possible and conducting removal activities. In order to achieve this goal, EPA must expend its limited funding in areas most likely to yield cleanups. Under Option A, EPA would not agree to indemnify RACs, and thus would not commit itself to use the Superfund to fund contingent liabilities.

*Arguments in Favor of Option A.* The prime goal of the Superfund program is to protect human health and the

[2] See Judiciary Committee of the House of Representatives Superfund Amendments Report of 1985, pg. 28.

environment by cleaning up hazardous waste sites and conducting removal actions. This goal must be accomplished by EPA (and states) with a limited amount of funding. As in any other government program, EPA must make choices as to where funds should be best expended in order to achieve its ultimate purpose. Funds unnecessarily expended in one area of the program detract from other areas of the program that could be improved with an infusion of funding. Therefore, EPA must choose whether section 119 indemnification is a necessary expense vital to the continued functioning of the Superfund program, or an expenditure of funds that could be put to better use in an area of the program that would more directly contribute to site cleanups.

Section 119 was included in SARA in part to address concerns that, without a viable risk transfer mechanism, RACs would not participate in the Superfund program. At that time, adequate and reasonably priced pollution liability insurance was not available to RACs. The section 119 legislative history indicates clearly that section 119 indemnification was to serve as a temporary risk transfer mechanism to ensure that the Superfund program was not delayed due to the unwillingness of qualified RACs to perform response actions. The House of Representatives Judiciary Committee Report (1985) states:

> Finally by simply authorizing EPA to provide indemnification, the Committee intends to allow for flexibility if regular market-place forces lead to the availability of insurance for response action contractors in the future. In this event, EPA should not agree to provide indemnification. [House of Representatives Report # 99–263, page 29]

EPA's experience during the past few years indicates that it is likely that Superfund sites will continue to be cleaned up and no program delays will result if EPA declines to provide indemnification to RACs. Although the failure to indemnify RACs could result in the withdrawal of some RACs from the market, it is likely that enough qualified RACs will remain available to perform Superfund program response actions so that the cleanup of sites will not be delayed.

Since the enactment of SARA, EPA has consulted other federal agencies that employ RACs to perform response actions at NPL sites. Through a series of informal consultations, EPA has found no other Federal agency, including the Department of Defense and the Department of Energy, that offers section 119 indemnification to Superfund RACs. RACs face similar risks performing response actions at NPL sites regardless of the Federal agency for which they are performing work. If RACs do not require Federal indemnification to perform essentially the same tasks for other Federal agencies, then they may not require indemnification to perform these tasks for EPA.

EPA has also informally consulted a number of states that employ RACs to perform response actions. In October 1988, EPA contacted all fifty states to determine the effect of state indemnification of RACs, or lack of state indemnification of RACs, on the states' ability to retain RACs. The informal survey indicated that eight states have statutory authority to indemnify RACs, while 13 states may require the RAC to indemnify the state. Five of those 13 states indicated that they had "some difficulty" procuring qualified RACs, and two of the 29 states that neither indemnify RACs nor require RAC indemnification of the state had "some difficulty" procuring qualified RACs. In general, the states were able to retain a sufficient number of qualified contractors to ensure the continued operation of their cleanup programs.

One might well conclude that, if RACs are willing to perform essentially the same response action activities for states without indemnification (and even in some cases indemnifying the state), then EPA should be able to obtain an adequate number of qualified RACs without Federal indemnification. Taking into consideration both EPA's limited resources and the experience of other Federal agencies and states, one must question whether indemnification is prerequisite to Superfund cleanups, and whether indemnification represents a judicious allocation of scarce financial resources.

*Arguments Against Option A.* If the commercial pollution liability insurance market does not fill any potential gap in coverage for Superfund RACs, then, absent EPA indemnification, these RACs could be left without an adequate risk transfer mechanism. If RACs do not possess such a risk transfer mechanism for their work in the Superfund program, it is possible that they may decide that the risks of performing Superfund response work outweigh any potential profits, and then may discontinue their participation in the program. The lack of an adequate number of qualified RACs to perform response actions could result in program delays for EPA.

A lack of indemnification or other viable risk transfer mechanisms could change the nature of competition in the RAC industry. The lack of an adequate risk transfer mechanism for RACs (either commercial pollution liability insurance or indemnification) may create a climate where many smaller, local firms are unwilling, or financially unable, to compete with larger companies. As a result, competition within the RAC industry may be decreased, causing an increase in the cost of response action work. A failure to offer indemnification could result in EPA being faced with a limited number of large RACs with the resources to self-insure who could demand a higher price for their services. More costly cleanups would result in fewer cleanups being performed given EPA's limited resources.

Alternatively, the absence of EPA indemnification may have just the opposite negative effect on competition in the RAC industry. EPA may be faced with a situation where only small RACs with few assets will be willing to perform response actions in the absence of commercial pollution liability insurance and indemnification. If such a small company with few assets and no risk transfer mechanisms were responsible for an injury to a third party, that third party would most likely be uncompensated for their injuries. While the section 119 indemnification program is not a victim's compensation program, public policy should not generally favor creating a situation which is likely to result in uncompensated injuries to third parties.

Another risk EPA faces if it does not offer indemnification is the possibility of subjecting the Superfund program to the uncertainties of the underwriting cycle. If section 119 indemnification is not available, it is uncertain how the commercial pollution liability insurance market would react to another hard swing in the P&C underwriting cycle. Commercial pollution liability insurance has become available from a small number of insurers in 1988 and 1989. This corresponds with a general softening of the P&C insurance market. Due to the predictably cyclical nature of the P&C industry, it is likely that another hard P&C insurance market will ensue in the next two to five years. If events transpire as they did during the last hard market, commercial P&C insurers may once again abandon perceived high risk lines such as pollution liability for Superfund RACs. If no alternative risk transfer mechanism such as section 119 indemnification is available, RACs may not wish to participate in the Superfund program. This situation could result in disruptive program delays for EPA's Superfund program.

Even if an absence of indemnification led to no reductions in the willingness of RACs to participate in the Superfund

program, it is possible that some RACs would be unable to continue to participate due to an unavailability of performance bonds. Most construction contractors are required to post a performance bond at the time that a bid is submitted. Sureties may be concerned that a contractor with no insurance coverage poses too great a risk; that is, without adequate liability insurance, a third party claim may bankrupt the contractor, leaving the surety responsible for completing the cleanup. Thus, it is possible that sureties may be unwilling to provide surety bonds if, in the opinion of the surety, adequate insurance and/or indemnification is not available to the contractor. Consequently, EPA indemnification may be necessary to ensure adequate competition on sealed bid construction contracts.

Finally, if EPA were unwilling to offer indemnification, EPA would almost certainly be required to expend additional funds. Most of EPA's Superfund contracts are cost-reimbursement contracts. Under such contracts, the reasonable costs of performing work assignments are reimbursed by EPA. If EPA does not indemnify its response contractors, then the RACs will be compelled to obtain insurance (or self-insure), the cost of which would be paid by EPA (as long as the cost is reasonable, as defined by the Federal Acquisition Regulations). A "reasonable" cost for insurance or self-insurance could be defined as the market price for insurance. It is entirely possible that the market price (i.e., premium) for insurance could exceed the present value of future claims, the risk of which are offset by the premium. Those Superfund dollars in excess of the expected present value of future claims which are expended on the purchase of liability insurance are resources that will not be available to clean up sites (except insofar as those costs are recovered from Responsible Parties).

In contrast, contractor indemnification may continue to reflect current claims history and generate few costs. Since the start of the Superfund program, EPA has included indemnification agreements in dozens of contracts, and those contractors have passed through the indemnification agreement to hundreds of subcontractors. As of September 15, 1989, EPA has been presented pollution liability claims totalling approximately $8,000, while saving millions of dollars by not having to reimburse contractors for the cost of pollution liability insurance (or self-insurance). While an indemnification program is unlikely to remain virtually costless forever, indemnifying RACs may save substantial Fund resources.

B. Provide Section 119 Indemnification Subject to Statutory Requirements When Adequate Insurance Is Not Available

*Summary.* Under this option, EPA would offer section 119 indemnification subject to statutory requirements. Implementation of this option would be based on the conclusion that, although it is likely that an EPA decision not to offer indemnification will not cause program delays, at this time EPA may not want to accept the risk of interrupting the operation of the Superfund program. The purpose of Option B indemnification would be to ensure that an adequate number of RACs are available for response activities in the event that RACs are once again left without an adequate commercial risk transfer mechanism. Moreover, due to the excellent loss history of RACs in the Superfund program, EPA indemnification could result in lower per site cleanup costs than would reimbursement by EPA of RACs' commercial insurance.

*Arguments in Favor of Option B.* Section 119 provides EPA with the statutory authority to indemnify RACs. According to its legislative history, section 119 indemnification was designed to serve as a discretionary interim risk transfer mechanism to ensure that the Superfund program remains operative. The House of Representatives Judiciary Committee Report on section 119 stated:

> Discretionary indemnification allows EPA to provide an interim solution to the lack of insurance until the insurance community restores financial stability and is capable and willing to provide prospective insurance for these contractors. Discretionary indemnification, as opposed to mandatory indemnification, does not create a disincentive for insurers to provide prospective insurance by establishing the equivalent of a Federally intrusive insurance program. Discretionary indemnification allows EPA to provide Federal indemnification with appropriate limits (i.e., to provide it in amounts equivalent to, but not in excess of, adequate insurance coverage), to include deductibles, to require the payment by contractors of a premium for indemnification coverage, and/or to offer it only as a supplement to available insurance, if available insurance is not adequate. [House of Representatives Report #99-263, page 28]

An EPA decision not to offer indemnification would probably not cause program delays at this time. However, EPA may find it necessary at this time to retain the option of offering discretionary indemnification if EPA finds that such indemnification is necessary in order to avoid program delays in the future.

EPA does not want to create an intrusive federal program that interferes with private sector efforts to develop RAC liability insurance coverage. Also, EPA does not want to create an indemnification program that provides greater coverage (or other benefits) than would traditional commercial pollution liability insurance. Therefore, the section 119 indemnification under Option B would include reasonable limits and deductibles in order to encourage high quality work, and would be offered only if commercial insurance is not available at a fair and reasonable price.

In addition to being consistent with section 119 legislative history, Option B indemnification could save substantial Fund resources. As noted above in the "Arguments Against Option A", in the absence of EPA indemnification, RACs would be compelled to obtain insurance (or self-insure), the cost of which would be paid by EPA (as long as the cost is reasonable). It is entirely possible that the cost of available insurance (even when included as part of the indirect cost pool on a cost reimbursement contracts) would be far greater than the present value of future claims, in which case EPA could, under Option B, determine that the cost of insurance was unreasonable, and offer to indemnify the RACs. In effect, Option B gives EPA the opportunity to self-insure (and incur future costs rather than pay insurance premiums) in those instances where the expected present value of future claims is much less than the cost of insurance. Retaining the option to self-insure becomes especially important in light of the claims history of the Superfund program. As noted above, EPA has expended minimal funds on pollution liability claims, despite having entered indemnification agreements with hundreds of contractors and (indirectly) subcontractors over an eight year time period. Purchasing liability insurance in lieu of indemnification would have cost millions of Superfund dollars.

Finally, offering Option B indemnification could avoid subjecting the Superfund program to the uncertainties of the underwriting cycle. If section 119 indemnification were not available, it is uncertain how the commercial pollution liability insurance market would react to another hard swing in the P&C underwriting cycle. Commercial pollution liability insurance has become available from a small number of insurers, corresponding with a general softening of the P&C insurance market. Due to the predictably cyclical

nature of the P&C industry, it is likely that another hard P&C insurance market will ensue in the next five years. If events transpire as they did during the last hard market, commercial P&C insurance may once again abandon perceived high risk lines such as pollution liability for Superfund RACs. If no alternative risk transfer mechanism such as section 119 indemnification is available, it is possible that RACs may not wish to participate in the Superfund program. This situation could result in disruptive program delays for EPA's Superfund program. Offering section 119 indemnification on a limited basis could deflect some of the impact of swings in the underwriting cycle from the Superfund program.

*Arguments Against Option B.* The prime goal of the Superfund program is to clean up hazardous waste sites. This goal must be accomplished by EPA (and states) with a limited amount of funding. As in any other government program, EPA must make choices concerning where funds should be best expended in order to achieve its ultimate purpose. Funds unnecessarily expended in one area of the program detract from those other areas of the program that could be improved with an infusion of funding. Therefore, EPA must decide whether section 119 indemnification is necessary to the continued functioning of the Superfund program, justifying the possible use of Superfund dollars for third-party liability claims (and administrative expenses) rather than in an area of the program that would more directly contribute to site cleanups.

Section 119 was included in SARA in part to address concerns that, without a risk transfer mechanism, RACs would not participate in the Superfund program. At that time, no adequate and affordable pollution liability insurance was available to RACs. Section 119 indemnification was designed to serve as a discretionary interim risk transfer mechanism to ensure that the Superfund program was not delayed due to a refusal by RACs to perform. If the entire Superfund program were to be delayed because of a lack of an adequate risk transfer mechanism, then expending funds for RAC indemnification may be justified. However, as noted above in "Arguments in Favor of Option A", Federal agencies other than EPA, as well as many states, have had little or no trouble retaining qualified RACs absent contractor indemnification. Consequently, it is reasonable to conclude that, since RACs are willing to perform essentially the same response action activities for states and other Federal agencies without indemnification (and even in some cases indemnifying the state), EPA would most likely be able to obtain an adequate number of qualified RACs without Federal indemnification.

C. Offer Indemnification with Market Incentives To Promote Purchase of Commercial Insurance

*Summary.* Rather than deciding on a case-by-case basis whether or not to offer indemnification (as would be done if option "B" were used), EPA could set up a system whereby the RACs themselves would decide whether they were to enter an indemnification agreement with EPA. Such a program would be identical to option "B", except that a cost would be associated with contractor indemnification. That is, a RAC would perceive that a financial cost must be borne (or, conversely, a financial benefit would be foregone) if the contractor were to enter into an indemnification agreement with EPA. The RAC would be free to choose whether to request indemnification (and bear the consequent cost) or use some other risk transfer mechanism (e.g., commercial insurance). EPA has identified three potential methods of setting up this "incentive-based" scheme:

1. EPA provides indemnification for a set price.
2. EPA offers to (a) indemnify, or (b) reimburse a set amount for pollution liability insurance (regardless of the actual cost of the insurance).
3. Indemnification and insurance cost reimbursement terms are determined during the competitive procurement process.

The three incentive-based approaches share a characteristic that distinguishes them as a group from option "B". All three require that EPA place an explicit price on EPA indemnification or the equivalent pollution liability insurance. The price would be in dollar terms, or, in the case of approach 3, the price would be converted to technical evaluation points for those contracts where the contract prices are negotiated and the choice of RAC depends on factors other than cost. The existence of an explicit price for indemnification gives RACs the incentive to seek pollution liability insurance that is less expensive than the EPA-priced indemnification (or insurance).

*Incentive-based approach (1): Provide indemnification for a set price.* The first market based incentive approach considered by EPA is a system whereby EPA would behave as if it were an insurer, and offer indemnification for a price. The price of indemnification would depend upon the work being performed by an RAC (for example, the price might be lower for an RAC performing a remedial investigation than it would be for a RAC performing a remedial action). All RACs would have the option of purchasing the indemnification from EPA. The cost of the indemnification, as well as the cost of any purchased insurance, would not be reimbursable. In effect, EPA would be setting the maximum price for RACs' pollution liability insurance: If the market price were less than the EPA indemnification price, then RACs would purchase commercial liability insurance (assuming that the terms of the commercial insurance are similar to those of EPA indemnification). Conversely, if the market price were greater than the EPA price, RACs would eschew commercial insurance, and would purchase EPA indemnification.

Similar types of government insurance programs have been established as a response to the inability or unwillingness of commercial insurers to assume a particular type of risk. Examples include the Federal Crop Insurance Program and the National Flood Insurance Program.

The Federal Crop Insurance Program was initially established in 1938 and replaced three times by updated versions. The current program was established as the Federal Crop Insurance Act of 1980. This Act established an all-risk[3] crop insurance program to be administered by the Department of Agriculture's Federal Crop Insurance Corporation (FCIC). The program utilizes commercial insurance companies as a delivery system and reimburses them for the costs associated with the coverage. Commercial insurers may enter the market at any time but, unlike the EPA insurance option, must price the coverage at the same level as the federal program.

The National Flood Insurance Program was established as part of the Housing and Urban Development (HUD) Act of 1968. Before this time flood insurance was generally considered unfeasible. The HUD Act established a national flood insurance program, which made flood insurance available to communities that adopted control measures designed to promote development away from flood prone areas. The program was initially established as a joint effort of the federal government and commercial

[3] "All-risk" insurance provides protection from loss arising out of any fortuitous cause other than those perils or causes specifically excluded by name. This is in contrast to other policies which name the peril or perils insured against.

insurers. The most recent enactment of the program however, established the federal government as the risk bearer. Residents in eligible communities can purchase flood insurance from licensed agents and brokers.

*Incentive-based approach (2): Provide indemnification, or reimburse a fixed amount for pollution liability insurance.* The second "incentive-based" approach considered by EPA is identical to the first, except that, rather than "selling" indemnification to RACs, EPA would offer RACs a set price if the RACs purchase pollution liability insurance. In other words, EPA would "reimburse" the RAC if the RAC purchased pollution liability insurance, but the amount of the reimbursement would be EPA's valuation of the risk transfer, and would be independent of the actual cost of the insurance (thus, this approach differs from the interim indemnification policy, which calls for reimbursement of the actual cost of any EPA approved pollution insurance purchased by an RAC). The key characteristic of this approach is the independence of the reimbursement amount from the actual cost of purchased insurance. This gives RACs incentive to seek the least costly pollution liability insurance available. If no insurance is available at a reasonable cost, RACs would still have the option to self-insure (as an alternative to EPA indemnification), in which case EPA would "reimburse" to the RAC an amount identical to the amount that would have been "reimbursed" had the RAC purchased insurance. If the RAC were to self-insure under this scheme, it would have to demonstrate financial responsibility for the self-insured amount before EPA would "reimburse".

*Incentive-based approach (3): Indemnification terms determined as part of the procurement process.* The third "incentive-based" option that is being considered by EPA is to incorporate indemnification decisions into the procurement process. This approach is similar to the first two "incentive-based" approaches discussed in that it would require EPA to set explicit prices for insurance/indemnification, but it differs in that there is no direct payment or reimbursement for insurance/indemnification. Instead, the potential RAC's bid (or proposal, in the case of negotiated contracts) is adjusted by the procuring official to reflect EPA's valuation of the RAC's insurance or request for indemnification.

Under this "bid-adjustment" approach, EPA would include as part of an Invitation for Bid (IFB) or Request for Proposal (RFP) a price schedule for insurance/indemnification which would reflect EPA's valuation of various magnitudes of insurance/indemnification. Bidders (or Proposers) would be given the option of requesting EPA indemnification.

For sealed bid procurements, EPA would adjust the submitted bids by adding to the bid EPA's valuation of the requested indemnification. That valuation would reflect, to the extent possible, the real cost to EPA of providing indemnification, and would be based on a combination of the market price for insurance (the cost of which, presumably, EPA would be obliged to pay absent indemnification), and a subjective evaluation of the risk posed by the site in question. A contractor will be paid an amount equal to the submitted bid, not an amount equal to the adjusted bid. For example, assume that RAC X submits a bid of $5 million, and RAC Z submits a bid of $4.8 million. However, RAC Z requests indemnification valued by EPA at $0.4 million. For purposes of the selection process only, RAC Z is considered to have submitted a $5.2 million bid. RAC X is selected, and receives a $5 million contract. Under this approach, RACs are not reimbursed for the cost of insurance (except insofar as the cost of insurance is included in the bid). Presumably, those costs will be reflected in the bids.

The procedure with negotiated procurements is similar except, instead of adjusting bids, the technical evaluation of proposals is adjusted. For example, EPA would subtract evaluation points from (or not award as many points to) proposals which include a request for EPA indemnification. Once again, the cost of insurance is not reimbursable.

*Argument in Favor of Option C.* As noted above, Option C differs from Option B only insofar as Option C places a perceived cost on EPA indemnification. Thus, it would provide an incentive for RACs to search actively for pollution insurance coverage (or the equivalent) which is similar to EPA's indemnification but has a lower cost. Encouraging RACs to seek the least costly risk transfer mechanism will ultimately save EPA resources, since EPA ends up paying for the cost of commercial insurance either via a cost reimbursement contract, or when the cost of insurance is included in a fixed-price bid.

Creating incentives for RACs to seek reasonably priced commercial insurance is an important step in encouraging a viable commercial insurance market. The insurance industry is not likely to actively develop new pollution insurance products unless there is a strong enough demand for these products to make them profitable. When commercial insurers see enough demand, and create a product that ensures adequate coverage at a reasonable price, it will no longer be necessary for EPA to consider offering indemnification. As a condition of reimbursement, EPA could require submission of copies of insurance policies purchased (with evidence of premiums paid), thus monitoring the market price of insurance. Presumably, EPA would then be able to reset periodically the "fixed premium" it is willing to pay, based on the market information gathered in the previous period. In this way, government intervention in the market would be minimized, with EPA responding to market signals rather than distorting market prices.

The use of market incentives (through placing a cost on EPA indemnification) would relieve EPA of the burden of determining the level of "adequate indemnification" and, just as importantly, of determining the type of RACs that should be covered by EPA indemnification. Through the pricing mechanism, EPA would leave such determinations to RACs. In effect, any RAC that was willing to pay the EPA price would receive indemnification; each RAC would determine its own indemnification limit (that is, up to EPA's proposed maximum indemnity limit level), based on the risk it perceives and the price of additional indemnification.

Another advantage to this approach is that it makes it clear to RACs and to commercial insurers the value EPA puts on section 119 indemnification. Under the system currently in place (under the interim guidelines), EPA decides when insurance is reasonably priced (among other factors) and either reimburses the RAC for the insurance or rejects the insurance. After EPA rejects the insurance, the RAC and the insurer know that the price for the insurance is too high, but they do not know what price will be considered reasonable. Under the "market incentives" approach, RACs and insurers will know specifically what price will be considered reasonable by EPA without the trial and error inherent in the present system.

*Arguments Against Option C.* The primary argument against the first two approaches is that they place EPA unambiguously in the position of an insurer. EPA does not wish to foster the perception that its indemnification is a

permanent alternative to commercial pollution liability insurance. These options could lead commercial insurers already active in the pollution liability market to withdraw if these insurers perceive their products as unable to compete with the price set for indemnification by the Federal government. Moreover, commercial insurers who were considering developing pollution liability insurance products could be discouraged from doing so if they perceive EPA's indemnity price is too low for them to compete with.

The third approach of incorporating the decision to indemnify into the procurement process also has its disadvantages. This approach has very little flexibility. For any given contract, the decision to request indemnification or seek liability insurance can be made only once, i.e., at the bidding (or proposing) stage. For example, if EPA inserts an indemnification clause into a fixed-price contract, and later determines that pollution liability insurance is generally available and fairly priced, EPA cannot withdraw its indemnification, since the RAC submitted (and EPA accepted) its contract bid on the condition that EPA provide indemnification throughout contract performance. Conversely, if EPA awards a contract to an RAC who has agreed to provide pollution liability insurance, EPA cannot later provide indemnification (if, for example, insurance becomes unavailable). To do so would be unfair to those potential RACs who were not awarded contracts, some of whom may have not been awarded the contract because they requested indemnification.

One disadvantage is common to all three of the incentive based approaches. Compared to Option A and Option B, these approaches are significantly more of an administrative burden to EPA. Calculating the value of transferring a portion of the RAC risk may place a substantial analytical and administrative burden on EPA. At this time EPA does not possess the resources to assess accurately the value of the RAC risk. Obtaining the resources to accomplish this task may add substantially to the cost of choosing this option.

D. Provide Reinsurance for a Commercial Insurance Pool

*Summary.* EPA has considered the option of acting as a reinsurer [4] above a programmed layer of commercial pollution insurance. Under such a plan, commercial insurers would provide primary pollution coverage with EPA acting as a reinsurer above this primary coverage up to a defined limit. This option could be established as a temporary measure until commercial insurers gain confidence in their ability to underwrite the RAC risk, thus allowing EPA to reduce or discontinue its role in the transfer of RAC risk.

When the Federal government has chosen to assist in specific insurance problems, the reinsurance option has been the method of choice in many circumstances. Since the ultimate aim of reinsurance is to spread the exposure and therefore the risk of loss, the public as represented by the Federal government has in some circumstances provided one avenue towards risk dispersal. Adoption of a reinsurance program could act as a catalyst for insurers' entry into the pollution insurance market by giving insurers experience in the market without the risk of paying out any large claims.

Similar types of government reinsurance programs have been established in several instances. Current programs include the Nuclear Energy Liability Insurance Program and the Federal Riot Reinsurance Program, among others. Both of these programs were established by the government as a response to the inability or unwillingness of commercial insurers to assume a particular type of risk. The majority of these and similar programs sought to include commercial insurers in the program in a way comparable to that described in this option.

The Nuclear Energy Liability Insurance Program was established in 1957 as an amendment to the Atomic Energy Act. This amendment, called the Price-Anderson Act, established a $560 million limit on liability arising out of a nuclear accident. The Price-Anderson Act required operators of nuclear reactors to purchase insurance up to this maximum limit or demonstrate the ability to retain all or a portion of the amount. Insurance pools formed by the commercial insurance industry currently provides for coverage up to $160 million per occurrence. The remaining limit is provided by contributions from individual operators. These contributions are limited to $5 million per operating license.

The Federal Riot Reinsurance Program was established to provide equal access to property insurance for inner-city property owners who were unable to obtain coverage from commercial insurers. The urban riots that occurred during the late 1960s made commercial insurers hesitant to provide coverage in those areas. Urban areas had always presented an increased risk to commercial insurers since the density to which most urban areas were developed increased the possibility of a conflagration. Intentionally ignited fires, like those that occurred during the riots, represented a risk that commercial insurers were unwilling to assume. A presidential committee was established to study the problem and made recommendations that led Congress to enact the Urban Protection and Reinsurance Act. This Act established the National Insurance Development Fund providing riot reinsurance to commercial insurers.

These programs establish precedent for the type of program that is being considered by EPA. Under this option, the EPA program would serve as a temporary measure, operating until such time as commercial insurers gain confidence in their ability to underwrite the RAC risk. As more primary insurers and reinsurers enter the market, the need for EPA reinsurance would disappear.

The method used to establish a reinsurance agreement varies. Between commercial insurers, two types of reinsurance agreements are generally implemented. The first is a "specific" agreement where coverage is optional to both the insurer and reinsurer in that neither party is universally obligated to provide insurance. Each contract is written on its own merit and negotiated individually. EPA could adopt this type of agreement and incorporate it into its proposal evaluation process. As commercial insurers enter the market they could be added to a list of potential insurers. Individual RACs could be provided this list as sources in order to obtain the primary layer of insurance. EPA could then negotiate a specific reinsurance agreement with the selected commercial insurer. The advantage of this approach is that as commercial insurers enter the market and gain underwriting experience, EPA could gradually withdraw by slowly changing the reinsurance agreements.

The second type of reinsurance agreement generally used by commercial insurers is called a treaty or automatic agreement. Under this type of agreement, the two parties agree in advance to the terms of coverage involving a designated class of risk. The liability of the reinsurer begins

[4] Reinsurance is the practice whereby one party, called the reinsurer, in consideration of a premium paid to him, agrees to indemnify another party, called the reinsured, for part or all of the liability assumed by the latter party under a policy or policies of insurance which it has issued. The reinsured may be referred to as the original or primary insurer, or the ceding company.

automatically when the original insurer accepts the risk. EPA could adopt this method by identifying insurers willing to provide the primary layer of insurance and establishing automatic agreements with these insurers. This list could then be provided to contractors who could choose primary coverage on the most favorable terms.

Specific and automatic reinsurance agreements also may use two basic methods of distributing the risk between the insurer and the reinsurer. The reinsurer agrees to accept either:

- A share of the amounts of risk which the primary insurer underwrites; or,
- An excess of the losses beyond certain established limits.

Reinsurance contracts that share the amounts of risk establish a ratio of insurance provided by the primary insurer and the reinsurer that is applied to every contract. For example, the primary insurer may retain one-fourth of the risk and the reinsurer assumes three-fourths of the risk. The reinsurer is entitled to three-fourths of the premium and would pay three-fourths of the losses. This form of reinsurance contract allows primary insurers to provide coverage in much larger amounts.

Reinsurance written as an excess of loss contract primarily provides protection against large losses. Under this type of contract, the reinsurer has no obligation until losses are in excess of the amount covered by the primary insurer. Some excess of loss contracts are written so that the primary insurer retains a share of the excess loss. Excess of loss is the usual way that a contract for catastrophic reinsurance is written.

*Argument in Favor of Option D.* This option would serve as a catalyst for commercial insurers to enter the pollution insurance market. Insurers could provide whatever level of insurance that they felt comfortable with. Even if the commercial layer of insurance does not provide a great deal of coverage, insurers will gain experience underwriting the RAC risk.

The reinsurance agreement and contract can be structured to provide constant encouragement to commercial insurers to assume greater portions of the risk. Particularly, if specific reinsurance is offered as a program, the amount of risk retained by the primary commercial insurer could be continuously under review and adjusted as allowed by market conditions. The variety of activities performed by RACs could also be part of the evaluation.

When capacity in the insurance industry expands, at least some commercial insurers will possess experience underwriting the RACs. EPA could then gradually withdraw from the market by reducing the amount of coverage offered. This could be done either by increasing the stipulated limit of primary insurance in an excess of loss contract or, by reducing the proportion of insurance carried in a risk sharing contract.

One of the biggest advantages of this option is that it will save EPA resources by putting the responsibility for administering claims upon commercial insurers. These insurers possess experience administering claims and could perform this task more efficiently than EPA. Employing this option would save the expense and time involved in creating a claims administration structure within EPA. At the same time whichever commercial insurers participate in insuring RACs to some extent will gain experience in the administration of RAC claims.

*Arguments Against Option D.* This option does not substantially reduce EPA's exposure to risk or expenditures for operating the section 119 indemnification. Under this system it is likely that commercial insurers will only write pollution insurance for companies with the best loss histories and least risk of claims against it. The "specific" reinsurance agreement is particularly susceptible to this adverse selection [5] since the agreement would be negotiated for every RAC contract. As a result EPA may still be forced to indemnify the marginal or bad risks. In addition, the cost of any insurance provided by commercial insurers will be reimbursed by EPA. Therefore, unless commercial insurers eliminate EPA's role as insurer completely, the savings of providing some commercial insurance is not that great.

Another factor working against this option is the past history of such government insurance programs. Some past efforts at cooperation between government and commercial insurers in providing insurance have not been a success. In particular, the National Flood Insurance Program was initially established as a cooperative effort between the federal government and the commercial insurance industry. This program has since been reestablished with the federal government acting as the insurer. This type of result would be unacceptable. Section 119 indemnification was enacted as an interim risk transfer mechanism and not a permanent government insurance program.

*2.2 Proposed Policy*

EPA is proposing to offer Option C indemnification in sealed bid procurements, and, specifically, is proposing to use the third incentive-based approach, where indemnification terms are decided as part of the procurement process. When submitting a bid, a bidder will request some combination of indemnification limit and deductible. For the purpose of selecting the lowest bidder, the submitted bids will be adjusted to reflect EPA's valuation of the requested indemnification. In effect, EPA will be procuring the bidder who requires the least compensation, where that compensation consists of dollar payments plus some amount of indemnification coverage from EPA.

EPA is proposing to offer Option B indemnification to other types of RACs (typically, cost-reimbursement RACs). Even though they are offered indemnification, RACs are required to make "diligent efforts" to obtain pollution liability insurance. Cost reimbursement contractors would be reimbursed the reasonable cost of purchased insurance.

**3.0 Discussion of Proposal Details**

*3.1 Deductibles and Limits of Coverage Under Cost-Reimbursement Contracts*

The reasonable cost of liability insurance is generally an allowable cost (thus reimbursable) under Federal Acquisition Regulations (FAR) section 31. Specifically, the cost of insurance is allowable under cost-reimbursement contracts if the insurance is "required or approved, and maintained by the contractor pursuant to the contract" [48 CFR 31.205–19(a)(1)]. Also, the cost of insurance is allowable if the types and extent of coverage follow sound business practice and if the premiums are reasonable [section 31.205–19(a)(2)]. One can infer from this set of FAR requirements (in combination with CERCLA section 119) that EPA has the responsibility to reimburse contractors for the allocable portion of the cost of insurance maintained by the contractor, or, if EPA determines that insurance is unreasonably priced or is unavailable, EPA may offer indemnification as a replacement for insurance that would have been purchased by a firm following "sound business practices" (had that insurance been available at "reasonable" prices).

For most types of insurance, it is not necessary for the government to make a

[5] "Adverse selection" is an imbalance in a risk exposure group, created when organizations that perceive a high probability of loss for themselves seek to buy insurance to transfer that risk.

determination concerning the amount of insurance that would have been purchased by a company following sound business practices. Insurance generally covers all of a company's operations. Generally, only an allocable portion of the cost of that insurance will be reimbursed by the government under a cost-reimbursement contract (unless the insurance cost is identified specifically and solely with the government contract as a direct cost). If a contractor purchases an amount of insurance greater than that required by "sound business practice", the government may agree to reimburse only the allocable portion of the extra premium payments. The contractor has an incentive not to purchase coverage in excess of that required by sound business practice. Consequently, although the government may make a more substantial evaluation of the contractor's costs, the government need only assume that its contractor is maintaining a "sound" amount of insurance, and pay the portion of the cost that is allocable to the contract.

Unfortunately, there is no sure way of knowing how much pollution liability insurance would be purchased by a contractor "following sound business practices". Most pollution liability insurance available today is written on either a project-specific or contract-specific basis, or covers operations performed almost exclusively under cost-reimbursement contracts with EPA. EPA may pay the entire cost of any pollution liability insurance purchased if it is a direct cost of the EPA contract. Consequently, there would be no incentive for a contractor to limit its insurance coverage to that required by sound business practice. If EPA paid the bill, the contractor would wish to purchase as much insurance as there was available.

Even in the absence of an incentive problem, EPA would be unable to rely on the contractor's purchased insurance being the amount of insurance required by sound business practice. Today, pollution liability insurance is available in limited amounts, and some contractors are unable to purchase any pollution liability insurance for the type of work they perform. Therefore, EPA cannot use the amount of purchased insurance as a guide to determine the "sound" amount of insurance.

Since the Agency could not depend on market forces to determine the appropriate amount of pollution liability insurance coverage (or the equivalent indemnification from EPA) for RACs, a primary task faced by the Agency was to use some other method to determine the appropriate limit of coverage. The Agency used four approaches to attempt to estimate the amount of coverage that would be appropriate to offer. First, the Agency requested the RAC Review Panel (and other firms working in the hazardous waste cleanup business) to supply information to EPA concerning their firms' risk transfer practices (for example, the EPA wanted an estimate of the amount of professional liability insurance carried by architect/engineering firms). The Agency received only 4 responses out of approximately 100 questionnaires distributed. Those that did respond carried $10–$20 million of professional liability insurance. Second, the Agency hired an actuarial firm to conduct a study of the risk faced by RACs, and to recommend an appropriate coverage limit. The actuarial firm was unable to make a recommendation based on its study. Third, the Agency conducted a study of the insurance coverage maintained by firms active in other high risk industries. That study indicated that coverage varied widely, and EPA was unable to infer from the study any general business practice that would be applicable to Superfund RACs. Finally, the Agency looked at the extent of indemnification coverage being offered to Superfund cleanup contractors by states and by other federal agencies. We found that, in general, states and other federal agencies did not offer indemnification, although some states offered limited coverage.

The information gathered by EPA is not adequate to determine the "sound" amount of insurance that any particular RAC should maintain, nor is it adequate to determine the extent to which indemnification should be offered to meet the Agency's objective (expeditious cleanup at least cost). Rather, the amount of insurance that would be purchased by an RAC following "sound business practices" depends on the type of work to be performed, the risk attendant at the sites at which the RAC will work, and the size and risk transfer practices of the RAC. Consequently, the Agency determined that the appropriate amount of insurance (or indemnification) needs to be determined on a contract-specific basis.

The indemnification limit and deductible scheme found in section 10 of the proposed guidance is based on the assumption that the RAC itself is best able to determine its required level of insurance or indemnification coverage. The RAC will, however, overstate its required indemnification limit unless a disincentive to overstatement is included. Therefore, EPA is proposing to tie the size of the RAC's deductible to the size of the indemnification limit requested. Under such a scheme, an RAC most concerned with the size of the deductible can request low limits of indemnification (and, consequently, be responsible for a small deductible amount), while an RAC most concerned about very large claims, while being relatively unconcerned about small (but more frequent) claims, can request large limits of indemnification (and, consequently, be responsible for a large deductible amount).

Today, deductible amounts of $100,000 to $250,000 are common in commercial pollution liability insurance policies, with liability limits of up to $5 million (in some cases, limits of up to $25 million may be available). Since section 119 indemnification is intended to supplement unavailable, inadequate, or unreasonably priced insurance, EPA chose to set a deductible amount that would be similar to that found in commercial pollution liability insurance policies. Section 10(e) of the guidance specifies that an RAC requesting an indemnification limit of $5 million will incur a $100,000 deductible, and an RAC requesting an indemnification limit of $10 million will incur a $250,000 deductible. RACs requesting a greater limit will incur a greater deductible, and RACs requesting a lesser limit will incur a lesser deductible.

EPA requests comment on the structure of its indemnification limits/deductibles scheme for cost reimbursement RACs, and the reasonableness of the specified limits and deductibles. Given the limited data which EPA has had available to it in shaping this scheme, the Agency is particularly interested in receiving further information that may support this or alternative schemes. The Agency will review its proposal in light of any such information received.

*3.2 Indemnification Under Fixed Price Contracts*

The Agency is not, in general, concerned with the amount of insurance carried by fixed-price contractors. Unlike the case of the cost reimbursement RAC, the Agency is unconcerned about a fixed-price RAC that carries "too much" insurance, since the cost of that insurance is not reimbursable. Presumably, the cost of extraneous insurance would be reflected in the RAC's bid. Thus, firms will have an incentive to not carry extraneous insurance, in order to be able to submit competitive bids.

The Agency is concerned with the financial viability of a fixed-price contractor insofar as it affects the RAC's ability to complete the project. Generally, the Miller Act (40 U.S.C. 270a–270f) requires a construction contractor to post a performance bond, guaranteeing the government that the job will be completed. If the contractor fails to complete the project, the government can call on the surety to complete it. It is possible, however, that surety companies may be unwilling to bond some Superfund RACs without adequate third-party liability coverage, because the surety will be called on to complete the job if the RAC is sued and forced into bankruptcy as a result of inadequate third-party liability coverage. In that case, it may be in the Agency's interest to offer indemnification to fixed-price RACs, if adequate insurance may not be available.

The Agency is also concerned with the degree of competition in sealed-bid procurements. It is possible that some firms, in the absence of adequate and reasonably priced insurance, will refrain from bidding on Superfund fixed-price contracts (those firms may be unwilling to self-insure and include the cost of self-insurance in their bids). Therefore, even if the availability of surety bonds is not a problem, it may be in the Agency's interest to offer indemnification as a substitute for pollution liability insurance.

Section 11 of the proposed guidance includes an indemnification scheme for fixed-price contracts that is designed to discourage requests for indemnification unless the RAC requires coverage for pollution liability, but insurance is unavailable, inadequate, or unreasonably priced. Before requesting indemnification, a bidder must consider carefully its need for third-party liability coverage, the cost of commercial insurance to cover that liability (presumably, that cost would be included in the bid), the possibility of self-insurance, and EPA's evaluation of the cost of indemnification at that site. The bidder may find that a request for indemnification is the difference between a low bid and the second lowest bid.

*3.3 Indemnification of Subcontractors*

Under CERCLA section 119, both prime contractors and subcontrators are defined as RACs. Consequently, there is no distinction between the Agency's authority to agree to indemnify prime contractors and its authority to agree to indemnify subcontractors. Because the Agency does not have privity of contract with subcontractors, however, any indemnification of subcontractors must be provided by the prime contractors. The Agency may, however, agree to indemnify the prime contractor with respect to liability arising as a result of the prime's indemnification of the subcontractor. In effect, the Agency would be extending section 119 indemnification to the subcontractor. Section 9 of the Proposed Guidance outlines policies and procedures for such an extension of an indemnification agreement to subcontractors.

In order for the Agency to indemnify the prime contractor with respect to any liability arising as a result of an agreement between the prime contractor and subcontractor, the terms and conditions of that agreement must be consistent with the requirements of section 119. The Agency has considered three options for ensuring that indemnification agreements with subcontractors (through prime contractors) satisfy the requirements of section 119 (as well as any other conditions required of RACs by EPA). The first option would require prime contractors to enforce the requirements of section 119 and EPA policy. If a claim were to arise, the Agency would inspect the records maintained by the prime contractor to determine if the prerequisites to indemnification had been met by the subcontractor. This option has the advantage of economy of resources in that it minimizes EPA oversight of the prime contractor's administration of subcontracts. Its major disadvantage is that it would leave the prime contractor (and subcontractor) ignorant of whether EPA would actually provide indemnification if the subcontractor were faced with a claim. The contractor would be certain of EPA coverage only after EPA had reviewed the documentation collected by the prime contractor and determined that the documentation was not deficient in any way.

The second option considered by the Agency is reflected in section 9 of the Proposed Guidance. Under this option, EPA would review all subcontractors' requests for indemnification. The prime contractor would be able to "pass through" EPA indemnification only if EPA had determined that the subcontractor's indemnification request met all the requirements of section 119 and section 7 of the proposed guidance. The advantage of this approach is that it allows the Agency to exercise discretion in determining what subcontractors it will indemnify, and it allows the subcontractor to know the terms of its contract (i.e., the indemnification terms) before it enters into the contract.

The disadvantage of this approach is that it would require significant Agency administrative resources, and the time required to process subcontractor applications could reduce the pace of cleanups at Superfund sites.

The third subcontractor indemnification option is to not indemnify any subcontractors. Under this option the prime contractor would, of course, be free to include any indemnification terms in its subcontracts. The Agency, however, would not indemnify the prime contractor with respect to any liability arising from indemnification agreements in subcontracts (that is, EPA indemnification would not "pass through" to subcontracts). This option has the obvious advantage of eliminating government administrative cost, while posing the risk that the Agency may be unable to procure subcontractors at certain sites. Furthermore, the Agency would no longer retain the option of agreeing to indemnify subcontractors as a replacement for liability insurance if the Agency determines that the insurance is too expensive.

The Proposed Guidance reflects the second option under consideration by the Agency. Upon further consideration, the Agency may determine to include any one of the three options in the final indemnification guidance. The Agency is soliciting comment on each of the three proposed approaches to indemnifying subcontractors.

*3.4 Other Issues*

*Application.* Section 4 of the guidance defines the application of the EPA section 119 indemnification program by stating that the guidance applies to indemnification of all RACs (for work started after the date of enactment of SARA). No indemnification other than section 119 indemnification is to be used by EPA RACs.

Some RACs have suggested that EPA supplement its use of section 119 indemnification authority with other forms of indemnification, such as the indemnification called for by the insurance clauses at FAR section 52.228–7, EPAAR section 1552.228, or FAR section 52.250–1 (i.e., "Indemnification Under Public Law 85–804"). EPA has determined that CERCLA section 119 is the sole authority for RAC indemnification. In drafting SARA, Congress had the opportunity to authorize EPA to provide any form of indemnification, including those forms found in the FAR/EPAAR clauses mentioned above. It is a rule of statutory construction that specific provisions

govern general provisions. Accordingly, the detailed, specific statutory scheme of section 119 necessarily supplants and supercedes the broad, general contract authority that EPA relied on before the enactment of SARA. Moreover, there is no indication in section 119 or its legislative history that Congress did not intend the provisions of section 119 to provide exclusive indemnification authority.

*Indemnification Request.* EPA indemnification is intended to provide a temporary substitute for pollution liability insurance when that insurance is inadequate, unavailable, or unreasonably priced. Section 119 requires RACs to make "diligent efforts" to obtain pollution liability insurance as a condition of federal indemnification. Because EPA indemnification provides the equivalent of "free insurance" to RACs, contractors have little incentive to look for insurance. A failure by the RACs to search for and purchase insurance would be contrary to the letter and spirit of section 119, and would leave EPA as the RACs' insurer for the indefinite future. Consequently, a requirement to search diligently for insurance coverage has been included as a prerequisite for EPA indemnification.

Section 7 of the guidance includes the specific steps that an RAC must take in order to be eligible for EPA indemnification. It should be noted that the RAC must submit the required information, and EPA must approve the request, before an indemnification clause will be included in the contract. For EPA RACs, this is a minor change from the procedures used under the interim indemnification policy, where standard indemnification language was routinely included in the contract, and RACs were required to submit the "diligent efforts" documentation within 30 days after signing the contract.

Section 7(h) of the guidance notes that EPA may decline to agree to indemnify an RAC even if the RAC satisfies all the requirements of section 119. This paragraph reflects the concern that EPA may become the insurer of last resort for RACs that are unable to satisfy the underwriting criteria of commercial insurers. That is, insurers may refuse to provide coverage for certain RACs because, for some reason, those RACs pose an unacceptably high risk. As a result of this process of adverse selection, the Agency may be left with providing coverage only for the very worst risks. Consequently, the Agency is considering using some sort of underwriting criteria when it considers entering into indemnification agreements with RACs. The Agency requests comment on the feasibility and advisability of using underwriting criteria, and on the varieties of criteria that should be used. Careful consideration should be given to how the indemnification process and underwriting criteria would be implemented in a sealed bid vs. a negotiated procurement, and how the indemnification process and underwriting criteria would be implemented in prime contracts and subcontracts.

*Terms and Conditions.* Section 8 of the guidance presents the general terms and conditions of EPA indemnification. These terms and conditions reflect the scope, requirements, and limitations of indemnification found in CERCLA section 119.

The definitions of limits and deductibles are similar to those found in commercial policies. The indemnification limit is a "contract aggregate" limit; EPA will pay claims and the cost of litigation until the contract aggregate is reached, regardless of the number of claims, whether the incidents leading to claims occurred at one site or many, and regardless of whether the claims all occur in one year or are spread out over a long time period (see "Coverage Term", however). Coverage at a particular site or for a particular firm is not necessarily limited to the contract aggregate amount. For a particular site, several EPA contracts may be involved (for example, a TAT contractor and an ERCS contractor may be present at a removal site), each of which has coverage up to its contract aggregate amount. A single RAC may have several contracts with EPA, each of which provides coverage up to the contract aggregate amount (each contract, of course, provides for indemnification for work conducted under that contract only).

EPA is proposing to set the maximum indemnification limit at $50 million. As noted above, the Agency has been unable to determine the amount of insurance that would be purchased by a firm following "sound business practice" under Superfund contracts (see "Indemnification under Cost Reimbursement Contracts", above). Consequently, the Agency was unable to infer from its research the maximum amount of insurance coverage required by Superfund contractors following "sound business practice". The Agency understands, however, that a maximum amount must be set, both to protect the Superfund and to satisfy the requirements of CERCLA section 119. Based on its consultations with individuals in the insurance industry and in the RAC community, the Agency is proposing a maximum limit of $50 million. The Agency is not suggesting that this maximum limit has been derived from formal actuarial studies, or from a statistical analysis or formal risk management analysis of any kind. Rather, it represents the informed professional judgment of EPA staff of the maximum reasonable amount of insurance/indemnification that would satisfy CERCLA section 119, protect the Superfund, and provide protection from the risk of pollution liability that is adequate to ensure that the Agency can attract qualified contractors to perform cleanup activities at Superfund sites.

The deductible amount (or "self-insured retention") is defined as a "per occurrence". That is, the RAC must incur a loss on each claim equal to the deductible amount before EPA will indemnify. There is, then, no logical upper limit to the potential loss that an RAC may incur; the loss is limited only by the number of occurrences.

Section 8(e) defines the coverage term of EPA indemnification. Today, commercial pollution liability policies generally have a coverage term extending at most two years beyond the policy period. The Agency recognizes that a two year "completed operations" or "extended reporting" period does not fit the entire liability exposure at a Superfund site. On the other hand, a very lengthy coverage term (of, for example, twenty or more years) may not be acceptable to the Agency because of the difficulties created by carrying contingent liability on its books for a period that far exceeds the life of the program as currently authorized. Furthermore, EPA indemnification is intended to be a temporary substitute for pollution liability insurance. It is unlikely that commercial insurers will offer a coverage period of greater than ten years anytime in the near future; if, then, EPA offers a coverage period of greater than ten years, any commercial insurance that is offered would not replace completely the broader EPA coverage. Consequently, the EPA indemnification program would not be a temporary substitute; instead, it would be at least a long-term supplement to commercial insurance. Therefore, the Agency is proposing to limit its coverage term to a ten year completed operations period; that is, the indemnification agreement will cover claims presented up to ten years after the completion of work at the site.

The Agency requests comment on the terms and conditions of its proposed indemnification agreements.

*Indemnification of PRP RACs.* CERCLA section 119(c), through E.O. 12580, gives EPA the discretionary authority to agree to indemnify RACs working for PRPs, where the PRP is conducting the cleanup pursuant to a consent decree or an administrative order. The purpose of this authority is to ensure that a lack of pollution liability insurance does not eliminate the possibility of PRP cleanups. Section 119(c)(5)(C) imposes significant limitations on EPA's ability to indemnify PRP RACs. To indemnify a PRP RAC, the Agency must first determine that the combined financial resources of all PRPs at the site are inadequate to provide indemnification against the reasonable potential liability of the contractor at the site. Before the Agency can pay a claim, the contractor must exhaust all administrative, judicial, and common law claims for indemnification against the PRPs. Finally, section 119(c)(6) provides for recovery from the PRPs of all indemnification costs paid by EPA.

EPA's interim indemnification guidance included policies and procedures for EPA indemnification of RACs working for PRPs. Nevertheless, EPA has not indemnified any RAC working for a PRP, having received only one request, which was denied on the grounds that the PRP did not demonstrate that it had inadequate financial resources to provide indemnification to the RAC. Based on this experience, it is reasonable to conclude that EPA indemnification of PRP RACs is not prerequisite to PRP cleanup of sites. Section 17 of the Proposed Guidance, which asserts that EPA will not agree to indemnify RACs working for PRPs, follows from that conclusion.

**Guidance Document—EPA Indemnification of Superfund Response Action Contractors—Introduction**

This guidance fulfills the requirement of CERCLA section 119(c)(7) and E.O. 12580, which require EPA to develop guidelines to carry out subsection 119(c).

*1. Purpose*

The purpose of the section 119 guidance is to provide policies and procedures by which the Environmental Protection Agency (EPA) may indemnify response action contractors (RACs) for claims that result from a release of a hazardous substance, pollutant or contaminant due to RAC negligence arising out of response action activities at a National Priorities List (NPL) or removal action site.

*2. Authority*

These guidelines are required by section 119(c)(7) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601, *et seq.*, as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), Public Law 99-499. In E.O. 12580, the President delegated to EPA the responsibility for issuing section 119 guidelines and regulations that establish an indemnification program funded by the Hazardous Substance Superfund (52 FR 2923 (Jan. 29, 1987)).

*3. Scope*

These guidelines govern indemnification by EPA of all RACs that work under contract at NPL or removal action sites for EPA, States (or political subdivisions) under cooperative agreement with EPA, and potentially responsible parties (PRPs) under a CERCLA administrative order or consent decree. EPA interprets section 119 to permit the Agency to provide indemnification to RACs working for federally recognized Indian tribes pursuant to a cooperative agreement with EPA. These guidelines also apply to EPA indemnification of SITE program vendors conducting field investigations pursuant to SARA section 311(b), recipients of training grants under SARA section 126, and of RACs working for other Federal agencies (such as the U.S. Army Corps of Engineers) at EPA-lead sites under a Memorandum of Understanding (MOU) or an Inter-Agency Agreement with EPA. Where other Federal agencies indemnify RACs under section 119, those indemnification agreements must not be inconsistent with the broad policies found in this guidance document.

*4. Application*

(a) These guidelines govern EPA's indemnification of RACs for work initiated after October 17, 1986, the date of enactment of SARA. These guidelines supercede OSWER Directive #9835.5, "EPA Interim Guidance on Indemnification of Superfund Response Action Contractors Under Section 119 of SARA".

(b) These guidelines will govern all RAC indemnification by EPA for future response action contracts.

(c) Contract indemnification terms (under EPAAR 1552.228-70) rather than these guidelines will apply to work performed at a site after the date of enactment of SARA only if response work at the site was initiated under an EPA contract prior to SARA's date of enactment. Indemnification terms under the SARA section 119 Interim Policy (as specified in OSWER Directive #9835.5) will be replaced, at the mutual consent of EPA and the contractor, with indemnification terms consistent with the policies found in this guidance document. Those terms will be applicable retroactively to the date of enactment of SARA, or to the starting date of the contract, whichever is later.

(d) Subject to all the requirements of these guidelines, any indemnification agreement provided by EPA to a prime contractor may be provided by the prime contractor to its subcontractors if the agreement is approved by EPA at the time of the award of the subcontract. That is, the prime contractor can agree to indemnify a subcontractor, and EPA may indemnify the prime contractor with respect to the prime contractor's obligations that may arise as a consequence of its indemnification of the subcontractor (see section 9, below).

*5. Abbreviations*

CERCLA—Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (as amended)
EPAAR—EPA Acquisition Regulations
FAR—Federal Acquisition Regulations
NPL—National Priorities List
PRP—Potentially Responsible Party
RAC—Response Action Contractor
SARA—Superfund Amendments and Reauthorization Act of 1986

*6. Definitions*

Terms not defined in this section have the meaning given by CERCLA, as amended by SARA.

*"Claim"* means the receipt by the RAC of a written demand for money, naming the RAC and alleging a release from RAC response action activities.

*"Indemnification"*, for the purpose of these guidelines, means an agreement under which EPA will compensate certain losses suffered by a RAC, and the actual payment of that compensation.

*"Non-federal sources"* means commercial insurance, PRP indemnification, state indemnification, or other alternative risk transfer mechanisms.

*"Response Action Contractor"*, as provided in section 119(e)(2), means any person who enters into a response action contract to provide services directly related to any release or threatened release of a hazardous substance or pollutant or contaminant from a facility, and any person hired or retained by such a person. It also includes

recipients of cooperative agreements under section 311(b) and recipients of grants pursuant to section 126(g) of SARA.

*"Response Action Contract"*, as provided in section 119(e)(1), means any written contract or agreement entered into by an RAC with the President, any Federal agency, a state or political subdivision under a cooperative agreement with EPA, or any PRP under an order or decree, to provide response action at an NPL or removal action site.

**Indemnification Requirements, Terms, and Conditions**

*7. Indemnification Request*

(a) EPA will not indemnify RACs that fail to meet the statutory requirements of section 119. EPA will not enter into an indemnification agreement with an RAC until the RAC submits the documentation described in section 119 and in this guidance document.

(b) To be eligible for indemnification by EPA, the RAC shall submit evidence of the following:

(i) That its potential third party liability is not covered by insurance available at a fair and reasonable price at the time the contract to perform a response action is entered into, and that adequate insurance is not generally available;

(ii) That it has made diligent efforts to obtain insurance coverage from non-federal sources (or, if it is a cost-reimbursement RAC, it has satisfied the minimum insurance requirements of 10(b), below);

(iii) And, under a multi-site contract, that the RAC also has made (or agrees to make) such diligent efforts (or, if it is a cost-reimbursement RAC, it will otherwise satisfy the requirements of 10(b)) every time it begins work at a new facility.

(c) Due to the variability of market conditions, EPA will determine on a case-by-case basis whether adequate insurance is available at a fair and reasonable price at the time indemnification documentation is submitted. This determination will be based on the documentation submitted in fulfillment of the diligent effort requirement, or on any other insurance market information available to EPA.

(d) To demonstrate that diligent efforts have been made to obtain non-federal pollution liability insurance coverage, an RAC must submit in writing:

(i) The names and addresses of at least three commercial insurers or alternative risk financiers to whom the RAC has submitted applications; and

(ii) A copy of each application submitted, insurance policies offered (including the declaration page), and any rejection letters received. If pollution liability insurance was offered by a commercial insurer, but not accepted by the RAC, an explanation of the reasons why such coverage was rejected must be included.

(e) The EPA will not enter into an indemnification agreement until the RAC has submitted the documentation required in (b) and (d). EPA will not enter into an indemnification agreement if it determines that the documentation submitted is insufficient, or if it determines that the RAC's efforts to obtain insurance were not sufficiently diligent.

(f) If the RAC is working under a multi-site contract, the "diligent effort" information must be updated and resubmitted within 30 days of the RAC beginning work at a new site (as part of the indemnification agreement, the RAC will have agreed to make such "diligent efforts" each time work is started at a new site (see 7(b)(iii), above)).

(i) If previously purchased insurance covers work at the new site, and the EPA has already determined that the purchase (and maintenance) of that insurance satisfies the diligent effort requirement for that contract, then there is no need to submit additional documentation for that site.

(ii) For certain types of contracts, where a search for insurance each time new site work starts is inappropriate or impractical, EPA may waive the requirement to search for insurance each time new site work starts. Where EPA has granted such a waiver, the RAC is required to resubmit "diligent efforts" documentation every 12 months. In any case, a RAC under a multi-site indemnification agreement must notify EPA before work (covered by the indemnification agreement) begins at a new site.

(g) EPA reserves the right to change the frequency and content of documentation submittal requirements, and also to direct indemnified RACs to purchase insurance from insurers identified by EPA.

(h) EPA may apply underwriting criteria in addition to the specific requirements of this section. That is, EPA may decline to enter into an indemnification agreement with an RAC even if the RAC meets all the requirements of the FAR, CERCLA section 119, and this guidance.

*8. Indemnification Terms and Conditions*

(a) Where EPA has agreed to indemnify an RAC, EPA will indemnify the RAC against third party liability (including the expenses of litigation or settlement) for negligence arising from the RAC's performance in carrying out the response action contract. Such indemnification shall apply only to liability not compensated by insurance or otherwise and shall apply only to liability which results from a release of a hazardous substance, pollutant, or contaminant if such release arises out of the response action activities of the contract.

(b) EPA indemnification is subject to limits and deductibles. For the purpose of determining the amount of the indemnification limit and deductible, the expenses of litigation or settlement are considered part of the liability covered by the indemnification agreement. That is, there is not a separate limit or deductible for expenses of litigation or settlement. The amount of the indemnification limit and deductible depends on the type of contract entered into (see below).

(i) The indemnification limit is defined as a contract aggregate limit.

(ii) The indemnification deductible is a per occurrence deductible. There is no aggregate limit to the deductible.[6]

(c) EPA indemnification will not cover liabilities (including the expenses of litigation or settlement) that were caused by the conduct of the RAC (including any conduct of its directors, managers, staff, representatives or employees) which was grossly negligent or constituted intentional misconduct. Nor shall the RAC be indemnified for liability arising under strict tort liability, or any basis of liability other than negligence.

(i) EPA indemnification will apply if the RAC is found to be not liable for alleged negligence, or if a negligence suit is settled. That is, EPA indemnification will cover the expenses of litigation or settlement subject to the terms and conditions of the indemnification agreement (such as limits and deductibles).

(ii) EPA indemnification will not apply if the RAC is found both strictly liable and negligent, and the cause of action is not divisible.

(d) If an RAC has an indemnification agreement with EPA, the RAC must promptly notify EPA of any claim or action against the RAC that may involve indemnification. Also, the RAC must promptly notify its insurers of any claim

[6] That is, the amount of deductible that must be incurred is limited only by the number of occurrences, whereas the total amount of indemnification payments per contract is limited by the defined "indemnification limit", which is invariant with respect to the number of occurrences.

or action that may involve EPA indemnification, even if the RAC believes that its insurance is not applicable to the claim or action. Indemnification is conditional on prompt receipt from the RAC of copies of the complaint (or other claim), the notice to the insurer, and the insurer's response.

(i) For the purpose of this guidance, "prompt" action is defined as action within twenty days of the date when the RAC knew or should have known of the claim or event.

(e) Coverage Term: Subject to the other terms and conditions listed in this document, an EPA indemnification agreement will cover claims arising (and reported to EPA) during the period of performance of the contract, plus any time within ten years after the contract term. For multisite contracts, the coverage term, with respect to an individual site, is the ten year period following the RAC's completion of work (as specified in the Work Assignment or other relevant work order) at the site.

*9. Subcontractors*

(a) EPA will not agree to indemnify subcontractors directly. However, with the prior written permission of EPA, prime contractors can include subcontractors in their indemnification agreements with EPA. Thus, EPA will enter into no more than one indemnification agreement per contract, with that agreement affording coverage to the prime contractor, including any obligation the prime contractor may incur as a result of its indemnification agreements with its subcontractors. See also the approval requirement in (b), below.

(b) The prime contractor confers indemnification to the subcontractor by including in the subcontract an indemnification clause by which the prime contractor agrees to indemnify the subcontractor. That clause must have terms and conditions (except for limits and deductibles, see below) identical to those found in the clause by which EPA agrees to indemnify the prime contractor. EPA will indemnify the prime contractor with respect to any liability incurred by the subcontractor(s) pursuant to an indemnification agreement between the prime contractor and any subcontractor (subject to the indemnification limits and deductibles specified in the prime contract). EPA, however, must approve (in writing) the subcontract which contains the indemnification agreement between the prime contractor and subcontractor. Accordingly, no indemnification agreement shall be included in any subcontract without first obtaining EPA approval. This will avoid indemnifying subcontractors that are determined to present an adverse risk and to whom indemnification would be denied pursuant to paragraph 7(h).

(c) EPA indemnification limits and deductibles are unaffected by the number of subcontracts entered into by the prime contractor. That is, the limit of EPA's obligation and the deductible specified in an indemnification agreement with a prime contractor applies jointly to the prime contractor and all subcontractors.

(d) The prime contractor is free to include any limit or deductible in its contract with the subcontractor (for example, the prime contractor may wish to provide a small deductible for a small company). EPA's obligation, however, is governed by its indemnification agreement with the prime contractor.[7]

(e) Subcontractors are defined as RACs. Consequently, subcontractors are subject to all indemnification requirements, terms, and conditions. These applicable requirements include the reporting requirements of section 7, above. That is, the subcontractor must demonstrate that it has made diligent efforts to obtain pollution liability insurance, and agree to continue to make such efforts. The subcontractor should forward all documentation to the prime contractor, and the prime contractor should forward copies of the documentation to the contracting officer (or other appropriate official). The contracting officer (or other appropriate official) may consent to the subcontract including the indemnification clause (see paragraph 9(b), above) only if the contracting officer has determined, based on the documentation supplied by the subcontractor (through the prime contractor), that the subcontractor has satisfied the reporting requirements of section 7.

(i) A demonstration of diligent efforts by the prime contractor is not sufficient to demonstrate that, by implication, insurance is unavailable to the subcontractor.

**Indemnification Terms and Conditions for Specific Contract Types**

*10. RACs Working for EPA Under Cost Reimbursement Contracts*

(a) RACs working for EPA under cost reimbursement contracts must procure and maintain all insurance required by law or regulation including:

(i) Insurance required for cost reimbursement contracts by part 28 of the Federal Acquisition Regulations,

(ii) Commercial general liability insurance for bodily injury, death or loss of or damage to property of third persons in the minimum amount of $1,000,000 per occurrence, and

(iii) Any additional insurance EPA may require.

(b) Indemnification and Insurance: Any RAC working for EPA under a cost reimbursement contract who requests that EPA enter into an indemnification agreement must procure and maintain pollution liability insurance for bodily injury, death or loss of or damage to property of third persons in the minimum amount of $1,000,000 per occurrence (or self-insure for the same), or it must demonstrate that it has made diligent efforts to obtain such pollution liability insurance (and, despite such diligent efforts, has failed to procure reasonably priced insurance), and, under a multi-site contract, agrees to make such diligent efforts every time work begins at a new site. EPA will not agree to indemnify a RAC who does not either purchase the required insurance or demonstrate diligent efforts, nor will EPA make indemnification payments to an RAC who has entered into an indemnification agreement but has failed to demonstrate adequately that it has made diligent efforts each time work started at a new site (possible exception: *See* 7(f)(ii), above).

(i) The RAC must procure and maintain pollution liability coverage for professional liability and/or general liability, as appropriate.

(ii) The minimum amount of pollution liability insurance to be purchased will increase by 25% per year unless EPA determines that the increased amount of insurance is not generally available. Thus, where t is defined as the number of years elapsed since promulgation of this policy guidance, the minimum amount of pollution liability insurance required in year t is equal to:

$1 million *1.25$^{t}$

(iii) The demonstration of "diligent efforts" is defined in 7(d), above. Those diligent efforts must be deemed satisfactory by EPA.

(c) Reimbursement: RACs working for EPA under cost reimbursement contracts shall submit to the Contracting Officer for prior approval all insurance policies (or documentation of all self-insurance plans) for which reimbursement will be sought from EPA.

[7] For example, if the indemnification agreement between the prime contractor and subcontractor calls for a $50,000 deductible, and the agreement between EPA and the prime contractor calls for a $200,000 deductible, then, in the event of a claim for $300,000, the subcontractor incurs a $50,000 loss, the prime contractor incurs a $150,000 loss, and EPA incurs a $100,000 loss.

(i) Any cost incurred within the EPA indemnification deductible amount (see below) will not be reimbursed as either direct or indirect cost. The RAC may purchase insurance to cover the indemnification deductible amount, but the cost of that insurance is not reimbursable (nor is any portion of the deductible amount of that insurance reimbursable as either a direct or indirect cost).

(d) Self-Insurance: If an RAC proposes to self-insure against pollution liability, and seeks reimbursement for the cost of self-insurance or seeks to satisfy the "minimum insurance" requirement of section 10(b) through self-insurance, it must demonstrate to EPA financial responsibility for the amount of self-insurance proposed. Financial responsibility may be demonstrated by letter of credit, surety bond, trust fund, escrow account, or other method approved by the EPA Contracting Officer.

(i) A demonstration of financial viability, by itself, does not constitute an adequate demonstration of financial responsibility.

(ii) To be eligible for reimbursement of the cost of self-insurance, a RAC must satisfy the applicable requirements of 48 CFR Parts 28, 30, and 31, and 4 CFR Part 416.

(e) Limits and Deductibles: Where EPA has agreed to indemnify a cost reimbursement RAC working for EPA, the limit of indemnification included in the indemnification agreement shall be requested by the RAC. The limit must be not less than $1 million and not more than $50 million. The deductible to be incurred by the RAC will depend on the limit chosen. Both the indemnification limit and the deductible amount shall be specified in the indemnification agreement.

(i) For RACs requesting indemnification limits of $1 million, the deductible amount shall be equal to 1% of the indemnification limit (i.e., $10,000).

(ii) For RACs requesting indemnification limits of $5 million or less, but more than $1 million, the deductible amount shall be equal to 2% of the indemnification limit. That is:

.02 * L

Where L is the indemnification limit.

(iii) For RACs requesting indemnification limits of $10 million or less, but more than $5 million, the deductible amount shall be equal to 3% of the indemnification limit in excess of $5 million, plus $100,000. That is:

$100,000+(.03 * (L−$5,000,000))

Where L is the indemnification limit.

(iv) For RACs requesting indemnification limits of $25 million or less, but more than $10 million, the deductible amount shall be equal to 5% of the indemnification limit in excess of $10 million, plus $250,000. That is:

$250,000+(.05 * (L−$10,000,000))

Where L is the indemnification limit.

(v) For RACs requesting indemnification limits of $50 million or less, but more than $25 million, the deductible amount shall be equal to 10% of the indemnification limit in excess of $25 million, plus $1,000,000. That is:

$1,000,000+(0.1 * (L−$25,000,000))

Where L is the indemnification limit.

Therefore, a cost reimbursement RAC requesting the maximum per contract indemnification limit of $50 million will be subject to a deductible of $3.5 million per occurrence.

(f) Limits, Deductibles, and Purchased Insurance: Any pollution liability insurance (or self-insurance), for the cost of which EPA reimbursed the RAC, reduces the limit of EPA indemnification on a dollar for dollar basis. Further, the RAC must exhaust both the available insurance coverage and the EPA deductible (found in the indemnification agreement) before EPA will make an indemnification payment. For example, if a RAC has an indemnification agreement with EPA that includes a $5 million limit (thus, a $100,000 deductible), and has $1 million of pollution liability insurance coverage, then the RAC must incur $1,100,000 before EPA will make indemnification payments, and EPA's obligation to indemnify is limited to $4 million ($5 million from the indemnification agreement, less $1 million purchased insurance). Any deductible amount on the commercial insurance policy (or self-insurance) is irrelevant to EPA's coverage trigger.

*11. Indemnification of RACs Working for EPA with Firm Fixed Price (Sealed Bid) Contracts*

(a) General: Although the Government is not ordinarily concerned with the contractor's insurance coverage if the contract is a fixed price contract, EPA recognizes that a RAC cleaning up a Superfund site may require insurance coverage against third-party liability, and that, in some cases, adequate insurance may not be available. In such cases, and from a bidder's perspective, EPA indemnification may be a prerequisite to cleanup activities at the site. Therefore, EPA will offer limited indemnification against third-party pollution liability to all firm fixed price RACs.

(b) RACs that seek EPA indemnification, and are working for EPA under fixed price contracts, including RACs working for the U.S. Army Corps of Engineers at EPA-lead sites, must procure and maintain all insurance required by the Contracting Officer.

(c) RACs working for EPA under fixed price contracts will not be reimbursed the cost of purchased insurance (except insofar as the cost of insurance may be reflected in the fixed price).

(d) All indemnification agreements must contain a limit of indemnification and a deductible amount. A firm fixed-price RAC may request any amount of indemnification coverage (not to exceed $50 million), and any deductible (with a minimum deductible of $10,000) as part of its bid.

(i) The Invitation For Bid (IFB) will include a "price schedule" for indemnification (with prices depending on the size of the limit and size of deductible amount). When EPA evaluates a bid, it will consider the requested indemnification coverage to be part of the bidder's requested remuneration. That is, when selecting the lowest bidder for a project, EPA will evaluate the "net bid", i.e. the bid plus the value (as reflected in the price schedule) of any requested indemnification. Consequently, bidders should consider carefully their estimation of the value of EPA indemnification before requesting such indemnification.

(ii) Model price schedules will be published in a supplement to this policy guidance.

(iii) Once included in the contract of a firm fixed-price RAC, indemnification terms and conditions cannot be modified.

(e) RACs working for EPA under firm fixed price contracts are deemed to have met the "diligent efforts" requirements of section 7, above. Because of the implicit "penalty" associated with indemnification of fixed-price RACs (through the bid evaluation scheme), it can be assumed that adequate "reasonably priced" insurance is not available if a fixed-price RAC requests indemnification.

*12. Indemnification of RACs Working for EPA Under Negotiated Fixed Price Contracts*

(a) For the purpose of indemnification, RACs working for EPA under negotiated fixed price contracts (including RACs under fixed rate contracts with some cost elements reimbursable, such as Time-and-Materials Contracts) will be considered cost reimbursement

contractors. If a negotiated fixed price RAC requests indemnification, it will be subject to the same insurance requirements and indemnification terms and conditions as cost reimbursement contractors (see section 10, above).

*13. Indemnification of SITE Program RACs*

(a) Technology vendors participating in the SITE program are defined as RACs by CERCLA section 119(e). Thus, those vendors participating in the SITE program, under cooperative agreement with EPA, may be eligible to enter into an indemnification agreement with EPA.

(b) Before EPA will agree to enter into an indemnification agreement with a SITE program vendor, the vendor must satisfy the requirements of section 7 of this document (i.e., EPA must determine that reasonably priced pollution liability insurance is not available to SITE program RACs, or the vendor must demonstrate that it has made diligent efforts to obtain pollution liability insurance from non-federal sources). The cost of insurance purchased pursuant to section 7 will not be reimbursed by EPA. The vendor should be aware that indemnification coverage from EPA may be available only at a substantial cost (i.e., the cost of purchased insurance).

(c) The limit and deductible amounts of EPA indemnification will be determined as if the vendor were a cost-reimbursement contractor working for EPA (see section 10, above).

(d) EPA will not indemnify SITE program RACs with respect to facilities which receive waste for disposal, treatment (not including small-scale demonstration testing), or storage independently of the SITE technology demonstration.

(e) EPA will not indemnify SITE program RACs with respect to any work conducted at a Federal facility (as described in CERCLA section 120), unless the Federal agency in question is the EPA.

(f) If a SITE demonstration project is funded by a party other than EPA, then the SITE RAC will be considered, for the purpose of indemnification, a RAC employed by that party. For example, if a SITE Program RAC is conducting a demonstration funded at least in part by a PRP, then EPA will not indemnify the SITE Program RAC (see section 18, below).

*14. Indemnification of RACs Receiving Grants Under SARA Section 126(g)*

(a) RACs receiving SARA section 126(g) grants may be eligible to enter into an indemnification agreement with EPA. Before EPA will agree to enter into an indemnification agreement with a grantee, the grantee must satisfy the requirements of section 7 of this document (i.e., the grantee must demonstrate that it has made diligent efforts to obtain pollution liability insurance from non-federal sources).

(i) The cost of insurance purchased pursuant to section 7 will not be reimbursed by EPA. The grantee should be aware that indemnification coverage from EPA may be available only at a substantial cost (i.e., the cost of purchased insurance).

(b) The limit of EPA indemnification will be equal to the greater of the dollar amount of the grant, or $1 million. The maximum limit is $50 million. The deductible amount is computed as if the grantee were a cost-reimbursement contractor (see section 10(e), above).

*15. Indemnification of RACs Employed by States or Political Subdivisions*

(a) General: EPA has been granted discretionary authority to indemnify RACs employed by states, political subdivisions of states, or federally-recognized Indian tribes that have entered into a cooperative agreement with EPA for new work initiated at NPL or removal action sites after the date of enactment of SARA. If EPA agrees to indemnify a RAC employed by such entity, the indemnification agreement will be embodied in the cooperative agreement through insertion of a special condition.

(b) Requirements for EPA Indemnification: The procedures for entering into indemnification agreements with RACs working for states (or political subdivisions) or federally-recognized Indian tribes under cooperative agreements are identical to those for RACs working directly for EPA. In addition, before EPA will enter into an indemnification agreement, proof of the following must be supplied to EPA:

(i) The RAC's contract concerns new site work initiated at an NPL or removal action site after the date of enactment of SARA; and

(ii) The RAC's contract is directly related to site cleanup.

(c) Terms and Conditions: For the purpose of determining the terms and conditions of an indemnification agreement, a RAC working for a state (or political subdivision) or federally-recognized Indian tribe under cooperative agreement will be subject to the same provisions of this guidance as would an EPA RAC. For example, if a RAC is working for a state under a cost reimbursement contract, the terms and conditions found in section 10 of this guidance will apply.

(d) EPA will agree to indemnify a RAC working for a state (or political subdivision) or federally-recognized Indian tribe even if that entity has agreed to indemnify the RAC. Responsibility for making indemnification payments will be held jointly by the EPA and the state (or political subdivision or federally-recognized Indian tribe). Unless otherwise stated in the indemnification agreement(s), responsibility for making indemnification payments will be divided equally between EPA and the state (or political subdivision or federally-recognized Indian tribe). Any indemnification payments made by EPA, however, are subject to the limits and deductibles specified in the indemnification agreement.

(e) EPA may agree to indemnify a RAC which is required under the terms of its contract with a state (or political subdivision) or federally-recognized Indian tribe to indemnify and hold harmless such contracting entity from claims, damages, losses and expenses, including litigation costs, that arise out of the RAC's performance of the contract. However, any costs or expenses payable to the state (or political subdivision) or federally-recognized Indian tribe under such indemnification are the sole responsibility of the RAC and are not covered under EPA's indemnification of the RAC or otherwise an eligible expense of the cooperative agreement.

*16. Indemnification of RACs Employed by Federal Agencies Other Than EPA*

(a) General Rule: Under CERCLA section 119 (as implemented by E.O. 12580), other Federal agencies are granted discretionary authority to indemnify RACs they employ at NPL or removal action sites from the date of enactment of SARA. Other federal agencies that indemnify RACs under section 119 must use their own appropriations to fund their programs and pay all indemnification costs. Under CERCLA section 120(a)(2), if other federal agencies choose to indemnify their RACs under CERCLA authority, then that indemnification must not be inconsistent with these guidelines.

(b) Interagency agreements: RACs employed by other Federal agencies (e.g., the Army Corps of Engineers) at EPA-lead NPL or removal action sites, managed pursuant to an interagency agreement with EPA, are subject to the same provisions of this guidance as are RACs employed by EPA. Thus, the same indemnification terms and conditions offered to RACs employed by EPA may be offered to RACs employed by other

agencies under interagency agreements with EPA.

*17. Indemnification of RACs Employed by PRPs*

CERCLA § 119(c)(5)(C) (as implemented by E.O. 12580) gives EPA the discretionary authority to enter into an indemnification agreement with a RAC employed by any potentially responsible party (PRP) which has entered into an agreement (such as a consent decree) with EPA. EPA will not exercise that discretionary authority, i.e., EPA will not agree to indemnify a RAC under contract with a PRP.

**Other Issues**

*18. Exclusion of Facilities That Receive Waste*

(a) EPA is prohibited (by CERCLA section 119(c)(5)(D)) from providing indemnification to owners or operators of facilities regulated under the Solid Waste Disposal Act, as amended, with respect to response activities performed at, or potential liability related to, those facilities.

(b) Under section 119, EPA will not agree to indemnify any owner or operator of a facility that receives solid or hazardous waste (for disposal, treatment, or storage), including publicly owned treatment works (POTWs), with respect to that facility. This applies to a facility regardless of whether or not it is subject to the permit-by-rule provisions, or any other provision of RCRA.

*19. Other Terms and Conditions*

(a) EPA will indemnify only RACs performing work directly related to site cleanup.

(b) At any time, EPA may cancel its indemnification of a RAC due to a material misrepresentation or a failure on the part of the RAC to provide necessary information.

(c) EPA reserves the right to add such additional terms and conditions to its RAC indemnification agreements as it deems necessary. Such terms and conditions will be consistent with CERCLA section 119.

*20. Claims Notifications and Processing*

(a) The RAC shall provide written notification to the contracting officer (or other EPA official designated in the indemnification agreement) immediately (i.e., within 20 days) upon receiving notice of any claim or action that may involve section 119 indemnification. EPA will not provide indemnification payments for costs incurred prior to its receipt of written notice from the RAC. Notice must include a copy of the complaint or other claim, or, if no written claim has been received, available information on the time, place, and circumstances involved and the names and addresses of the injured and of available witnesses.

(b) The RAC shall notify its insurers promptly (i.e., within 20 days) of any claim or action that may involve EPA indemnification, even if the RAC believes that its insurance is not applicable to the claim or action. The RAC shall provide to the contracting officer (or other designated person) a copy of any correspondence from the insurance company, including any notice of denial of coverage.

(c) The RAC shall furnish evidence or proof related to. any claim that may involve indemnification payments in the manner and form required by EPA.

(d) The RAC shall furnish to EPA complete photocopies of all of the RAC's insurance policies that were in force at the time of the response action, and all those in force at the time of the notice of claim.

(e) EPA reserves the right to direct, control, or assist in the settlement or defense of any claim or action against an indemnified RAC.

(f) The RAC shall not admit liability or settle any claim without EPA's written consent.

(g) If EPA recommends settlement of a claim for an amount within the RAC's deductible, and the RAC refuses such settlement, EPA shall not be obligated to indemnify for any loss or obligation of the RAC relating to the claim in excess of the deductible.

(h) If EPA recommends settlement of a claim for a total amount in excess of the RAC's indemnification limit (as specified in the contract) and the RAC refuses such settlement, EPA's obligation for any loss shall be limited to that portion of the recommended settlement and the costs, charges, and expenses (as of the RAC's refusal) that exceeds the deductible and falls within the limit of liability.

(i) EPA reserves the right to make any claim payment either to the RAC or the claimant at its discretion.

*21. Cost Recovery*

Under section 119(c)(6), indemnification payments made by EPA to RACs are recoverable from PRPs as a response cost. EPA shall document any indemnification payments by following the same record-keeping and reporting procedures as for all other response costs.

*22. Limitation*

Nothing in this guidance shall be construed as a waiver of sovereign immunity by the United States. Nothing in this guidance shall be construed to establish the United States as a liable party, within the meaning of section 107 of CERCLA, for any release that has occurred or may occur in the course of any response action the United States undertakes pursuant to section 104 of CERCLA. In addition, EPA's agreement to indemnify any RAC, or EPA's payment of any money under an indemnification agreement, shall not be construed as a waiver of sovereign immunity by the United States, within the meaning of section 107 of CERCLA.

**Jonathan Z. Cannon,**

*Acting Assistant Administrator, Office of Solid Waste and Emergency Response.*

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Tuesday
October 31, 1989

Part VI

# United States Sentencing Commission

Notification of Miscellaneous Amendments; Notice

## UNITED STATES SENTENCING COMMISSION

### Notification of Miscellaneous Actions

**AGENCY:** United States Sentencing Commission.

**ACTION:** Public notice of (1) promulgation of a temporary, emergency sentencing guideline amendment for possession of cocaine base ("crack"); (2) promulgation of a temporary, emergency guideline amendment concerning the statutory authority of judges to deny or terminate certain Federal benefits; (3) promulgation of a sentencing policy statement concerning the retroactive applicability of sentencing guideline amendments; and, (4) approval of miscellaneous technical and clarifying revisions to the Guidelines Manual.

**SUMMARY:** The Sentencing Commission hereby gives public notice of several actions taken pursuant to its authorities under section 21(a) of the Sentencing Act of 1987 (Pub. L. 100–182) and section 217(a) of the Comprehensive Crime Control Act of 1984 (28 U.S.C. § 994 (a) and (u)).

**DATES:** The effective date of the actions set forth below is November 1, 1989.

**FOR FURTHER INFORMATION CONTACT:** Paul K. Martin, Communications Director for the Commission, telephone (202) 662–8800.

**SUPPLEMENTARY INFORMATION:** The United States Sentencing Commission is an independent commission in the judicial branch of the United States Government. Section 21(a) of the Sentencing Act of 1987 (Pub. L. 100–182, Dec. 7, 1987) authorizes the U.S. Sentencing Commission to promulgate temporary, emergency guidelines or amend existing guidelines in certain circumstances, including "the creation of a new offense or amendment of an existing offense." Unlike regular amendments issued pursuant to 28 U.S.C. 994(p), amendments promulgated by the Commission under this authority are not required to be submitted to Congress for 180 days' review prior to their taking effort; nor is the Commission required to publish proposed temporary, emergency guideline amendments prior to promulgation, though it may do so if circumstances permit. However, section 21 emergency amendments are temporary; i.e., unless submitted to Congress as regular amendments in the next regular amendment report, they expire upon the disposition of that report.

The temporary amendments set forth below pertain to the possession of cocaine base ("crack") and to the authority of courts to deny or terminate certain federal benefits to defendants convicted of controlled substances offenses.

Possession of cocaine base ("crack"). Section 6371 of the Anti-Drug Abuse Act of 1988 (Pub. L. 100–690, Nov. 18, 1988), sets forth mandatory minimum terms of imprisonment for defendants possessing certain amounts of cocaine base ("crack"). On June 5, 1989, the Commission published in the **Federal Register** for comment three options for a proposed temporary, emergency sentencing guideline amendment incorporating the new statutory penalties. 54 FR 24073–24074 (1989). On July 18, 1989, the Commission reviewed its proposed temporary, emergency guideline amendments on simple possession and possession with intent to distribute. While it did not necessarily accept the view of some who submitted comments that the proposals were outside of its emergency guideline promulgation authority, the Commission decided to promulgate the narrow amendment set forth below as amendment 1. This amendment provides that convictions for possession of cocaine base ("crack") subject to the enhanced penalties created by section 6371 of the Anti-Drug Abuse Act of 1988 are to be treated as if the conduct constituted possession of the controlled substance with intent to distribute.

Denial of certain Federal benefits. On August 30, 1989, the President of the United States submitted a report to Congress concerning the implementation of section 5301 of the Anti-Drug Abuse Act of 1988 (Pub. L. 100–690, Nov. 18, 1988) pertaining to denial of Federal benefits for certain drug offenders. In that report, the President "ask[s] the United States Sentencing Commission to assist in the initial dissemination of information to the Federal courts" regarding section 5301. Further, the report states that "[p]rincipal responsibility will rest with the Sentencing Commission to disseminate all necessary information concerning section 5301 to Article III Judges and other appropriate Federal personnel." In response to discussions with the Office of Drug Policy and the Office of Management and Budget regarding this anticipated request of the President, and in preparation for the submission of his report to Congress, the Commission adopted the temporary, emergency guideline amendment on August 22, 1989, set forth below as amendment 2. The amendment informs judges, probation officers, and all recipients of the Guidelines Manual of the availability of penalties under section 5301.

New Policy Statement: Retroactive application of amendments to guideline sentencing ranges. Section 994(a)(2) of title 28, United States Code authorized the Commission to promulgate policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation. Unlike guideline amendments issued pursuant to 28 U.S.C. § 994(p), sentencing policy statements and amendments thereto promulgated by the Commission are not required to be submitted to Congress for 180 days' review prior to their taking effect.

Section 3582(c)(2) of title 18, United States Code provides that "the court may reduce the term of imprisonment [in the case of a defendant who has been sentenced to a term of imprisonment based upon a sentence range that has subsequently been lowered by the Sentencing Commission] * * * if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." Further, under section 994(u) of title 28, United States Code, the Commission is directed to "specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced" where it has lowered sentencing ranges applicable to an offense or group of offenses. In furtherance of these statutory mandates, on September 12, 1989, the Commission adopted a policy statement concerning the retroactive application of amendments that reduce guideline ranges set forth below as amendment 3.

Technical revisions to the Guidelines Manual. The Commission approved several miscellaneous technical and clarifying revisions to the Guidelines Manual as set forth below under Miscellaneous Matters.

**Authority:** Section 217(a) of the Comprehensive Crime Control Act of 1984 (28 U.S.C. 994(a) and (u)) and Section 21(a) of the Sentencing Act of 1987 (Pub. L. 100–182).

**William W. Wilkins, Jr.,**

*Chairman.*

### Amendment 1

The Commission has promulgated the following temporary, emergency amendment to the guidelines and commentary implementing statutory minimum sentences for possession of cocaine base ("crack"):

Section 2D2.1 is amended by inserting the following additional subsection:

"(b) Cross Reference

(1) If the defendant is convicted of possession of more than 5 grams of a mixture or substance containing cocaine

base, apply § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking) as if the defendant had been convicted of possession of that mixture or substance with intent to distribute.".

The Commentary to § 2D2.1 captioned "Background" is amended by deleting the entire text as follows:

"*Background:* Absent a prior drug related conviction, the maximum term of imprisonment authorized by statute is one year. With a single prior drug related conviction, a mandatory minimum term of imprisonment of fifteen days is required by statute and the maximum term of imprisonment authorized is increased to two years. With two or more prior drug related convictions, a mandatory minimum term of imprisonment of ninety days is required by statute and the maximum term of imprisonment authorized is increased to three years.",

and inserting in lieu thereof:

"*Background:* Mandatory minimum penalties for several categories of cases, ranging from fifteen days' to five years' imprisonment, are set forth in 21 U.S.C. 844(a). When a mandatory minimum penalty exceeds the guideline range, the mandatory minimum becomes the guideline sentence. § 5G1.1(b).

Section 2D2.1(b)(1) provides a cross reference to § 2D1.1 for possession of more than five grams of a mixture or substance containing cocaine base, an offense subject to an enhanced penalty under Section 6371 of the Anti-Drug Abuse Act of 1988. Other cases for which enhanced penalties are provided under Section 6371 of the Anti-Drug Abuse Act of 1988 (e.g., for a person with one prior conviction, possession of more than three grams of a mixture or substance containing cocaine base; for a person with two or more prior convictions, possession of more than one gram of a mixture or substance containing cocaine base) are to be sentenced in accordance with § 5G1.1(b).".

*Statement of Reasons:* The purpose of this amendment is to reflect revisions in 21 U.S.C. 844(a) made by section 6371 of the Anti-Drug Abuse Act of 1988.

**Amendment 2**

The Commission has promulgated the following temporary, emergency guideline amendment concerning the statutory authority of judges to deny or terminate certain Federal benefits: Chapter Five, Part F, is amended by inserting the following additional section:

*"§ 5F1.6. Denial of Federal Benefits to Drug Traffickers and Possessors*

The court, pursuant to 21 U.S.C. 853a, may deny the eligibility for certain Federal benefits of any individual convicted of distribution or possession of a controlled substance.

**Commentary**

*Application Note:*

1. 'Federal benefit' is defined in 21 U.S.C. 853a(d) to mean 'any grant, contract, loan, professional license, or commercial license provided by an agency of the United States or by appropriated funds of the United States' but 'does not include any retirement, welfare, Social Security, health, disability, veterans benefit, public housing, or other similar benefit, or any other benefit for which payments or services are required for eligibility.'

*Background:* Subsections (a) and (b) of 21 U.S.C. § 853a provide that an individual convicted of a state or federal drug trafficking or possession offense may be denied certain federal benefits. Except for an individual convicted of a third or subsequent drug distribution offense, the period of benefit ineligibility, within the applicable maximum term set forth in 21 U.S.C. 853a(a)(1) (for distribution offenses) and (a)(2)(for possession offenses), is at the discretion of the court. In the case of an individual convicted of a third or subsequent drug distribution offense, denial of benefits is mandatory and permanent under 21 U.S.C. 853a(a)(1)(C)(unless suspended by the court under 21 U.S.C. 853a(c)).

Subsection (b)(2) of 21 U.S.C. § 853a provides that the period of benefit ineligibility that may be imposed in the case of a drug possession offense 'shall be waived in the case of a person who, if there is a reasonable body of evidence to substantiate such declaration, declares himself to be an addict and submits himself to a long-term treatment program for addiction, or is deemed to be rehabilitated pursuant to rules established by the Secretary of Health and Human Services.'

Subsection (c) of 21 U.S.C. 853a provides that the period of benefit ineligibility shall be suspended 'if the individual (A) completes a supervised drug rehabilitation program after becoming ineligible under this section; (B) has otherwise been rehabilitated; or (C) has made a good faith effort to gain admission to a supervised drug rehabilitation program, but is unable to do so because of inaccessibility or unavailability of such a program, or the inability of the individual to pay for such a program.'

Subsection (e) of 21 U.S.C. 853a provides that a period of benefit ineligibility 'shall not apply to any individual who cooperates or testifies with the Government in the prosecution of a Federal or State offense or who is in a Government witness protection program.' ".

*Statement of Reasons:* The purpose of this amendment is to reflect the enactment of 21 U.S.C. 853a by section 5301 of the Anti-Drug Abuse Act of 1988.

**Amendment 3**

The Commission has promulgated the following policy statement concerning the retroactive application of amendments to guideline sentencing ranges:

Chapter One, Part B, is amended by inserting the following additional policy statement:

*"1B1.10. Retroactivity of Amended Guideline Range (Policy Statement)*

(a) Where a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the guidelines listed in subsection (d) below, a reduction in the defendant's term of imprisonment may be considered under 18 U.S.C. 3582(c)(2). If none of the amendments listed in subsection (d) is applicable, a reduction in the defendant's term of imprisonment under 18 U.S.C. 3582(c)(2) is not consistent with this policy statement.

(b) In determining whether a reduction in sentence is warranted for a defendant eligible for consideration under 18 U.S.C. 3582(c)(2), the court should consider the sentence that it would have originally imposed had the guidelines, as amended, been in effect at that time.

(c) Provided, however, that a reduction in a defendant's term of imprisonment—

(1) Is not authorized unless the maximum of the guideline range applicable to the defendant (from Chapter Five, Part A) has been lowered by at least six months; and

(2) May, in no event, exceed the number of months by which the maximum of the guideline range applicable to the defendant (from Chapter Five, Part A) has been lowered.

(d) Amendments covered by this policy statement are listed in Appendix C as follows: 126, 130, 156, 176, and 269.

**Commentary**

*Application Note:*

1. Although eligibility for consideration under 18 U.S.C. 3582(c)(2) is triggered only by an amendment listed in subsection (d) of this section, the amended guideline range referred to in subsections (b) and (c) of this section is to be determined by applying all amendments to the guidelines (i.e., as if the defendant was being sentenced under the guidelines currently in effect).

*Background:* Section 3582(c)(2) of Title 18, United States Code, provides: '[I]n the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.'

This policy statement provides guidance for a court when considering a motion under 18 U.S.C. 3582(c)(2) and implements 28 U.S.C. 994(u), which provides: 'If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced.'

Among the factors considered by the Commission in selecting the amendments included in subsection (d) were the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively.

The requirement in subsection (c)(1) that the maximum of the guideline range be lowered by at least six months for a reduction to be considered is in accord with the legislative history of 28 U.S.C. 994(u) (formerly 994(t)), which states: 'It should be noted that the Committee does not expect that the Commission will recommend adjusting existing sentences under the provision when guidelines are simply refined in a way that might cause isolated instances of existing sentences falling above the old guidelines or when there is only a minor downward adjustment in the guidelines. The Committee does not believe the courts should be burdened with adjustments in these cases.' S. Rep. 98-225, 98th Cong., 1st Sess. 180 (1983).".

*Statement of Reasons:* The purpose of this amendment is to implement the directive in 28 U.S.C. 994(u).

**Miscellaneous Matters**

The Commission has approved the following miscellaneous, technical, and clarifying revisions to the Guidelines Manual. The number of the amendment in Appendix C of the revised Manual containing the revision is shown following each revision.

The following additional application note is inserted in the Commentary to § 2B3.1 to complement the addition of a specific offense characteristic subdivision pertaining to "an express threat of death:"

"8. 'An express threat of death,' as used in subsection (b)(2)(D), may be in the form of an oral or written statement, act, gesture, or combination thereof. For example, an oral or written demand using words such as 'Give me the money or I will kill you', 'Give me the money or I will pull the pin on the grenade I have in my pocket', 'Give me the money or I will shoot you', 'Give me your money or else (where the defendant draws his hand across his throat in a slashing motion)', or 'Give me the money or you are dead' would constitute an express threat of death. The court should consider that the intent of the underlying provision is to provide an increased offense level for cases in which the offender(s) engaged in conduct that would instill in a reasonable person, who is a victim of the offense, significantly greater fear than that necessary to constitute an element of the offense of robbery.".

(Appendix C, amendment 110).

A typographical error in the amended § 2D1.1(c)(14) is corrected by revising "Schedule I or I Depressants" to read "Schedule I or II Depressants". No substantive change occurs because this result would be required by, and the intent of this subsection is clear from, the immediately preceding and following subsections. In addition, the Commentary to § 2D1.1 captioned "Application Notes" is amended in Note 10 by deleting "Other Schedule I or II Substances" and inserting in lieu thereof "Schedule I or II Depressants" to conform to the revision in the guideline (Appendix C, amendment 125).

The Commentary to § 2D1.5 captioned "Application Notes" is amended in Note 2 by deleting "if the quantity of drugs substantially exceeds that required for level 36 in the drug quantity table,", and by deleting "is extremely" and inserting in lieu thereof "was extremely". This revision conforms this Commentary to the amendment of the Drug Quantity Table in § 2D1.1, which expanded the Drug Quantity Table itself to provide higher offense levels for extremely large drug quantities (Appendix C, amendment 139).

The Commentary to § 2F1.1 captioned "Application Notes" is amended in Note 1 by deleting "(b)(2)" and inserting in lieu thereof "(b)(3)", and by deleting "several" and inserting in lieu thereof "both" to conform to the revision of the guideline (Appendix C, amendment 156).

The Commentary to § 4B1.1 captioned "Application Note" is amended in Note 1 by deleting "felony conviction" and inserting in lieu thereof "two prior felony convictions" to make an editorial improvement (Appendix C, amendment 267).

The caption to § 4B1.2 is amended by deleting "Definitions" and inserting in lieu thereof "Definitions of Terms Used in § 4B1.1", and §§ 4B1.2 (1) and (2) are amended by deleting "as used in this provision" in each instance to make an editorial improvement (Appendix C, amendment 268).

Editorial improvements are made to the sentencing table in Chapter Five, part A, by inserting "(in months of imprisonment)" immediately under the title "Sentencing Table", by inserting "(Criminal History Points)" immediately following the caption "Criminal History Category", and by enclosing in parentheses each of the six sets of criminal history points displayed under that caption (Appendix C, amendment 270).

To conform to an amendment to § 5C1.1 authorizing the use of home detention as a substitute for imprisonment in certain circumstances, § 5B1.1(a)(2) is amended by deleting "or community confinement" and inserting in lieu thereof ", community confinement, or home detention". The Commentary to § 5B1.1 captioned "Application Notes" is amended in Note 1 by inserting ", home detention," immediately after "community confinement" wherever the latter appears. Chapter One, section 4(d) is amended in the third sentence of the third paragraph by deleting "or intermittent confinement" and inserting in lieu thereof ", intermittent confinement, or home detention", and in the fourth sentence of the third paragraph by inserting "or home detention" immediately following "of community confinement". These conforming revisions make no substantive change because § 5C1.1, as amended, is controlling in any event (Appendix C, amendment 271).

A revision to the amended Commentary of § 5G1.3, is made to clarify that the amended commentary recommends, rather than requires, the court apply the methodology described. The Commentary to § 5G1.3, as amended, is revised in the second sentence of the second paragraph by deleting "The court should impose" and inserting in lieu thereof "The court may consider imposing", and by inserting the following additional sentences at the end "Where the defendant is serving a term of imprisonment for a state offense, the information available may permit only a rough estimate of the total punishment that would have been imposed under the guidelines. It is not intended that the above methodology be applied in a manner that unduly complicates or prolongs the sentencing process." (Appendix C, amendment 289).

A typographical error in an amended statutory reference in the Statutory Index is corrected by revising "43 U.S.C. 1773(a)" to read "43 U.S.C. 1733(a)" (Appendix C, amendment 298).

In addition, the Commission inserted a "Historical Note" following each guideline section that contains the effective date of the section and the Appendix C reference number of each amendment to the section, and has made a number of additional minor editorial changes to improve the internal consistency and appearance of the Manual.

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# Part VII

## Department of Defense
## General Services Administration
## National Aeronautics and Space Administration

48 CFR Parts 29 and 52
Federal Acquisition Regulation (FAR); Raising Thresholds in FAR Tax Sections; Proposed Rule

**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Parts 29 and 52**

**Federal Acquisition Regulation (FAR); Raising Thresholds in FAR Tax Sections**

**AGENCIES:** Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

**ACTION:** Proposed rule.

**SUMMARY:** The Civilian Agency Acquisition Council and the Defense Acquisition Regulatory Council are considering revisions to FAR Parts 29 and 52 regarding taxes.

**DATE:** Comments should be submitted to the FAR Secretariat at the address shown below on or before January 2, 1990 to be considered in the formulation of a final rule.

**ADDRESS:** Interested parties should submit written comments to: General Services Administration, FAR Secretariat (VRS), 18th & F Streets, NW., Room 4041, Washington, DC 20405.

Please cite FAR Case 89–73 in all correspondence related to this issue.

**FOR FURTHER INFORMATION CONTACT:** Margaret A. Willis, FAR Secretariat, Room 4041, GS Building, Washington, DC 20405, (202) 523–4755.

**SUPPLEMENTARY INFORMATION:**

**A. Background**

As part of an ongoing review of various dollar thresholds in the FAR, the Councils have concluded that certain thresholds in Parts 29 and 52 pertaining to taxes should be changed.

Section 29.201 instructs Government contracting officers to solicit prices on a tax-exclusive basis when they know that the Government is exempt from the taxes and the exemption is at least $100. The Councils are proposing that the threshold be eliminated since it requires no additional effort by either the Government or offerors if prices are solicited on a tax-free basis, and if the Government is exempt from a tax it should not pay it.

The Councils are proposing to revise 29.401–3, 29.401–4, and 29.402–2 to consistently apply the policy that contract clauses relating to taxes generally are not applicable to procurements of less than $25,000.

The clauses at 52.229–3, 52.229–4, 52.229–6, and 52–229–7 all state that no adjustments in contract price shall be made to contracts that contain the clauses unless the amount of the adjustment exceeds $100. The Councils believe that $100 is too low to justify a contract modification, and therefore are proposing to raise the figure to $250.

**B. Regulatory Flexibility Act**

This proposed rule is not expected to have a significant cost or administrative impact on a substantial number of small businesses within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et. seq., because it does not require any additional action on the part of contractors, and because the dollar amounts involved are relatively low. Therefore, an Initial Regulatory Flexibility Analysis has not been performed. Comments from small entities concerning the affected FAR subparts will also be considered in accordance with section 610 of the Act. Such comments must be submitted separately and cite § 89–610 (FAR Case 89–73) in correspondence.

**C. Paperwork Reduction Act**

The Paperwork Reduction Act does not apply because the proposed changes to the FAR do not impose recordkeeping information collection requirements or collection of information from offerors, contractors, or members of the public which require the approval of OMB under 44 U.S.C. 3501, et seq.

**List of Subjects in 48 CFR Parts 29 and 52**

Government procurement.

Dated: October 23, 1989.

**Albert A. Vicchiolla,**

*Director, Office of Federal Acquisition Policy.*

Therefore, it is proposed that 48 CFR parts 29 and 52 be amended as set forth below:

1. The authority citation for 48 CFR parts 29 and 52 continues to read as follows:

**Authority:** 40 U.S.C. 486(c); 10 U.S.C. Chapter 137; and 42 U.S.C. 2473(c).

## PART 29—TAXES

2. Section 29.201 is amended by revising paragraphs (b) and (c) to read as follows:

**29.201 General.**

* * * * *

(b) Sometimes the law exempts the Federal Government from these taxes. Contracting officers should solicit prices on a tax-exclusive basis when it is known that the Government is exempt from these taxes, and on a tax-inclusive basis when no exemption exists.

(c) Executive agencies shall take maximum advantage of available Federal excise tax exemptions.

3. Section 29.401–3 is revised to read as follows:

**29.410–3 Competitive contracts.**

The contracting officer shall insert the clause at 52.229–3, Federal, State, and Local Taxes, in all solicitations and contracts if the contract is to be performed wholly or partly within the United States, its possessions, or Puerto Rico when a fixed-price contract is contemplated, and the contract is expected to exceed the small purchase limitation in 13.000, unless the clause at 52.229–4, Federal, State, and Local Taxes (Noncompetitive Contract), is included in the contract.

4. Section 29.401–4 is amended by revising the first sentence to read as follows:

**29.401–4 Noncompetitive contracts.**

The contracting officer shall insert the clause at 52.229–4, Federal, State, and Local Taxes (Noncompetitive Contract), in fixed-price noncompetitive contracts when the contract exceeds the small purchase limitation in 13.000 to be performed wholly or partly within the United States, its possessions, or Puerto Rico when satisfied (a) that the contract price does not include contingencies for State and local taxes and (b) that, unless the clause is used, the contract price will include such contingencies. * * *

**29.402–1 [Amended]**

5. Section 29.402–1 is amended in paragraph (a) by inserting the words "expected to exceed the dollar amount in 13.000" after the words "solicitations and contracts", and in paragraph (b) by inserting the words "that exceed the dollar amount in 13.000" after the words "solicitations and contracts".

## PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

**52.229–3 [Amended]**

6. Section 52.229–3 is amended by removing in the title of the clause the date "(APR 1984)" and inserting in its place the date "(OCT 1989)"; by removing in paragraph (f) the figure "$100" and inserting in its place the figure "$250"; and by removing the two derivation lines following "(End of clause)".

7. Section 52.229–4 is amended by revising the introductory text; by removing in the title of the clause the date "(APR 1984)" and inserting in its

place the date "(OCT 1989)"; by removing in paragraph (f) the figure "$100" and inserting in its place the figure "$250"; and by removing the two derivation lines following "(End of clause)" to read as follows:

**52.229–4 Federal, State, and Local Taxes (Noncompetitive Contract).**

As prescribed in 29.401–4, insert the following clause:

* * * * *

**52.229–6 [Amended]**

8. Section 52.229–6 is amended by inserting a colon in the first sentence of the introductory text following the word "clause" and removing the remainder of the paragraph; by removing in the title of the clause the date "(APR 1984)" and inserting in its place the date "(OCT 1989)"; by removing in paragraph (g) the figure "$100" and inserting in its place the figure "$250"; and by removing the derivation line following "(End of clause)".

**52.229–7 [Amended]**

9. Section 52.229–7 is amended by inserting a colon in the first sentence of the introductory text following the word "clause" and removing the remainder of the paragraph; by removing in the title of the clause the date "(APR 1984)" and inserting in its place the date "(OCT 1989)"; by removing in paragraph (d) the figure "$100" and inserting in its place the figure "$250"; and by removing the derivation line following "(End of clause)".

[FR Doc. 89–25516 Filed 10–31–89; 8:45 am]
BILLING CODE 6820–JC

federal register

Tuesday
October 31, 1989

PART VIII

# The President

Proclamation 6057—Fire Safety at Home Day, 1989

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Federal Register
Vol. 54, No. 209
Tuesday, October 31, 1989

# Presidential Documents

Title 3—

The President

**Proclamation 6057 of October 27, 1989**

## Fire Safety at Home Day, 1989

**By the President of the United States of America**

**A Proclamation**

Sunday, October 29, 1989, is the date on which the Nation will return to Standard Time. In jurisdictions that observe daylight savings time, clocks will be set back 1 hour. We may use this adjustment of the clocks as a reminder to perform other simple actions—actions that can save lives by helping to make our homes safe from accidental fire.

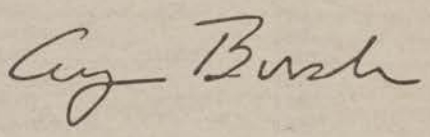
All Americans can take simple steps such as checking to ensure that fire exit paths are clear, safely disposing of dangerous and flammable chemicals through means recommended by their local fire department, and verifying that home appliances are fire-safe. In particular, we can also take a few minutes to test our home smoke detectors, clean them, and change their batteries.

Smoke detectors are a proven lifesaver. The few minutes spent by each American in ensuring the proper operation of smoke detectors can help avert many senseless tragedies. Most of the 6,000 Americans who succumb to fire each year fall victim in their homes. Children, senior citizens, families in substandard housing, and persons with disabilities are particularly vulnerable. Information on the proper methods for cleaning and testing smoke detectors may be obtained from local fire departments.

The Congress, by Senate Joint Resolution 177, has designated October 29, 1989, as "Fire Safety at Home—Change Your Clock, and Change Your Battery Day" and has authorized and requested the President to issue a proclamation in observance of this occasion.

NOW, THEREFORE, I, GEORGE BUSH, President of the United States of America, do hereby proclaim October 29, 1989, as Fire Safety at Home Day, 1989. I call upon all Americans to observe this day by taking steps to ensure that their homes are safe from fire.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-seventh day of October, in the year of our Lord nineteen hundred and eighty-nine, and of the Independence of the United States of America the two hundred and fourteenth.



[FR Doc. 89-25795
Filed 10-30-89; 10:55 am]
Billing code 3195-01-M

# Reader Aids

Federal Register

Vol. 54, No. 209

Tuesday, October 31, 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, OCTOBER

40369-40626.....2
40627-40856.....3
40857-41038.....4
41039-41236.....5
41237-41428.....6
41429-41576.....10
41577-41816.....11
41817-41942.....12
41943-42286.....13
42287-42462.....16
42463-42798.....17
42799-42944.....18
42945-43032.....19
43033-43166.....20
43167-43264.....23
43265-43414.....24
43415-43574.....25
43575-43794.....26
43795-43934.....27
43935-45728.....30
45729-46042.....31

## CFR PARTS AFFECTED DURING OCTOBER

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**

**Proposed Rules:**
Ch. III.....40880

**3 CFR**

**Proclamations:**
6030.....40839
6031.....40849
6032.....40851
6033.....40853
6034.....41039
6035.....41041
6036.....41429
6037.....41431
6038.....41573
6039.....41577
6040.....41579
6041.....41581
6042.....41817
6043.....42281
6044.....42283
6045.....42461
6046.....42463
6047.....42465
6048.....42737
6049.....42943
6050.....43033
6051.....43265
6052.....43267
6053.....43793
6054.....43795
6055.....43935
6056.....43937
6057.....46041

**Executive Orders:**
11145 (Continued by EO 12692).....40627
11183 (Continued by EO 12692).....40627
11287 (Continued by EO 12692).....40627
11776 (Continued by EO 12692).....40627
12131 (Continued by EO 12692).....40627
12171 (Amended by EO 12693).....40629
12190 (Continued by EO 12692).....40627
12196 (Continued by EO 12692).....40627
12216 (Continued by EO 12692).....40627
12296 (Revoked by EO 12692).....40627
12345 (Continued by EO 12692).....40627
12345 (Amended by EO 12694).....42285
12367 (Continued by EO 12692).....40627
12382 (Continued by EO 12692).....40627
12462 (Revoked by EO 12692).....40627
12528 (Revoked by EO 12692).....40627
12592 (Revoked by EO 12692).....40627
12601 (Revoked by EO 12692).....40627
12607 (Revoked by EO 12692).....40627
12610 (Superseded by EO 12692).....40627
12668 (Revoked by EO 12692).....40627
12692.....40627
12693.....40629
12694.....42285

**Administrative Orders:**
Orders:
Aug. 25, 1989 (Superseded by Final Order of Oct. 16, 1989).....42795
Oct. 16, 1989.....42795
Presidential Determinations:
No. 90-1 of Oct. 5, 1989.....43797
No. 90-2 of Oct. 6, 1989.....43035

**5 CFR**

890.....43939

**7 CFR**

2.....42467
26.....41237
250.....42467
301.....40570, 42478, 43037, 43269, 43575
352.....43167
401.....43269-43273
422.....43276
701.....41819
906.....41583
910.....40369, 41433, 42287, 43038, 43799
920.....41433
946.....41585
989.....41586, 43039
1065.....41240
1079.....40857, 41241
1137.....41437, 45891
1427.....41237
1434.....41588
1435.....41043, 41588
1446.....40858
1475.....43941
1477.....40369
1610.....43415, 45729
1765.....41713
1864.....42799

1930.....43415
1962.....42799
1980.....42480
2003.....42492
**Proposed Rules:**
51.....41597, 41599, 43384
301.....43585
401.....41246, 41248, 43295
403.....41249
456.....42305
906.....41249
926.....41251
949.....42306
955.....41252
966.....41253
971.....45737
968.....41601
981.....41979
984.....45738
1032.....43182
1139.....41254
1762.....43429
1948.....41626

**8 CFR**

245.....43384

**9 CFR**

77.....42945
318.....43041
319.....40631
327.....41045
381.....41045, 43948
**Proposed Rules:**
71.....41845, 43065
78.....43065
80.....41845
85.....45739
92.....42144
94.....41845

**10 CFR**

11.....40859
20.....42287
21.....42287
25.....40859
35.....41819
51.....43576
73.....42287
95.....40859
600.....41943
**Proposed Rules:**
2.....40780
50.....41980

**12 CFR**

207.....43952
220.....43952
221.....43952
224.....43952
Ch. III.....42799, 45891
312.....40377, 43521
Ch. IV.....45891
Ch. V.....42799
701.....43277
708.....43278
747.....43280
932.....43384
1510.....41948
1511.....41948
**Proposed Rules:**
5.....42306
7.....42306, 43398
32.....43398
203.....41255
220.....41454
745.....43297
747.....43299

**13 CFR**

120.....45891
124.....43217
**Proposed Rules:**
121.....42512

**14 CFR**

21.....41955, 43417
23.....41955, 43417
25.....43922
29.....43928
39.....40381, 40382, 40632, 40633, 40635, 40636–40639, 41051–41054, 41438, 41821, 41958–41960, 42288–42292, 42493, 42621, 43045–43047, 43217, 43578–43581, 43800–43805, 43954
61.....41234
71.....41822, 42293, 42494, 42495, 42801, 43048, 43385, 43422, 43423, 43582, 43786, 43956–43959
73.....42495
91.....40624, 41211, 42439, 43049
97.....41590, 43048
121.....43922
135.....43922
1260.....43050
**Proposed Rules:**
Ch. I.....40672, 43430
1.....41986, 42916
11.....42916
27.....41986
29.....41986, 42716
33.....41986
39.....40672, 40673, 40675–40678, 40680, 41103–41106, 41456, 41846, 41987, 41988, 42307, 42512, 42514, 43069–43081, 43430, 43432, 43586, 43591, 43824, 43825
43.....43934
65.....42916, 43934
71.....41109, 41110, 41458, 41713, 42694, 42806, 42916 43433, 43434, 43971
75.....42916, 45891
91.....42916
93.....42916
101.....42916
103.....42916
105.....42916
121.....42916
127.....42916
137.....42916
139.....42912
145.....43934
171.....42916
205.....42309
221.....41989
294.....42309
298.....42309

**15 CFR**

769.....41439
770.....40861
771.....40861
772.....42496
776.....40640
779.....40643, 41055
799.....40861, 41055, 43806
**Proposed Rules:**
19.....41848
771.....40681
772.....40681
773.....40681
774.....40681
786.....40681
799.....40681
806.....41275

**16 CFR**

305.....41242
**Proposed Rules:**
417.....43434
432.....43435

**17 CFR**

1.....41068
3.....41068
31.....41068
145.....41068
147.....41068
200.....40862
211.....41084
**Proposed Rules:**
240.....40395

**18 CFR**

37.....42945
154.....41085
294.....41086
1314.....42456

**19 CFR**

171.....41364, 43423
**Proposed Rules:**
12.....40882, 43826
24.....40882
132.....40887
133.....40882
142.....40887

**20 CFR**

200.....43054
222.....42949
262.....43054
335.....43057
404.....40779
416.....40779
**Proposed Rules:**
404.....40570

**21 CFR**

Ch. I.....41363
5.....43960
81.....43961
177.....40383, 43168
178.....42886
436.....41823, 42886
442.....40651, 40653, 41823, 43384, 44007
453.....40654, 41823, 43288, 43384, 44007
455.....40384, 41823, 42886
510.....40656, 41441, 41713, 43290
522.....40656, 41441
540.....41441
544.....41441
555.....41441
558.....40657, 41713
801.....43766
**Proposed Rules:**
Ch. I.....43183
10.....41629
310.....40618, 41629
314.....41629, 42515
320.....41629
341.....40412
347.....40808
348.....40808
436.....43592
444.....43303
452.....43592, 43593
1020.....42674
1306.....43436
1316.....40888

**22 CFR**

120.....42496
122.....42496
123.....42496
126.....42496
514.....40386
**Proposed Rules:**
50.....41459

**23 CFR**

658.....43290
**Proposed Rules:**
658.....41278

**24 CFR**

888.....43170, 43291
1710.....40863
**Proposed Rules:**
882.....43594
887.....43594

**25 CFR**

**Proposed Rules:**
61.....45743

**26 CFR**

1.....41087, 41442, 41962, 43522
5h.....41243, 41364
602.....41087, 41243, 41442, 41962
1926.....45894
**Proposed Rules:**
1.....41990, 42621
602.....41990
882.....43594
887.....43594

**29 CFR**

1601.....40657, 44007
1910.....41364, 42498
1926.....41088
2610.....42294
2622.....42294
2644.....41962
2676.....41963
**Proposed Rules:**
1614.....45747
1910.....41460, 41461

**30 CFR**

914.....41824, 41828
**Proposed Rules:**
7.....40950, 40995
44.....43028
56.....43026
57.....43026
58.....43026
70.....40950, 43026
71.....43026
72.....43026
75.....40950, 43026
90.....43026

104.....43028
917.....40413, 45767
925.....40414
935.....45768
943.....41281

**31 CFR**

317.....40830
515.....45730
**Proposed Rules:**
103.....45769
515.....43304

**32 CFR**

536.....43892
537.....43914
**Proposed Rules:**
169a.....42807, 45771

**33 CFR**

100.....41088, 42499, 43217
117.....41964, 41965, 43808
165.....40868, 40869, 43809, 43810
241.....40578
**Proposed Rules:**
117.....41991, 42517
154.....41366
155.....41366, 42624
156.....41366
165.....43890
334.....40572

**34 CFR**

30.....43583
200.....43220
201.....43220
203.....43220
208.....43583
219.....43584
600.....40388
668.....43811
682.....43811
**Proposed Rules:**
302.....42704
668.....45994

**35 CFR**

103.....43962
133.....43962

**36 CFR**

7.....43060
292.....41089
**Proposed Rules:**
254.....41849, 43597

**37 CFR**

202.....42295

**38 CFR**

1.....40388, 40870
3.....42802
21.....40871, 42500
**Proposed Rules:**
3.....40684, 40686, 41110, 43436, 44008
21.....40687, 40688, 41110, 42961

**39 CFR**

3.....42300
4.....42300
5.....42300
6.....42300
8.....42300
601.....43061

**40 CFR**

35.....40798
52.....40657, 40659, 40660, 41094, 41443, 41830, 43173–43176, 43812–43816
60.....40662
61.....40662
81.....41094, 41831, 42956
123.....40664
180.....41098, 43424, 45733
185.....43424
186.....43424
261.....41402, 43818
271.....41402
300.....41000, 41015
302.....41402
355.....43164
370.....41904
403.....40664
795.....41832, 43252
799.....41832, 43252
**Proposed Rules:**
51.....41218
52.....40689, 40889, 41218, 41629, 41849, 42309, 43083, 43183, 43521, 43827
61.....40779, 41113
81.....41218, 43829
228.....40415
260.....41930, 43718
261.....41114, 43718, 43829
264.....43718
265.....43718
266.....43718
270.....43718
271.....43718
300.....40889, 43778
370.....41907
372.....42962, 45891
721.....42439

**41 CFR**

Ch. 101.....41244
101–6.....41214
101–40.....42803
101–41.....43425, 43890
101–44.....43521
101–45.....43521
101–47.....41099, 41244
201–1.....42302
201–2.....42302
201–6.....42302
201–38.....42302
302–6.....43521
302–12.....43521
**Proposed Rules:**
201–2.....41850
201–6.....41850
201–7.....41850
201–8.....41850
201–11.....41850
201–16.....41850
201–17.....41850
201–18.....41850
201–19.....41850
201–20.....41850
201–21.....41850
201–22.....41850
201–23.....41850
201–24.....41850
201–26.....41850
201–30.....41850
201–31.....41850
201–33.....41850
201–34.....41850
201–38.....41850
201–39.....41850
201–41.....41850
201–44.....41850

**42 CFR**

405.....41716
411.....41716
412.....41716
433.....41966
489.....41716

**43 CFR**

**Public Land Order:**
6750.....43178
**Proposed Rules:**
11.....41363, 43185
2090.....43185
2200.....43185, 43597

**44 CFR**

60.....42144
64.....40872, 43425
65.....43178
67.....42501, 43291
**Proposed Rules:**
67.....40890, 41631, 42518, 43305

**45 CFR**

60.....42722, 43890
205.....42146
224.....42146
233.....42146
234.....42146
238.....42146
239.....42146
240.....42146
250.....42146
255.....42146
256.....42146

**46 CFR**

50.....40590
56.....40590
61.....40590
67.....41835
153.....43584
**Proposed Rules:**
12.....42624
13.....42624
15.....42624
30.....41124, 42624
31.....41124, 42624
32.....41366
33.....41124
35.....41124, 41366, 42624
39.....41366
67.....41992, 44008
70.....41124
71.....41124
75.....41124
78.....41124, 42624
90.....41124, 42624
91.....41124
94.....41124
97.....41124, 42624
98.....42624
105.....42624
107.....41124
108.....41124
109.....41124
112.....41124
151.....42624
153.....42624
154.....41124, 42624
160.....41124
161.....41124
167.....41124
168.....41124
188.....41124
189.....41124
192.....41124
196.....41124
199.....41124
580.....40891, 43834
581.....40891, 43834

**47 CFR**

1.....40392, 43062
2.....41974, 43293
73.....40393, 40873–40875, 41100, 41445, 41446, 42507, 42804, 43062, 43063, 45735
74.....41842
76.....41842
80.....42804
90.....43293, 45891
300.....41447
**Proposed Rules:**
2.....41464
15.....41125, 41464
73.....40419, 40420, 40893–40896, 41125–41128, 41465–41470, 41852, 41853, 42523, 42524, 42807–42809, 43086–43088, 45771–45773

**48 CFR**

5.....46004
6.....46004
19.....46004
52.....46004
302.....43965
304.....43965
309.....43965
315.....43965
332.....43965
342.....43965
352.....43965
532.....43180
552.....43180
815.....42507, 45736
1532.....40876
1552.....40876
2801.....40877
2813.....40877
2819.....40877
**Proposed Rules:**
20.....40420
29.....46036
31.....43032
37.....41941
52.....41941, 46036
1602.....43089
1615.....43089
1616.....43089
1622.....43089
1632.....43089
1652.....43089

**49 CFR**

171.....41447
172.....41447
191.....40878
195.....40878
209.....42894
219.....40879
383.....40782
391.....40782

531.....40665, 42303
565.....41843
571.....41844
1135.....42509
1145.....42509
1171.....42958
1312.....42959
1314.....42959

**Proposed Rules:**

23.....43835
177.....41902
195.....41912
217.....40856
219.....40856
225.....40656
531.....40689
541.....42809
571.....40896, 41632, 41636, 41854, 43598
1022.....41643
1043.....41643
1044.....41643
1047.....41643
1051.....41643
1058.....41643
1061.....41643
1063.....41643
1067.....41643
1070.....41643
1080.....41643
1081.....41643
1083.....41643
1084.....41643
1085.....41643
1091.....41643
1104.....41643
1105.....42964
1136.....41643
1143.....41643
1152.....42964
1161.....41643
1167.....41643
1169.....41643
1170.....41643
1331.....41643

**50 CFR**

17.....41448, 43966
285.....43181
380.....40668
611.....43821
642.....43970
651.....41975
661.....41591, 41592
662.....41975, 41976
663.....41594
672.....40394, 41101, 41976
675.....40716, 41101, 41977, 43823

**Proposed Rules:**

16.....43097
17.....40444–40458, 41470–41475, 42270, 42813–42820, 43835, 45773
23.....41282, 41475, 42524, 42529
24.....41295
216.....41654
222.....40699
228.....40703
264.....40779
265.....41296
611.....40716, 41855, 42312
641.....41297, 42439
650.....40463, 41902, 42439
651.....40466, 42439
663.....41855, 42312
672.....40716

## 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 October 30, 1989**

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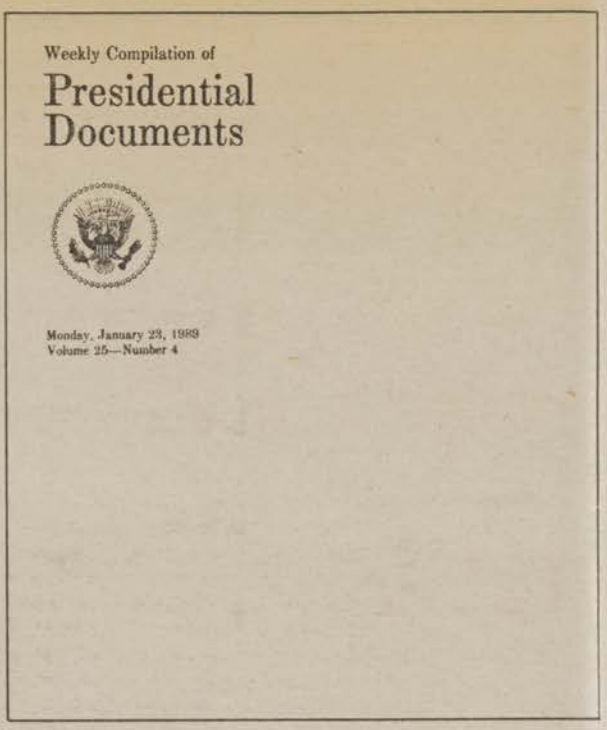


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