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Presidential Documents

Title 3—

The President

Proclamation 6384 of December 2, 1991

Geography Awareness Week, 1991 and 1992

By the President of the United States of America

A Proclamation

Coaches know that, before a winning team can prove itself on the field, each of its members must master the "fundamentals." The same principle applies to education; thus, our efforts to restore excellence in our schools include renewed emphasis on the basics. One of the key aims of AMERICA 2000, our strategy to achieve our National Education Goals, is to ensure that this country's students demonstrate competence in five core subject areas: mathematics, science, English, history, and geography. The study of geography, which focuses on people and their physical surroundings, not only goes hand in hand with the study of history and science but also gives us a better understanding of current world events.

Geography has been a determining factor in the social, economic, and political development of every nation on Earth; indeed, it is impossible to understand history without taking into account the location, natural resources, and other geographic characteristics of nations. When we study the geography of our 50 States, as well as the relationship of America to the world as a whole, we gain a better understanding of our Nation's history and development—and a deeper appreciation of its diversity and splendor.

While most geographic features of our Nation and the planet have taken shape over thousands of years, the study of geography gives us more than insight into the past; it also equips us with knowledge that we need to understand and to participate in the world of today. As advances in technology bring the world closer together, and as democratic reforms in many nations create new opportunities for international trade and travel, the mastery of geography becomes increasingly important. If the United States is to remain a leader in our rapidly changing world, then our citizens must be able to recognize the location and the significance of events abroad. If we are to continue to enjoy success in the complex realms of foreign policy and international commerce, then we must also be familiar with the languages, customs, and physical circumstances of our neighbors around the globe.

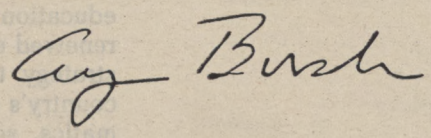
Despite the importance of geography, and despite the fact that it can be both fascinating and fun for students, too many Americans do not have basic knowledge in this field. Too many schoolchildren—and too many adults—are unable to locate major cities, countries, or even entire continents on a globe. Many are unaware of the advantages of seaports and rivers to a nation's security and commerce, and some Americans are even unable to locate their own communities on a map.

By working together to achieve our National Education Goals, we can change this intolerable situation. During Geography Awareness Week, let us reaffirm our determination to make the United States a Nation of students. As parents and as teachers, let us help our children to recognize the importance of geography and other basic subjects, and by word, deed, and example, let us introduce them to the joys of lifelong learning.

In recognition of the importance of the study and mastery of geography, the Congress, by House Joint Resolution 201, has designated the week of December 1 through December 7, 1991, and the week of November 15 through November 21, 1992, each as "Geography Awareness Week" and has authorized and requested the President to issue a proclamation in observance of these occasions.

NOW, THEREFORE, I, GEORGE BUSH, President of the United States of America, do hereby proclaim the week beginning December 1, 1991, and the week beginning November 15, 1992, as Geography Awareness Week. I call upon all Americans to observe these occasions with appropriate programs, ceremonies, and activities.

IN WITNESS WHEREOF, I have hereunto set my hand this second day of December, in the year of our Lord nineteen hundred and ninety-one, and of the Independence of the United States of America the two hundred and sixteenth.



[FR Doc. 91-29180
Filed 12-2-91; 1:43 pm]
Billing code 3195-01-M

Presidential Documents

Proclamation 6385 of December 2, 1991

National Home Care Week, 1991 and 1992

By the President of the United States of America

A Proclamation

Each day, thousands of hardworking men and women bring vital home health care services to Americans who are incapacitated by illness, age, or disability. Working in association with more than 12,000 home care agencies across the country, these dedicated professionals and volunteers play an important part in our Nation's total health care system. This week, we honor them for their many contributions.

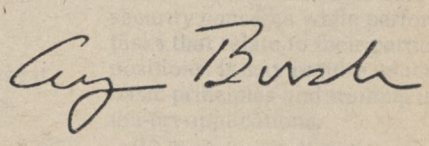
The administrators and employees of home health care agencies work closely with government agencies and with concerned private organizations, including hospitals, to give patients a welcome alternative to institutionalized care. Home care not only emphasizes the dignity, comfort, and independence of patients but also affirms the importance of family love and support to their well-being. By enabling clients to prevent or to postpone costly hospital stays and other forms of inpatient care, home care has often proved to be economical, as well.

Thousands of nurses, therapists, social workers, and others provide our Nation's home care services, and each of them deserves our recognition and thanks. Their professionalism and compassion are making a real difference in the lives of Americans in need.

To increase public awareness of and support for our Nation's home care agencies, the Congress, by House Joint Resolution 175, has designated the weeks beginning December 1, 1991, and November 29, 1992, as "National Home Care Week" and has authorized and requested the President to issue a proclamation in observance of these weeks.

NOW, THEREFORE, I, GEORGE BUSH, President of the United States of America, do hereby proclaim the weeks of December 1 through December 7, 1991, and November 29 through December 5, 1992, as National Home Care Week. I encourage all Americans—as well as government officials, health and social service providers, insurance companies, and private voluntary organizations—to observe these weeks with appropriate programs and activities.

IN WITNESS WHEREOF, I have hereunto set my hand this second day of December, in the year of our Lord nineteen hundred and ninety-one, and of the Independence of the United States of America the two hundred and sixteenth.



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Rules and Regulations

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

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 930

RIN 3206-AD43

Training Requirement for the Computer Security Act

AGENCY: Office of Personnel Management.

ACTION: Final regulation.

SUMMARY: This regulation implements Public Law 100–235, the Computer Security Act of 1987, which requires training for all employees responsible for the management and use of Federal computer systems that process sensitive information. Under the regulation agencies will be responsible for identifying the employees to be trained and providing appropriate training.

EFFECTIVE DATE: January 3, 1992.

FOR FURTHER INFORMATION CONTACT: Ms. Constance Guitian, (202) 632–9769.

SUPPLEMENTARY INFORMATION: On June 12, 1991, the Office of Personnel Management published proposed rules on this subject (56 FR 26942). Four comments were received. The Department of Education suggested that the regulations apply to all computer information systems. The regulation cannot exceed the scope of the law, which gives as its purpose (section 2(b)(4)) "to require mandatory periodic training for all persons involved in management, use, or operation of Federal computer systems that contain sensitive information." The law limits training to only those systems which contain sensitive information.

A Naval Supply Center wanted the initial training for new employees to be given within the first 180 days of appointment rather than the first 60. In the testimony for this law, it was pointed out that the vast majority of security breaches are caused by employee negligence. The law states (section 5(b)) that required training should start within 60 days of the issuance of regulations. The same should apply to any new employees. Furthermore, the current interim regulations have the same requirement because it is a sound mangement practice to train employees early in computer security to establish good security habits.

A Marine Corps installation informed us of their concurrence with the regulation. A Naval Weapons Center asked where they can find training materials. OPM has prepared some generic computer security awareness training packages that are available from the National Audiovisual Center, Attn: Customer Service Staff, 8700 Edgeworth Drive, Capitol Heights, MD 20743–3701, (301) 763–1891. There is a videocassette, a one-day course, a deskguide, an executive briefing, and an independent study course. The National Institutes of Standards and Technology's "Computer Security Training Guidelines" NIST Special Publication 500–172 is available from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402–9325. The GPO publication number is 003–003–029575–1. Requests must be accompanied by a check or money order for $2.50. It can also be ordered by phone with a VISA or Mastercard and the telephone number is 202–783–3238.

E.O. 12291, Federal Regulation

I have determined that this is not a major rule as defined under section 1(b) of E.O. 12291, Federal Regulation.

Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities, including small businesses, small organizational units, and small governmental jurisdictions, because it will affect only Federal employees.

Constance Berry Newman,

Director, Office of Personnel Management.

Accordingly, the Office of Personnel Management is revising 5 CFR part 930, subpart C, to read as follows:

PART 930—PROGRAMS FOR SPECIFIC POSITIONS AND EXAMINATIONS (MISCELLANEOUS)

Subpart C—Employees Responsible for the Management or Use of Federal Computer Systems

Sec.

930.301 Definitions.
930.302 Training requirement.
930.303 Initial training.
930.304 Continuing training.
930.305 Refresher training.

Subpart C—Employees Responsible for the Management or Use of Federal Computer Systems

Authority: 40 U.S.C. 759 note.

§ 930.301 Definitions.

(a) The amount and type of training different groups of employees will receive will be distinguished by the following knowledge levels identified in the Computer Security Training Guidelines developed by the National Institute of Standards and Technology:

(1) *Awareness level training* creates the sensitivity to the threats and vulnerabilities and the recognition of the need to protect data, information, and the means of processing them;

(2) *Policy level training* provides the ability to understand computer security principles so that executives can make informed policy decisions about their computer and information security programs;

(3) *Implementation level training* provides the ability to recognize and assess the threats and vulnerabilities to automated information resources so that the responsible managers can set security requirements which implement agency security policies; and

(4) *Performance level training* provides the employees with the skill to design, execute, or evaluate agency computer security procedures and practices. The objective of this training is that employees will be able to apply security concepts while performing the tasks that relate to their particular positions. It may require education in basic principles and training in state-of-the-art applications.

(b) Training audiences are groups of employees with similar training needs. Consistent with the Computer Security Training Guidelines, they are defined as follows:

(1) *Executives* are those senior managers who are responsible for setting agency computer security policy, assigning responsibility for implementing the policy, determining acceptable levels of risk, and providing the resources and support for the computer security program.

(2) *Program and Functional Managers* are those managers and supervisors who have a program or functional responsibility (not in the area of computer security) within the agency. They have primary responsibility for the security of their data. This means that they designate the sensitivity and criticality of data and processes, assess the risks to those data, and identify security requirements to the supporting data processing organization, physical facilities personnel, and users of their data. Functional managers are responsible for assuring the adequacy of all contingency plans relating to the safety and continuing availability of their data.

(3) *Information Resources Managers (IRM), Security, and Audit Personnel* are all involved with the daily management of the agency's information resources, including the accuracy, availability, and safety of these resources. Each agency assigns responsibility somewhat differently, but as a group these persons issue procedures, guidelines, and standards to implement the agency's policy for information security, and to monitor its effectiveness and efficiency. They provide technical assistance to users, functional managers, and to the data processing organization in such areas as risk assessment and available security products and technologies. They review and evaluate the functional and program groups' performance in information security.

(4) *Automated Data Processing (ADP) Management, Operations, and Programming Staff* are all involved with the daily management and operations of the automated data processing services. They provide for the protection of the data in their custody and identify to the data owners what those security measures are. This group includes such diverse positions as computer operators, schedulers, tape librarians, data base administrators, and systems and applications programmers. They provide the technical expertise for implementing security-related controls within the automated environment. They have primary responsibility for all aspects of contingency planning.

(5) *End Users* are any employees who have access to an agency computer system that processes sensitive information. This is the largest and most heterogenous group of employees. It consists of everyone from the executive who has a personal computer with sensitive information to data entry clerks.

(c) The training guidelines developed by the National Institute of Standards and Technology identify five subject areas. They are:

(1) *Computer security basics* is the introduction to the basic concepts behind computer security practices and the importance of the need to protect the information from vulnerabilities to known threats;

(2) *Security planning and management* is concerned with risk analysis, the determination of security requirements, security training, and internal agency organization to carry out the computer security function;

(3) *Computer security policies and procedures* looks at Governmentwide and agency-specific security practices in the areas of physical, personnel software, communications, data, and administrative security;

(4) *Contingency planning* covers the concepts of all aspects of contingency planning, including emergency response plans, backup plans and recovery plans. It identifies the roles and responsibilities of all the players involved; and

(5) *Systems life cycle management* discusses how security is addressed during each phase of a system's life cycle (e.g. system design, development, test and evaluation, implementation, and maintenance). It addresses procurement, certification, and accreditation.

(d) The statute defines the term "sensitive information" as any information, the loss, misuse, or unauthorized access to or modification of which could adversely affect the national interest or the conduct of Federal programs, or the privacy to which individuals are entitled under section 552a of title 5, United States Code (the Privacy Act), but which has not been specifically authorized under criteria established by an Executive order or an Act of Congress to be kept secret in the interest of national defense or foreign policy.

§ 930.302 Training requirement.

The head of each agency shall identify employees responsible for the management or use of computer systems that process sensitive information and provide the following training (consult "Computer Security Training Guidelines," NIST Special Publication 500–172 [1], for more detailed information) to each of these groups:

(a) Executives shall receive awareness training in computer security basics, computer security policy and procedures, contingency planning, and systems life cycle management; and policy level training in security planning and management.

(b) Program and functional managers shall receive awareness training in computer security basics; implementation level training in security planning and management, and computer security policy and procedures; and performance level training in contingency planning and systems life cycle management.

(c) IRM, security, and audit personnel shall receive awareness training in computer security basics; and performance level training in security planning and management, computer security policies and procedures, contingency planning, and systems life cycle management.

(d) ADP management and operations personnel shall receive awareness training in computer security basics; and performance level training in security planning and management, computer security policies and procedures, contingency planning, and systems life cycle management.

(e) End users shall receive awareness training in computer security basics, security planning and management, and systems life cycle management; and performance level training in computer security policies and procedures, and contingency planning.

§ 930.303 Initial training.

The head of each agency shall provide the training outlined in § 930.302 of this subpart to all such new employees within 60 days of their appointment.

§ 930.304 Continuing training.

The head of each agency shall provide training whenever there is a significant change in the agency information security environment or procedures or when an employee enters a new position which deals with sensitive information.

§ 930.305 Refresher training.

Computer security refresher training shall be given as frequently as determined necessary by the agency based on the sensitivity of the

[1] Copies may be ordered from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402–9325.

information that the employee uses or processes.

[FR Doc. 91-28909 Filed 12-3-91; 8:45 am]

BILLING CODE 6325-01-M

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 984

[FV-91-443-FR]

Expenses and Assessment Rate for Walnuts Grown in California

AGENCY: Agricultural Marketing Service.

ACTION: Final rule.

SUMMARY: This final rule will authorize expenditures and establish an assessment rate under Marketing Order No. 984 for the 1991–92 marketing year established under the walnut marketing order. Funds to administer this program are derived from assessments on handlers. This action is needed in order for the Walnut Marketing Board (Board), the agency responsible for the local administration of the order, to have sufficient funds to meet the expenses of operating the program. This facilitates program operations. An annual budget of expenses is prepared by the Board and submitted to the U.S. Department of Agriculture (Department) for approval.

EFFECTIVE DATE: August 1, 1991, through July 31, 1992.

FOR FURTHER INFORMATION CONTACT: Richard Lower, Marketing Specialist, Marketing Order Administration Branch, F&V, AMS, USDA, P.O. Box 96456, room 2524–S, Washington, DC 20090–6456; telephone: (202) 720–2861.

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

This final rule has been reviewed by the Department of Agriculture (Department) in accordance with Departmental Regulation 1512–1 and the criteria contained in Executive Order 12291 and has been determined to be a "non-major" rule.

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 final 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 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 regulated area. Small agricultural producers have been defined by the Small Business Administration (13 CFR 121.601) as those having annual receipts of less than $500,000, and small agricultural service firms are defined as those whose 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 Department 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 a public meeting. 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 are 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 13, 1991, and unanimously recommended 1991–92 marketing order expenditures of $1,804,116 and an assessment rate of $0.0085 per kernelweight pound of walnuts. Assessment income for the 1991–92 marketing year is estimated at $1,912,500 based on a merchantable supply of 225,000,000 kernelweight pounds of walnuts. Comparative actual expenditures in 1990–91 were $1,472,633 and the assessment rate was $0.0088 per kernelweight pound of walnuts. Estimated assessment income in 1990–91 was $1,711,370 based on a merchantable supply of 194,474,000 kernelweight pounds of walnuts.

Major budget categories for the 1991–92 marketing year are $848,000 for the domestic market research and development program, $460,528 for walnut production research, $134,300 for administrative and office salaries, and $43,400 for walnut crop estimates. Comparable actual expenditures for the 1990–91 marketing year were $690,817, $384,230, $126,832, and $40,000, respectively. The domestic market research and development program expenses of $848,000 are due to the Board's continued emphasis on expansion and improvement of existing markets as well as the creation of new markets for California walnuts. The increase from $384,230 to $460,528 for walnut production research is due to six additional research projects that were recommended by the Board.

While this final action will 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 will 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 will not have a significant economic impact on a substantial number of small entities.

This action adds a new § 984.342 and is based on Board recommendations and other information. A proposed rule on the expenses and assessment rate was published in the October 30, 1991, issue of the **Federal Register** [56 FR 55843]. Comments on the proposed rule were invited from interested persons until November 12, 1991. No comments were received.

After consideration of the information and recommendation submitted by the Board and other available information, it is found that this final rule will tend to effectuate the declared policy of the Act.

This rule should be expedited because the Board needs to have sufficient funds to pay its expenses, which are incurred on a continuous basis. In addition, handlers are aware of this action, which was recommended by the Board at a public meeting. Therefore, it is found that good cause exists for not postponing the effective date of this action until 30 days after publication in the **Federal Register** (5 U.S.C. 553).

List of Subjects in 7 CFR Part 984

Marketing agreements, Nuts, Reporting and Recordkeeping requirements, Walnuts.

For the reasons set forth in the preamble, 7 CFR part 984 is amended as follows:

PART 984—WALNUTS GROWN IN CALIFORNIA

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.

2. A new § 984.342 is added to read as follows:

Note: This section will not appear in the annual Code of Federal Regulations.

§ 984.342 Expenses and assessment rate.

Expenses of $1,804,116 by the Walnut Marketing Board are authorized and an assessment rate of $0.0085 per kernelweight pound of merchantable walnuts is established for the 1991–92 marketing year ending on July 31, 1992. Unexpended funds from the 1990–91 fiscal year may be carried over as a reserve.

Dated: November 27, 1991.

William J. Doyle,

Associate Deputy Director, Fruit and Vegetable Division.

[FR Doc. 91–29075 Filed 12–3–91; 8:45 am]

BILLING CODE 3410–02–M

FEDERAL RESERVE SYSTEM

12 CFR Parts 208 and 211

[Docket No. R-0742]

Membership of State Banking Institutions in the Federal Reserve System (Regulation H); International Banking Operations (Regulation K)

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Interpretation.

SUMMARY: The Board is issuing an interpretation of the provisions of its Regulation H, Membership of State Banking Institutions in the Federal Reserve System, that provides that engaging in certain activities relating to commodities, including commodity- or equity-linked activities such as commodity or stock index swaps, will be considered to be a change in the general character of a bank's business, and that state member banks must obtain the Board's approval under Regulation H to engage in such activities. Under the provisions of the Board's Regulation K, International Banking Operations, this approval requirement will also apply to certain commodity swap activities when undertaken outside of the United States by U.S. banking organizations.

DATES: *Effective date:* December 4, 1991. *Applicability date:* For activities commenced prior to the adoption of this interpretation, applications to continue such activities should be submitted on or before February 3, 1992.

FOR FURTHER INFORMATION CONTACT: For state member banks under Regulation H: Oliver Ireland, Associate General Counsel (202/452-3625), or Lawranne Stewart, Attorney (202/452-3513), Legal Division; or Robert S. Plotkin, Assistant Director (202/452-2782), Division of Banking Supervision and Regulation. For international banking organizations under Regulation K: Kathleen M. O'Day, Assistant General Counsel (202/452-3786), Legal Division; or Michael Martinson, Assistant Director (202/452-3640), Division of Banking Supervision and Regulation. For the hearing impaired *only*: Telecommunications Device for the Deaf ("TDD"), Dorothea Thompson (202/452-3544).

SUPPLEMENTARY INFORMATION: Commodity-linked transactions (transactions in which a portion of the return is linked to the price of a particular commodity or to an index of commodity prices) are offered currently by only a few banks. Recently, however, more and more banks have become interested in offering loans, deposits, debt issues, and derivative products, such as forward contracts, options, and swaps, linked to the prices of commodities or to stock indices. In these transactions, the interest, principal, or both, or the payment streams in the case of swaps, are linked to the price of a commodity, equity, or related index. To date, the bulk of bank activities in commodity-linked transactions has been commodity or equity swaps.[1] Banks also enter into exchange-traded commodity futures and options to hedge the exposure created by commodity-linked transactions.

Under the Federal Reserve Act, the Board is authorized to prescribe regulations concerning state bank membership in the Federal Reserve System, and to impose conditions on membership.[2] The Board's Regulation H, Membership of State Banking Institutions in the Federal Reserve, requires as a condition of membership that a state member bank seek the approval of the Board before permitting "any change to be made in the general character of its business or in the scope of the corporate powers exercised by it at the time of admission to membership."[3] The Board has determined that engaging in certain commodity-linked activities and similar transactions linked to equity securities will be considered a change in the general character of a state member bank's business.

As stated in this interpretation, a state member bank that wishes to commence or continue certain commodity- or equity-linked activities will be required to obtain the approval of the Board. Board approval is not required to engage in transactions linked to commodities or securities that the bank is permitted to hold directly, or when the transactions are engaged in on a perfectly matched basis. Additionally, approval will not be required for a state member bank to offer loan or deposit contracts in which only the interest portion of the return is linked to commodity or security prices or indices. The approval requirement is intended to enable the Board to determine whether state member banks engaging in these activities are adequately prepared to deal with the risks presented by such transactions.

Under Regulation K, this interpretation also will apply to commodity swap activities undertaken outside of the United States by bank holding company and Edge corporation subsidiaries.[4]

Administrative Procedures and Regulatory Flexibility Acts.

The provisions of the Administrative Procedures Act concerning notice and comment are not applicable to interpretative rules. 5 U.S.C. 553(b). Because no notice of proposed rulemaking is required, a statement concerning the effects of the rule on small entities is also not required under the Regulatory Flexibility Act. 5 U.S.C. 604. The Board notes, however, that the

[1] A commodity swap, like an interest rate swap, is a cash-settled transaction. Both types of contracts are based on a "notional" principal amount, and counterparties agree to make payments to one another based on changes resulting from movements in the interest rates or commodity or other price indices to which the swap is linked.

[2] FRA sec. 9, 1 (12 U.S.C. 321).

[3] 12 CFR 208.7(a)(1).

[4] Under Regulation K, this interpretation would not apply to swap transactions linked to equity instruments. Regulation K provides that bank holding company and Edge corporation subsidiaries may engage in such transactions abroad as incidental to other securities activities. As indicated in this interpretation, perfectly matched transactions may include a swap executed by a state member bank with an affiliate that is authorized under Regulation K to engage in equity swaps.

interpretation is unlikely to have any effect on small institutions.

List of Subjects

12 CFR Part 208

Accounting, Agriculture, Banks, Banking, Confidential business information, Currency, Federal Reserve System, Reporting and recordkeeping requirements, Securities.

12 CFR Part 211

Exports, Federal Reserve System, Foreign banking, Holding companies, Investments, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, title 12, parts 208 and 211, of the Code of Federal Regulations are amended as follows:

PART 208—MEMBERSHIP OF STATE BANKING INSTITUTIONS IN THE FEDERAL RESERVE SYSTEM

1. The authority citation for part 208 continues to read as follows:

Authority: Sections 9, 11(a), 11(c), 19, 21, 25, and 26(a) of the Federal Reserve Act, as amended (12 U.S.C. 321-338, 248(a), 248(c), 461, 481-486, 601, and 611, respectively); sections 4 and 13(j) of the Federal Deposit Insurance Act, as amended (12 U.S.C. 1814 and 1823(j), respectively); section 7(a) of the International Banking Act of 1978 (12 U.S.C. 3105); sections 907-910 of the International Lending Supervision Act of 1983 (12 U.S.C. 3906-3909); sections 2,12(b), 12(g), 12 (i), 15B(c)(5), 17, 17A, and 23 of the Securities Exchange Act of 1934 (15 U.S.C. 78b, 78*l*(b), 78*l*(g), 78o-4(c)(5), 78q, 78q-1, and 78w, respectively); section 5155 of the Revised Statutes (12 U.S.C. 36) as amended by the McFadden Act of 1927; and sections 1101-1122 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (12 U.S.C. 3310-3351).

2. Section 208.128 is added to read as follows:

§ 208.128 Commodity- or equity-linked transactions.

(a) State-chartered banks that are members of the Federal Reserve System are required to obtain the approval of the Board under Regulation H (Membership of State Banking Institutions in the Federal Reserve System) before permitting any change to be made in the general character of their business or in the scope of the corporate powers they exercised at the time of admission to membership. The Board has considered whether engaging in transactions linked to commodity or equity security prices or indices would represent a change in the general character of the business of a state member bank.

(b) Banking organizations have developed a number of commodity- or equity-linked transactions in which a portion of the return is linked to the price of a particular commodity or equity security or to an index of such prices. These transactions have been offered in a variety of forms, including commodity-indexed deposits, loans, debt issues, and derivative products, such as forwards, options, and swaps. In these transactions, the interest, principal, or both, or payment streams in the case of swaps, are linked to the price of a commodity. In addition, banks are also entering into exchange-traded commodity or stock-index futures and options in order to hedge the exposure inherent in these transactions. These types of transactions have been linked to a variety of commodities, including gold, oil, aluminum, and copper, as well as individual securities and stock indices.

(c) With the exception of gold, silver, and, in some cases, platinum, banks are not empowered to purchase or hold the commodities or equity securities that underlie these transactions. Although commodity-linked transactions settle only in cash, they effectively expose banks to commodity or equity market price risks. Thus, linking payments to commodities or equities may present risks with which banks generally are not familiar, and the inability of the bank to purchase the commodity or equity security to which a transaction is linked may increase the difficulty of hedging the exposure created by such transactions.

(d) The Board has determined that engaging in transactions linked to commodities or securities that a state member bank does not have the authority to purchase and hold directly should generally be considered a change in the character of the bank's business unless the transactions are entered into on a perfectly matched basis.[1] State member banks that wish to engage in commodity- or equity-linked transactions that are considered to be a change in the general character of their business should obtain Board approval before initiating these transactions or, in the case of activities commenced prior to the adoption of this interpretation, to continue such activities. Applications to continue such activities should be submitted on or before February 3, 1992.

(e) Transactions linked to securities or monetary metals that a state member bank is authorized to purchase and hold directly will not be considered to be a change in the general nature of the bank's business, and approval will not be required.[2] Additionally, approval will not be required for a state member bank to offer loan or deposit contracts in which only the interest portion of the return is linked to a commodity or security even if the bank is not authorized to hold the commodity or security.

(f) Applications to engage in commodity-related activities should outline the types of transactions and scope of activities that the bank plans to undertake. The application also should demonstrate that the bank has the expertise to engage in such transactions and has developed adequate policies and controls to govern the conduct of these activities and to monitor the associated risks.

(g) Recent revisions to Regulation K (International Banking Operations) permit bank holding company subsidiaries, Edge and agreement corporations, and member banks to act as principal or agent outside of the United States in swap transactions, subject to any limitations applicable to state member banks under Regulation H Banking organizations that wish to engage in swap transactions based on commodities that the organizations do not have the authority to purchase directly, therefore, must submit applications under Regulation K in order to engage in such transactions. Because Regulation K provides separate authority to engage outside of the United States in swap transactions based on equity securities or indices, approval of these transactions is not required.

[1] The term "perfectly matched," as used in this interpretation refers to transactions that are entered into on a matched basis, that is, offsetting transactions where the counterparties for both transactions have been found before the bank enters into either transaction and the transactions are consummated on the same day. Offsetting transactions include transactions that have a price differential to provide the bank with its usual and customary fee or commission for its services. The exemption from prior approval for perfectly matched transactions would include mirror image equity swaps executed by a state member bank with any affiliate that is authorized under Regulation K to engage in equity swaps.

[2] Gold and silver are the only commodities that banks generally have authority to purchase. In states where banks have authority to deal in platinum, transactions linked to platinum will not be considered a change in the general nature of the business of a bank.

PART 211—INTERNATIONAL BANKING OPERATIONS

1. The authority citation for part 211 continues to read as follows:

Authority: Federal Reserve Act (12 U.S.C. 221 *et seq.*); Bank Holding Company Act of 1956, as amended (12 U.S.C. 1841 *et seq.*); the International Banking Act of 1978 (Pub. L. 95-369; 92 Stat. 607; 12 U.S.C. 3101 *et seq.*); the Bank Export Services Act (Title II, Pub. L. 97-290, 96 Stat. 1235); the International Lending Supervision Act (Title IX, Pub. L. 98-181, 97 Stat. 1153, 12 U.S.C. 3901 *et seq.*); and the Export Trading Company Act Amendments of 1988 (Title III, Pub. L. 100-418, 102 Stat. 1384 (1988)).

2. Section 211.603 is added to read as follows:

§ 211.603 Commodity swap transactions.

For text of interpretation relating to this subject, see § 208.128 of this chapter.

By order of the Board of Governors of the Federal Reserve System, November 25, 1991.

William W. Wiles,

Secretary of the Board.

[FR Doc. 91-29038 Filed 12-3-91; 8:45 am]

BILLING CODE 6210-01-F

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 382

[Docket No. RM90-8-000; Order No. 529]

Amendments to FERC Form Nos. 1 and 1-F, and Annual Charges, and Fuel Cost and Purchased Economic Power Adjustment Clauses; Technical Amendment

Issued November 27, 1991

AGENCY: Federal Energy Regulatory Commission.

ACTION: Final rule; Technical Amendment.

SUMMARY: The Federal Energy Regulatory Commission (Commission) is correcting an error in the regulations concerning annual charges under parts II and III of the Federal Power Act and related statutes. A sample worksheet found at § 382.201(b)(4)(B)(ii) of the Commission's regulations was not revised to reflect Commission-ordered revisions in Order No. 529 issued on November 5, 1990. [55 FR 47311 (Nov. 13, 1990].

EFFECTIVE DATE: This technical amendment is effective November 27, 1991.

FOR FURTHER INFORMATION CONTACT: Ann E. Gorton, Office of the General Counsel, Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, (202) 208-0231.

SUPPLEMENTARY INFORMATION: In addition to publishing the full text of this document in the **Federal Register**, the Commission also provides all interested persons an opportunity to inspect or copy the contents of this document during normal business hours in room 3308, 941 North Capitol Street, NE., Washington, DC 20426.

The Commission Issuance Posting System (CIPS), an electronic bulletin board service, provides access to the texts of formal documents issued by the Commission. CIPS is available at no charge to the user and may be accessed using a personal computer with a modem by dialing (202) 208-1397. To access CIPS, set your communications software to use 300, 1200, or 2400 baud, full duplex, no parity, 8 data bits, and 1 stop bit. The full text of this technical amendment will be available on CIPS for 30 days from the date of issuance. The complete text on diskette in WordPerfect format may also be purchased from the Commission's copy contractor, La Dorn Systems Corporation, also located in room 3308, 941 North Capitol Street, NE., Washington, DC 20426.

The Federal Energy Regulatory Commission (Commission) is correcting an error in the regulations on annual charges under parts II and III of the Federal Power Act and related statutes.

On November 5, 1990, the Commission issued Order No. 529, a final rule amending FERC Form No. 1, Annual Report of Major Electric Utilities, Licensees and Others, and FERC Form No. 1-F, Annual Report of Nonmajor Public Utilities and Licensees. (55 FR 47311 (Nov. 13, 1990)); FERC Stats. & Regs. (Regulations Preambles 1986-1990 ¶ 30,904 (Nov. 5, 1990)). Order No. 529 also made minor conforming changes to the Commission's fuel cost and purchased economic power adjustment clause regulations in part 35 of the Commission's regulations, and the Commission's annual charges regulations in part 382. The final rule made conforming changes to the worksheet that must be submitted as part of the Commission's annual charges reporting requirement in § 382.201 of the Commission's regulations. However, the Commission failed to correct the sample worksheet shown in § 382.201(b)(4)(B)(ii) of the Commission's regulations. This technical amendment corrects that sample worksheet. A corrected sample worksheet is attached.

In § 382.201(b)(4)(B)(ii), in the sample worksheet, the heading for column 3, the title for Row B, and footnote 2 are all amended by removing the words "interchange out" and inserting in their place the words "exchange delivered"; footnote 2 is amended by removing the words "page 328" and inserting in their place the words "pages 326-327"; and footnote 3 is amended by removing the words "page 332" and inserting in their place the words "pages 328-330." In addition, the subtitle is amended by removing the words "Kilowatt-hours" and inserting in their place the words "Megawatt-hours"; and the heading for column 4 is amended by removing the term "Kwh" and inserting in its place "Mwh".

While the conforming changes to the worksheet that were ordered in the final rule were made effective 30 days after publication in the **Federal Register**, or on December 13, 1990, this technical amendment correcting the sample worksheet is effective on November 27, 1991.

Lois D. Cashell,

Secretary.

PART 382—ANNUAL CHARGES

1. The authority citation for part 382 is revised to read as follows:

Authority: Sec. 3401, Pub. L. 99-509, 100 Stat. 1890-1891; 42 U.S.C. 7101-7352; E.O. 12009, 3 CFR, 1978 Comp., p. 142; 5 U.S.C. 551-557; 15 U.S.C. 717-717w; 16 U.S.C. 791a-828c; 15 U.S.C. 3301-3432; 16 U.S.C. 2601-2645; 49 U.S.C. 1-27.

2. In § 382.201(b)(4)(ii), the Worksheet is revised to read as follows:

§ 382.201 Annual charges under Parts II and III of the Federal Power Act and related statutes.

* * * * *

(b) * * *

(4) * * *

(ii) * * *

WORKSHEET—AS REPORTED ON THE FERC FORM NO. 1

[Amounts in Megawatt-hours]

Annual charge categories	Form 1 sales for resale	Form 1 exchange delivered	Form 1 transmission delivered	Mwh totals
Totals from Form 1	(1)	(2)	(3)	(4)

WORKSHEET—AS REPORTED ON THE FERC FORM NO. 1—Continued

[Amounts in Megawatt-hours]

Annual charge categories	Form 1 sales for resale	Form 1 exchange delivered	Form 1 transmission delivered	Mwh totals
(A) Adjusted sales for resale for A/C purposes				
(B) Coordination sales including transmission delivered and exchange delivered for A/C purposes				

[1] Must agree with totals shown in Form No. 1, on pages 310–311, included in Account No. 447.
[2] Must agree with total exchange delivered shown in Form No. 1, on pages 326–327, included in Account No. 555.
[3] Must agree with total transmission delivered shown in Form No. 1, on pages 328–330, included in Account No. 456.
[4] Total A+B=Total [1]+[2]+[3].

* * * * *

[FR Doc. 91–29008 Filed 12–3–91; 8:45 am]
BILLING CODE 6717–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 620

[Docket No. 91N–0366]

Amendment of Additional Standards for Bacterial Products; Pertussis Vaccine

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the biologics regulations by revising the definition for Pertussis Vaccine. The definition as currently codified could be interpreted as encompassing the new generation of acellular pertussis vaccines. FDA does not believe that these new acellular vaccines should be subject to licensure and regulation under the additional standards in §§ 620.1 through 620.6 (1 CFR 620.1 through 620.6). To clarify that these requirements are not applicable to acellular vaccines, FDA is deleting the reference to fractionated bacteria from the definition.

DATES: Written comments by February 3, 1992. This rule becomes effective December 4, 1991.

ADDRESSES: Written comments may be submitted to the Dockets Management Branch (HFA–305), Food and Drug Administration, rm. 1–23, 12420 Parklawn Dr., Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Ann Reed Gaines, Center for Biologics Evaluation and Research (HFB–132), Food and Drug Administration, 8800 Rockville Pike, Rockville, MD 20892, 301–295–8188.

SUPPLEMENTARY INFORMATION:

I. Current Regulation

FDA specifies the requirements for Pertussis Vaccine in §§ 620.1 through 620.6. Under § 620.1, FDA defines Pertussis Vaccine as "whole *Bordetella pertussis* bacteria or a fraction of *Bordetella pertussis* bacteria." Under §§ 620. through 620.6, FDA specifies the production, reference standard, potency test, mouse toxicity test, and general requirements for Pertussis Vaccine. Licensed vaccines subject to these requirements include both single pertussis vaccines (i.e., Pertussis Vaccine Adsorbed) and the pertussis component of combined vaccines (i.e., Diphtheria and Tetanus Toxoids and Pertussis Vaccine Adsorbed).

II. Background

All currently licensed Pertussis Vaccines are whole bacteria vaccines. To date, only one fractionated bacteria vaccine has been licensed. The method used to manufacture the previously licensed fractionated bacteria vaccine yielded a preparation that differed from whole bacteria vaccines in that it was a soluble mixture of undefined components. In spite of such differences, the potency, safety, and freedom from toxicity requirements applicable to whole bacteria vaccines were also appropriate for the fractionated bacteria vaccine. For reasons unrelated to regulatory issues, the manufacturer of the fractionated bacteria vaccine ceased production, and the product license was revoked at the request of the manufacturer on December 2, 1985. FDA does not anticipate that any similarly manufactured fractionated bacteria vaccines will be licensed in the future.

A new generation of acellular pertussis vaccines is currently under investigation in the United States and abroad. The methods used to manufacture the new acellular pertussis vaccines yield preparations that, like the fractionated bacteria vaccines, differ from whole bacteria vaccines in that they are soluble mixtures. In contrast to the fractionated bacteria vaccines, the new acellular vaccines are soluble mixtures of highly purified components. Because of the differences between the fractionated and new acellular bacteria vaccines, the additional standards at §§ 620.1 through 620.6 are neither appropriate nor adaptable for the new acellular vaccines. FDA is currently evaluating these new acellular vaccines on the basis of data and specifications contained in the product license applications (PLA's).

The definition for Pertussis Vaccine in § 620.1 could be interpreted as encompassing the new acellular vaccines. If so interpreted, the new acellular vaccines would be required to meet the production, potency, safety, and freedom from toxicity standards specified in §§ 620.3 through 620.6, when those standards are not appropriate for the new acellular vaccines. FDA is therefore revising the definition in § 620.1 by deleting the reference to fractionated bacteria. This amendment will clarify that acellular vaccines are not subject to the additional standards in §§ 620.1 through 620.6. FDA has determined that notice and public procedure for revising § 620.1 are contrary to the public interest in that licensure of new acellular pertussis vaccines could be delayed.

Investigations currently underway suggest equal, if not greater, effectiveness and less reactigenicity with the new acellular vaccines than with the whole bacteria vaccines. Licensure of acellular vaccines that meet, if not exceed, the safety, purity, potency, and effectiveness of whole bacteria vaccines is in the public interest. FDA has received PLA's for acellular pertussis vaccines and anticipates that the clinical data and manufacturing specifications in the PLA's may support licensure in the near future.

This final rule contains only a minor amendment that is necessary to clarify that the new generation of acellular pertussis vaccines is not subject to the regulations at §§ 620.1 through 620.6. Therefore, FDA finds that there is good cause to dispense with a notice of proposed rulemaking, pursuant to sections 553 (b) and (d) of the Administrative Procedure Act (5 U.S.C. 553 (b) and (d)) and FDA's administrative practices and procedures regulations (21 CFR 10.40(e)). FDA also finds, in accordance with the Administrative Procedure Act, that there is good cause to make this final rule effective on the date of publication in the Federal Register. FDA is, however,

allowing 60 days for public comment on this final rule, in accordance with 21 CFR 10.40(e)(1).

III. Amended Regulation

FDA is revising the definition in § 620.1 by deleting "either" and "or a fraction of *Bordetella pertussis* bacteria." All currently licensed whole bacteria pertussis vaccines remain subject to the current regulations for additional standards in §§ 620.1 through 620.6. FDA is not proposing regulations for additional standards for the new acellular vaccines at this time.

IV. Economic Impact

FDA has examined the economic impact of this final rule and has determined that neither a regulatory impact analysis, as specified in Executive Order 12291, nor a regulatory flexibility analysis, as specified in the Regulatory Flexibility Act (Pub. L. 96–354), is required. The final rule constitutes a correction amendment that requires no change in current manufacturing practices.

FDA believes that the final rule will facilitate the approval of a new generation of acellular pertussis vaccines, which will be of benefit to the public health and of potential economic benefit to manufacturers. FDA has determined that the final rule is not a major rule, as defined in Executive Order 12291, and certifies that the final rule will not have a significant impact on a substantial number of small entities, as defined in the Regulatory Flexibility Act.

V. Environmental Impact

The agency has determined under 21 CFR 25.24(a)(9) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

VI. Request for Comments

Interested persons may, on or before February 3, 1992, submit to the Dockets Management Branch (address above) written comments regarding this final rule. Two copies of any comments are to be submitted, except that individuals may submit one copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the office above between 9 a.m. and 4 p.m., Monday through Friday.

List of Subjects in 21 CFR Part 620

Biologics, Labeling, Reporting and recordkeeping requirements.

Therefore, under the Federal Food, Drug, and Cosmetic Act, the Public Health Service Act, and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 620 is amended as follows:

PART 620—ADDITIONAL STANDARDS FOR BACTERIAL PRODUCTS

1. The authority citation for 21 CFR Part 620 continues to read as follows:

Authority: Secs. 201, 501, 502, 503, 505, 510, 701 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321, 351, 352, 353, 355, 360, 371); secs. 215, 351, 352, 353, 361 of the Public Health Service Act (42 U.S.C. 216, 262, 263, 263a, 264).

2. Section 620.1 is revised to read as follows:

§ 620.1 Pertussis Vaccine.

The proper name of this product shall be "Pertussis Vaccine", which shall be an aqueous preparation of killed whole *Bordetella pertussis* bacteria. The vaccine may be precipitated or adsorbed and may be combined with other antigens.

Dated: November 18, 1991.

Michael R. Taylor,

Deputy Commissioner for Policy.

[FR Doc. 91–29036 Filed 12–3–91; 8:45 am]

BILLING CODE 4160–01–M

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[T.D. 8375; Final Draft of 11–14–91]

RIN 1545–AK41

Minimum Participation

AGENCY: Internal Revenue Service, Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations relating to the minimum participation requirements of section 401(a)(26) of the Internal Revenue Code of 1986. They reflect changes made by the Tax Reform Act of 1986 and the Technical and Miscellaneous Revenue Act of 1988. These regulations provide guidance necessary to comply with the law and affect sponsors of, and participants in, tax-qualified retirement plans and certain other employee benefit plans.

EFFECTIVE DATE: These regulations are effective for plan years beginning on or after January 1, 1989, and are applied to those plan years except as set forth in § 1.401(a)(26)–9.

FOR FURTHER INFORMATION CONTACT: David Munroe at 202–377–9372 (not a toll-free number).

SUPPLEMENTARY INFORMATION: Proposed regulations under section 401(a)(26) of the Internal Revenue Code (Code) were published in the **Federal Register** on February 14, 1989 (54 FR 6710). A public hearing on the proposed regulations was announced in 54 FR 32453 and held on October 30, 1989. After consideration of all comments regarding the proposed regulations, the proposed regulations were withdrawn and new proposed regulations were published on May 14, 1990 (55 FR 19935). These new proposed regulations were supplemented and modified by proposed regulations published in the **Federal Register** on February 1, 1991 (56 FR 3988).

Written comments were received from the public on the proposed section 401(a)(26) regulations of May 14, 1990. In addition, a public hearing on those proposed regulations was held on September 26, 27, and 28, 1990 and a public hearing on the February 1, 1991, proposed regulations was held on May 16, 1991. After consideration of all the written comments received and the statements made at the public hearings, the proposed regulations under section 401(a)(26) are adopted as modified by this Treasury Decision.

Statutory Analysis

Section 401(a)(26) requires that each qualified plan benefit at least the lesser of 50 employees or 40 percent of all employees of the employer (the minimum participation rule). The minimum participation rule applies separately to each qualified plan of an employer and generally is effective for plan years beginning on or after January 1, 1989.

The section 401(a)(26) minimum participation rules were added by the Tax Reform Act of 1986 (TRA '86) in conjunction with amendments to the minimum coverage requirements of section 410(b). The primary purpose of section 401(a)(26), like section 410(b) and section 401(a)(4), is to ensure that tax-favored pension, stock bonus or profit-sharing plans do not discriminate in favor of the highly compensated employees of the employer maintaining the plan. Specifically, Congress enacted section 401(a)(26) to address two fundamental concerns. First, the provision is intended to promote the nondiscriminatory provision of benefits or features by limiting the extent to which an employer is able to design different benefit formulas for different employees in order to maximize benefit disparities in favor of highly

compensated employees. Second, the provision is intended to limit the extent to which a defined benefit plan operates as an individual account for one employee, or a small group of the employer's employees, either by currently benefiting only one or a few of the employer's highly compensated employees or by maintaining accrued benefits for only one or a few such employees.

Explanation of provisions

Development of Final Regulations

These regulations were developed in conjunction with regulations under the various related statutory nondiscrimination provisions governing tax-qualified retirement plans, principally sections 401(a)(4), 401(a)(17), 401(l), 410(b), and 414(s). This coordinated approach was initially adopted in developing the proposed regulations and was intended to provide taxpayers with an integrated framework for applying the nondiscrimination provisions of the Code. Because the then proposed and now final regulations under section 401(a)(4) set out comprehensive nondiscrimination tests for the first time, it has been possible to substantially simplify the legal and administrative requirements contained in the section 401(a)(26) regulations.

Most significantly, although section 401(a)(26)(l) states that the Secretary may provide that any separate benefit structure, trust, or other arrangement is to be treated as a separate plan for purposes of section 401(a)(26), the final regulations, like the May 14, 1990, proposed regulations, do not require separate current benefit structure testing. As in the proposed regulations, the decision not to exercise this statutory grant of discretion at this time was made because the Treasury and the Service believe that the relevant underlying statutory purpose of section 401(a)(26) is adequately addressed by the publication of comprehensive guidelines on the nondiscrimination requirements under section 401(a)(4).

Summary of significant modifications

In general, the comments on the May 14, 1990, proposed regulations were favorable. Therefore, in large part, the final regulations adopt the rules in the proposed regulations with only minor revisions to clarify and to more closely parallel similar provisions under sections 401(a)(4) and 410(b). The more significant changes are the provision of a retroactive correction period extending beyond the end of the plan year that parallels similar provisions for sections 401(a)(4) and 410(b), the clarification of the term "benefiting" by generally adopting the benefiting rules of section 410(b) by cross reference, and the revision of the rules governing the exclusion of nonresident aliens and the exclusion of former employees to reflect expanded exclusions provided for these categories of employees in the section 410(b) final regulations.

Summary of Provisions

1. Applicable to Plans Separately

Section 401(a)(26) applies separately to each plan of the employer. Thus, plans may not be aggregated to satisfy the requirements of section 401(a)(26) even where the plans are identical in all respects or where the plans are aggregated and treated as a single plan for purposes of section 401(a)(4) and section 410(b).

The final regulations, like the proposed regulations, provide generally that each single plan within the meaning of section 414(l) is a separate plan for purposes of section 401(a)(26). A plan that is treated as a single plan under section 414(l) is, however, treated as comprising separate plans if disaggregated. The final regulations provide disaggregation provisions that generally parallel similar provisions in section 410(b). However, for purposes of section 401(a)(26), disaggregation is permissive for portions of plans covering collectively bargained and noncollectively bargained employees, respectively. Portions of plans covered by sections 401(k) and 401(m) and portions of plans not subject to those provisions are not disaggregated for purposes of section 401(a)(26).

2. Plans that are Excepted from Section 401(a)(26)

Like the proposed regulations, the final regulations provide exceptions in the case of four categories of plans. Plans meeting the requirements of these exceptions are generally treated as satisfying section 401(a)(26) without further testing of participation under the plan.

A. *Plans benefiting no highly compensated employees.* A plan, other than a top-heavy plan under section 416 or a frozen defined benefit plan, satisfies section 401 (a)(26) if the plan benefits no highly compensated employee or highly compensated former employee of the employer.

B. *Multiemployer plans.* A multiemployer plan, or portion thereof, that benefits only employees included in a unit of employees covered by a collective bargaining agreement is not required to meet the minimum participation requirements of section 401(a)(26). A multiemployer plan that also covers employees not included in a unit of employees covered by a collective bargaining agreement is required to satisfy section 401(a)(26). However, the final regulations retain a special testing rule that permits such multiemployer plans to satisfy section 401(a)(26) if the plan as a whole benefits at least 50 employees.

C. *Underfunded defined benefit plans.* Certain underfunded defined benefit plans are treated as satisfying the requirements of section 401(a)(26).

D. *Acquisitions and dispositions.* Like the proposed regulations, the final regulations provide that rules similar to the rules in section 410(b)(6)(C) apply in the event of an acquisition or disposition.

3. Minimum Participation Requirements

If a plan does not satisfy one of the exceptions mentioned above, the plan must satisfy section 401(a)(26) for the plan year. A plan generally satisfies section 401(a)(26) for a plan year if the plan benefits the lesser of 50 employees of the employer or 40 percent of the employees of the employer.

A defined contribution plan satisfies this requirement if it provides current benefits to the requisite number of employees of the employer or if it does not currently benefit any employees or former employees. A defined benefit plan must satisfy section 401(a)(26) with respect to both its current accruals and its prior benefit structure. A defined benefit plan satisfies this requirement with respect to current accruals by providing a current benefit to the requisite number of employees of the employer and with respect to its prior benefit structure if the requisite number of employees either have a meaningful accrued benefit or are currently receiving a meaningful benefit accrual. For purposes of testing the prior benefit structure, former employees may be aggregated with employees in establishing that the requisite number of employees have a meaningful accrued benefit under the plan.

A defined benefit plan that is a multiemployer plan is not required to satisfy the prior benefit structure rule unless the multiemployer plan benefits employees who are not included in a unit of employees covered by a collective bargaining agreement. In that case, however, the multiemployer plan satisfies the prior benefit structure rule for a plan year if the multiemployer plan either provides meaningful benefits to at least 50 employees for a plan year, or 50 employees have meaningful accrued benefits under the plan. For purposes of this rule, all employees benefiting under the multiemployer plan may be considered.

The determination of whether the plan is providing (or has provided) meaningful benefits is based on all of

the facts and circumstances in a manner consistent with the section 401(a)(26) policy objective of limiting the extent to which a defined benefit plan operates as an individual account for one employee or a small group of employees. Accordingly, an ongoing defined benefit plan will typically satisfy the prior benefit structure requirements concurrently with satisfaction of the general plan requirements. A plan that satisfies one of the six prior benefit structure tests in § 1.401(a)(26)–6 of the February 14, 1989, proposed regulations is deemed to satisfy this requirement.

4. Testing Former Employees

Like the proposed regulations, the final regulations provide that if a defined benefit plan provides additional benefits to former employees during a plan year, the plan must satisfy section 401(a)(26) with respect to former employees. The final regulations retain a special former employee testing rule provided in the proposed regulations. This special rule is satisfied if a plan benefits at least 5 former employees and either benefits more than 95 percent of all former employees with vested accrued benefits under the plan or at least 60 percent of the former employees receiving an additional benefit are non-highly compensated employees.

5. Testing Methods

Section 401(a)(26) requires that a plan satisfy section 401(a)(26) on each day of the plan year. Like the proposed regulations, however, the final regulations provide a simplified testing method. Under this method, a plan is treated as satisfying section 401(a)(26) if the plan satisfies section 401(a)(26) on a single day during the plan year as long as the day selected is reasonably representative of the employer's employees and the plan's coverage.

6. Retroactive Correction

A number of commentators requested a revision to the regulations permitting a retroactive correction period extending beyond the end of the plan year for purposes of satisfying section 401(a)(26). In response, the final regulations provide a retroactive correction mechanism permitting employers to make certain retroactive amendments in order to achieve compliance with the section 401(a)(26) minimum participation requirements at any point up to the 15th day of the 10th month after the end of the plan year. This retroactive correction provision parallels similar provisions for sections 401(a)(4) and 410(b), both in scope and duration.

7. Transition Rules

The final regulations retain special transition rules for governmental plans and certain section 403(b) annuities, plans that have a minimum-period-of-service requirement or a last-day-of-the-year requirement, and plans that provided certain early retirement "window period" benefits. Although the need for the "window benefit" transition rule was substantially eliminated with the elimination of separate benefit structure testing, the transition relief is still potentially necessary for an otherwise frozen plan that was amended to provide a subsidized window benefit.

8. Plans Maintained by More Than One Employer

Generally, multiple employer plans must satisfy section 401(a)(26) on an employer-by-employer basis rather than on the basis of participating employers in the aggregate. Failure to satisfy section 401(a)(26) with respect to any component of this testing process may result in disqualification of the plan for all participating employers. Any noncollectively bargained portion of a multiemployer plan is generally a multiple employer plan for purposes of nondiscrimination testing and, thus, is subject to section 401(a)(26) on an employer-by-employer basis. The final regulations, like the proposed regulations, provide a special testing rule under which the noncollectively bargained portion of a multiemployer plan nevertheless may be tested on an aggregate basis taking the collectively bargained employees of the multiemployer plan into account. The Commissioner, in a proper case, could retain the qualified status for innocent employers in a multiple employer plan that fails to satisfy section 401(a)(26). In such a case the Commissioner would require corrective and remedial action with respect to the plan, such as allowing the withdrawal of an offending employer, allowing a disqualifying defect to be cured within a reasonable time after the plan administrator has or should have knowledge of the disqualifying defects, or requiring plan amendments to prevent future disqualifying events.

9. Effective Date

Section 401(a)(26) generally is effective with respect to plan years beginning on or after January 1, 1989. A deferred effective date applies with respect to certain collectively bargained plans.

Effect on Other Laws

Compliance with the provision of these regulations do not ensure compliance with other applicable Federal laws, including, but not limited to, the provisions of Title I of the Employee Retirement Income Security Act of 1974, which are administered by the Secretary of Labor pursuant to Reorganization Plan Number 4 of 1978. Employers should note that plan amendments pursuant to these regulations may necessitate reporting and disclosure under such Act, including requirements related to summary plan descriptions and summaries of material modifications.

Special Analyses

It has been determined that these rules are not major rules as defined in Executive Order 12291. Therefore, a Regulatory Impact Analysis is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) and the Regulatory Flexibility Act (5 U.S.C. chapter 6) do not apply to these regulations and, therefore, a final Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking for the regulations was submitted to the Administrator of the Small Business Administration for comment on their impact on small business.

Drafting Information

The principal author of these regulations is Nancy J. Marks, Office of the Associate Chief Counsel (Employee Benefits and Exempt Organizations), Internal Revenue Service. However, personnel from other offices of the Service and Treasury Department participated in their development.

List of Subjects in 26 CFR 1.401–0 Through 1.419A–2T

Bonds, Employee benefit plans, Income taxes, Pensions, Reporting and recordkeeping requirements, Securities, Trusts and trustees.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAX; TAXABLE YEARS BEGINNING AFTER DECEMBER 31, 1953

Paragraph 1. The authority for part 1 is amended by adding the following citation:

Authority: Sec. 7805, 68A Stat. 917; 26 U.S.C. 7805 * * * §§ 1.401(a)(26)–1 through (a)(26)–9 also issued under 26 U.S.C. 401(a)(26). * * *

Par. 2. New §§ 1.401(a)(26)–0 through 1.401(a)(26)–9 are added to read as follows:

§ 1.401(a)(26)–0 Table of contents.

This section contains a listing of the headings of §§ 1.401 (a)(26)–1 through 1.401(a)(26)–9.

§ 1.401(a)(26)–1 Minimum participation requirements

(a) General rule.
(b) Exceptions to section 401(a)(26).
(1) Plans that do not benefit any highly compensated employees.
(2) Multiemployer plans.
(i) In general.
(ii) Multiemployer plans covering noncollectively bargained employees.
(A) In general.
(B) Special testing rule.
(3) Certain underfunded defined benefit plans.
(i) In general.
(ii) Eligible plans.
(iii) Actuarial certification.
(iv) Cessation of all benefit accruals.
(4) Section 401(k) plan maintained by employers that include certain governmental or tax-exempt entities.
(5) Certain acquisitions or dispositions.
(i) General rule.
(ii) Special rule for transactions that occur in the plan year prior to the first plan year to which section 401(a)(26) applies.
(iii) Definition of "acquisition" or "disposition".
(c) Additional rules.

§ 1.401(a)(26)–2 Minimum participation rule

(a) General rule.
(b) Frozen plans.
(c) Plan.
(d) Disaggregation of certain plans.
(1) Mandatory disaggregation.
(i) ESOPs and non-ESOPs.
(ii) Plans maintained by more than one employer.
(A) Multiple employer plans.
(B) Multiemployer plans.
(iii) Defined benefit plans with other arrangements.
(A) In general.
(B) Examples.
(iv) Plans benefiting employees of qualified separate lines of business.
(2) Permissive disaggregation.
(i) Plans benefiting collectively bargained employees.
(ii) Plans benefiting otherwise excludable employees.

§ 1.401(a)(26)–3 Rules applicable to a defined benefit plan's prior benefit structure

(a) General rule.
(b) Prior benefit structure.
(c) Testing a prior benefit structure.
(1) General rule.
(2) Meaningful benefits.
(d) Multiemployer plan rule.

§ 1.401(a)(26)–4 Testing former employees

(a) Scope.
(b) Minimum participation rule for former employees.
(c) Special rule.
(d) Excludable former employees.
(1) General rule.
(2) Exception.

§ 1.401(a)(26)–5 Employees who benefit under a plan

(a) Employees benefiting under a plan.
(1) In general.
(2) Sequential or concurrent benefit offset arrangements.
(i) In general.
(ii) Offset by sequential or grandfathered benefits.
(iii) Concurrent benefit offset arrangements.
(A) General rule.
(B) Special rules for certain section 414(n) employer-recipients.
(b) Former employees benefiting under a plan.

§ 1.401(a)(26)–6 Excludable employees

(a) In general.
(b) Excludable employees.
(1) Minimum age and service exclusions.
(i) In general.
(ii) Plans benefiting otherwise excludable employees.
(iii) Examples.
(2) Certain air pilots.
(3) Certain nonresident aliens.
(i) In general.
(ii) Special treaty rule.
(4) Employees covered pursuant to a collective bargaining agreement.
(5) Employees not covered pursuant to a collective bargaining agreement.
(6) Examples.
(7) Certain terminating employees.
(i) In general.
(ii) Hours of service.
(8) Employees of qualified separate lines of business.
(c) Former employees.
(1) In general.
(2) Employees terminated before a specified date.
(3) Previously excludable employees.
(4) Vested accrued benefits eligible for mandatory distribution.
(d) Certain police or firefighters.

§ 1.401(a)(26)–7 Testing methods

(a) Testing on each day of the plan year.
(b) Simplified testing method.
(c) Retroactive correction.

§ 1.401(a)(26)–8 Definitions

Collective bargaining agreement.
Collectively bargained employee.
Covered by a collective bargaining agreement.
Defined benefit plan.
Defined contribution plan.
Employee.
Employer.
ESOP.
Former employee.
Highly compensated employee.
Highly compensated former employee.
Multiemployer plan.
Noncollectively bargained employee.
Nonhighly compensated employee.
Nonhighly compensated former employee.
Plan.
Plan year.
Professional employee.
Section 401(k) plan.
Section 401(m) plan.

§ 1.401(a)(26)–9 Effective dates and transition rules

(a) In general.
(b) Transition rules.
(1) Governmental plans and certain section 403(b) annuities.
(2) Early retirement "window-period" benefits.
(3) Employees who do not benefit because of a minimum-period-of-service requirement or a last-day requirement.
(4) Certain plan terminations.
(i) In general.
(ii) Exception.
(5) ESOPs and non-ESOPs.
(c) Waiver of excise tax on reversions.
(1) In general.
(2) Termination date.
(3) Failure to satisfy section 401(a)(26).
(d) Special rule for collective bargaining agreements.

§ 1.401(a)(26)–1 Minimum participation requirements.

(a) *General rule.* A plan is a qualified plan for a plan year only if the plan satisfies section 401(a)(26) for the plan year. A plan that satisfies any of the exceptions described in paragraph (b) of this section passes section 401(a)(26) automatically for the plan year. A plan that does not satisfy one of the exceptions in paragraph (b) of this section must satisfy § 1.401(a)(26)–2(a). In addition, a defined benefit plan must satisfy § 1.401(a)(26)–3 with respect to its prior benefit structure. Finally, a defined benefit plan that benefits former employees (for example, a defined benefit plan that is amended to provide an ad hoc cost-of-living adjustment to former employees) must separately satisfy § 1.401(a)(26)–4 with respect to its former employees.

(b) *Exceptions to section 401(a)(26)—* (1) *Plans that do not benefit any highly compensated employees.* A plan, other than a frozen defined benefit plan as defined in § 1.401(a)(26)–2(b), satisfies section 401(a)(26) for a plan year if the plan is not a top-heavy plan under section 416 and the plan meets the following requirements:

(i) The plan benefits no highly compensated employee or highly compensated former employee of the employer; and

(ii) The plan is not aggregated with any other plan of the employer to enable the other plan to satisfy section 401(a)(4) or 410(b). The plan may, however, be aggregated with the employer's other

plans for purposes of the average benefit percentage test in section 410(b)(2)(A)(ii).

(2) *Multiemployer plans*—(i) *In general.* The portion of a multiemployer plan that benefits only employees included in a unit of employees covered by a collective bargaining agreement may be treated as a separate plan that satisfies section 401(a)(26) for a plan year.

(ii) *Multiemployer plans covering noncollectively bargained employees*—(A) *In general.* The rule provided in paragraph (b)(2)(i) does not apply to the portion of a multiemployer plan that benefits employees who are not included in any collective bargaining unit covered by a collective bargaining agreement. Thus, the portion of the plan benefiting these employees must separately satisfy section 401(a)(26).

(B) *Special testing rule.* A multiemployer plan that benefits employees who are not included in any collective bargaining unit covered by a collective bargaining agreement satisfies section 401(a)(26) if the plan benefits 50 employees. For purposes of this special testing rule, employees who are included in a unit of employees covered by a collective bargaining agreement may be included in determining whether the plan benefits 50 employees.

(3) *Certain underfunded defined benefit plans*—(i) *In general.* A defined benefit plan is deemed to satisfy section 401(a)(26) for a plan year if all of the conditions of paragraphs (b)(3)(ii) through (b)(3)(iv) of this section are satisfied with respect to the plan for the plan year.

(ii) *Eligible plans.* This condition is satisfied for a plan year only if the plan is subject to Title IV of the Employee Retirement Income Security Act of 1974 (ERISA) for the plan year or, if the plan is not a Title IV plan under ERISA, it is not a top-heavy plan within the meaning of section 416. This condition does not apply for plan years beginning before January 1, 1992.

(iii) *Actuarial certification.* This condition is satisfied for a plan year only if the employer's timely filed actuarial report, as required by section 6059, evidences that the plan does not have sufficient assets to satisfy all liabilities under the plan (determined in accordance with section 401(a)(2)).

(iv) *Cessation of all benefit accruals.* This condition is satisfied for a plan year only if, for the plan year, no employee or former employee is benefiting within the meaning of § 1.401(a)(26)–5(a) or (b). For this purpose, an employee is not treated as benefiting solely by reason of being a non-key employee receiving minimum benefit accruals required by section 416.

(4) *Section 401(k) plan maintained by employers that include certain governmental or tax-exempt entities.* Section 401(k)(4)(B) prevents certain State and local governments and tax-exempt organizations from maintaining a section 401(k) plan. A section 401(k) plan or a section 401(m) plan that consists solely of employer matching contributions or employee after-tax contributions that are tied to elective contributions under a section 401(k) plan may be treated as a separate plan that satisfies section 401(a)(26) for a plan year if the following requirements are satisfied:

(i) The section 401(k) plan is maintained by an employer who has employees precluded from being eligible employees under the arrangement by reason of section 401(k)(4)(B), and

(ii) More than 95 percent of the employees of the employer who are not precluded from being eligible employees under a section 401(k) plan by reason of section 401(k)(4)(B) benefit under the section 401(k) plan.

(5) *Certain acquisitions or dispositions*—(i) *General rule.* Rules similar to the rules prescribed under section 410(b)(6)(C) apply under section 401(a)(26). Pursuant to these rules, the requirements of section 401(a)(26) are treated as satisfied for certain plans of an employer involved in an acquisition or disposition (transaction) for the transition period. The transition period begins on the date of the transaction and ends on the last day of the first plan year beginning after the date of the transaction.

(ii) *Special rule for transactions that occur in the plan year prior to the first plan year to which section 401(a)(26) applies.* Where there has been a transaction described in section 410(b)(6)(C) in the plan year prior to the first plan year in which section 401(a)(26) applies to a plan, the plan satisfies section 401(a)(26) for the transition period if the plan benefited 50 employees or 40 percent of the employees of the employer immediately prior to the transaction.

(iii) *Definition of "acquisition" and "disposition."* For purposes of this paragraph (b)(5), the terms "acquisition" and "disposition" refer to an asset or stock acquisition, merger, or other similar transaction involving a change in employer of the employees of a trade or business.

(c) *Additional rules.* The Commissioner may, in revenue rulings, notices, and other guidance of general applicability, provide any additional rules that may be necessary or appropriate in applying the minimum participation requirements of section 401(a)(26).

§ 1.401(a)(26)–2 Minimum participation rule.

(a) *General rule.* A plan satisfies this paragraph (a) for a plan year only if the plan benefits at least the lesser of—

(1) 50 employees of the employer, or

(2) 40 percent of the employees of the employer.

(b) *Frozen plans.* A plan under which no employee or former employee benefits (within the meaning of § 1.401(a)(26)–5 (a) or (b)), is a frozen plan for purposes of this section and satisfies paragraph (a) of this section automatically. Thus, a frozen defined contribution plan satisfies section 401(a)(26) automatically and a frozen defined benefit plan satisfies section 401(a)(26) for a plan year by satisfying the prior benefit structure requirements in § 1.401(a)(26)–3. For purposes of the rule in this paragraph (b), a defined benefit plan that provides only the minimum benefits for non-key employees required by section 416 is a frozen defined benefit plan.

(c) *Plan.* "Plan" means a plan within the meaning of § 1.401(b)–7 (a) and (b), after the application of the mandatory disaggregation rules of paragraph (d)(1) of this section and, if applicable, the permissive disaggregation rules of paragraph (d)(2) of this section.

(d) *Disaggregation of certain plans*—(1) *Mandatory disaggregation*—(i) *ESOPs and non-ESOPs.* The portion of a plan that is an ESOP and the portion of the plan that is not an ESOP are treated as separate plans for purposes of section 401(a)(26), except as otherwise permitted under § 54.4975–11(e) of this Chapter.

(ii) *Plans maintained by more than one employer*—(A) *Multiple employer plans.* If a plan benefits employees of more than one employer and those employees are not included in a unit of employees covered by one or more collective bargaining agreements, the plan is a multiple employer plan. A multiple employer plan is treated as separate plans, each of which is maintained by a separate employer and must separately satisfy section 401(a)(26) by reference only to that employer's employees.

(B) *Multiemployer plans.* The portion of a multiemployer plan that benefits employees who are included in one or more units of employees covered by one or more collective bargaining agreements and the portion of that plan that benefits employees who are not included in a unit of employees covered

pursuant to any collective bargaining agreement are treated as separate plans. The portion of a multiemployer plan that benefits employees who are not included in a unit of employees covered by a collective bargaining agreement is a multiple employer plan as described in paragraph (d)(1)(ii)(A) of this section. This paragraph (d)(1)(ii)(B) does not apply to the extent that the special testing rule in § 1.401(a)(26)–1(b)(2)(ii) applies. Also, this paragraph (d)(1)(B)(*2*) does not apply for purposes of prior benefit structure testing under § 1.401 (a)(26)–3.

(iii) *Defined benefit plans with other arrangements*—(A) *In general.* A defined benefit plan is treated as comprising separate plans if, under the facts and circumstances, there is an arrangement (either under or outside the plan) that has the effect of providing any employee with a greater interest in a portion of the assets of a plan in a way that has the effect of creating separate accounts. Separate plans are not created, however, merely because a partnership agreement provides for allocation among partners, in proportion to their partnership interests, of either the cost of funding the plan or surplus assets upon plan termination.

(B) *Examples.* The following examples illustrate certain situations in which other arrangements relating to a defined benefit plan are or are not treated as creating separate plans:

Example 1. Employer A maintains a defined benefit plan under which each highly compensated employee can direct the investment of the portion of the plan's assets that represents the accumulated contributions with respect to that employee's plan benefits. In addition, by agreement outside the plan, if the product of the employee's investment direction exceeds the value needed to fund that employee's benefits, Employer A agrees to make a special payment to the participant. In this case, each separate portion of the pool of assets over which an employee has investment authority is a separate plan for the employee.

Example 2. Employer B is a partnership that maintains a defined benefit plan. The partnership agreement provides that, upon termination of the plan, a special allocation of any excess plan assets after reversion is made to the partnership on the basis of partnership share. This arrangement does not create separate plans with respect to the partners.

(iv) *Plans benefiting employees of qualified separate lines of business.* If an employer is treated as operating qualified separate lines of business for purposes of section 401(a)(26) in accordance with § 1.414(r)–1(b), the portion of a plan that benefits employees of one qualified separate line of business is treated as a separate plan from the portions of the same plan that benefit employees of the other qualified separate lines of business of the employer. See §§ 1.414(r)–1(c)(3) and 1.414(r)–9 (separate application of section 401(a)(26) to the employees of a qualified separate line of business). The rule in this paragraph (d)(6) does not apply to a plan that is tested under the special rule for employer-wide plans in § 1.414(r)–1(c)(3)(ii) for a plan year.

(2) *Permissive disaggregation*—(i) *Plans benefiting collectively bargained employees.* For purposes of section 401(a)(26), an employer may treat the portion of a plan that benefits employees who are included in a unit of employees covered by a collective bargaining agreement as a plan separate from the portion of a plan that benefits employees who are not included in such a collective bargaining unit. This paragraph (d)(2)(i) applies separately to each collective bargaining agreement. Thus, for example, the portion of a plan that benefits employees included in a unit of employees covered by one collective bargaining agreement may be treated as a plan that is separate from the portion of the plan that benefits employees included in a unit of employees covered by another collective bargaining agreement.

(ii) *Plans benefiting otherwise excludable employees.* If an employer applies section 401(a)(26) separately to the portion of a plan that benefits only employees who satisfy age and service conditions under the plan that are lower than the greatest minimum age and service conditions permissible under section 410(a), the plan is treated as comprising separate plans, one benefiting the employees who have not satisfied the lower minimum age and service but not the greatest minimum age and service conditions permitted under section 410(a) and one benefiting employees who have satisfied the greatest minimum age and service conditions permitted under section 410(a). See § 1.401(a)(26)–6(b)(1)(ii) for rules concerning testing of otherwise excludable employees.

§ 1.401(a)(26)–3 Rules applicable to a defined benefit plan's prior benefit structure.

(a) *General rule.* A defined benefit plan that does not meet one of the exceptions in § 1.401(a)(26)–1(b) must satisfy paragraph (c) of this section with respect to its prior benefit structure. Defined contribution plans are not subject to this section.

(b) *Prior benefit structure.* Each defined benefit plan has only one prior benefit structure, and all accrued benefits under the plan as of the beginning of a plan year (including benefits rolled over or transferred to the plan) are included in the prior benefit structure for the year.

(c) *Testing a prior benefit structure*—(1) *General rule.* A plan's prior benefit structure satisfies this paragraph if the plan provides meaningful benefits to a group of employees that includes the lesser of 50 employees or 40 percent of the employer's employees. Thus, a plan satisfies the requirements of this paragraph (c) if at least 50 employees or 40 percent of the employer's employees currently accrue meaningful benefits under the plan. Alternatively, a plan satisfies this paragraph if at least 50 employees and former employees or 40 percent of the employer's employees and former employees have meaningful accrued benefits under the plan.

(2) *Meaningful benefits.* Whether a plan is providing meaningful benefits, or whether individuals have meaningful accrued benefits under a plan, is determined on the basis of all the facts and circumstances. The relevant factors in making this determination include, but are not limited to, the following: the level of current benefit accruals; the comparative rate of accruals under the current benefit formula compared to prior rates of accrual under the plan; the projected accrued benefits under the current benefit formula compared to accrued benefits as of the close of the immediately preceding plan year; the length of time the current benefit formula has been in effect; the number of employees with accrued benefits under the plan; and the length of time the plan has been in effect. A rule for determining whether an offset plan provides meaningful benefits is provided in § 1.401(a)(26)–5(a)(2). A plan does not satisfy this paragraph (c) if it exists primarily to preserve accrued benefits for a small group of employees and thereby functions more as an individual plan for the small group of employees or for the employer.

(d) *Multiemployer plan rule.* A multiemployer plan is deemed to satisfy the prior benefit structure rule in paragraph (c)(1) of this section for a plan year if the multiemployer plan provides meaningful benefits to at least 50 employees for a plan year, or 50 employees have meaningful accrued benefits under the plan. For purposes of this paragraph, all employees benefiting under the multiemployer plan may be considered, whether or not these employees are included in a unit of employees covered pursuant to any collective bargaining agreement.

§ 1.401(a)(26)–4 Testing former employees.

(a) *Scope.* This section applies to any defined benefit plan that benefits former employees in a plan year within the meaning of § 1.401(a)(26)–5(b) and does not meet one of the exceptions in § 1.401(a)(26)–1(b).

(b) *Minimum participation rule for former employees.* Except as set forth in paragraph (c) of this section, a plan that is subject to this section must benefit at least the lesser of:

(1) 50 former employees of the employer, or

(2) 40 percent of the former employees of the employer.

(c) *Special rule.* A plan satisfies the minimum participation rule in paragraph (b) of this section if the plan benefits at least five former employees, and if either:

(1) More than 95 percent of all former employees with vested accrued benefits under the plan benefit under the plan for the plan year, or

(2) At least 60 percent of the former employees who benefit under the plan for the plan year are nonhighly compensated former employees.

(d) *Excludable former employees*—(1) *General rule.* Whether a former employee is an excludable former employee for purposes of this section is determined under § 1.401(a)(26)–6(c).

(2) *Exception.* Solely for purposes of paragraph (c) of this section, the rule in § 1.401(a)(26)–6(c)(4) (regarding vested accrued benefits eligible for mandatory distribution) does not apply to any former employee having a vested accrued benefit. Thus, a former employee who has a vested accrued benefit is not an excludable former employee merely because that vested accrued benefit does not exceed $3,500.

§ 1.401(a)(26)–5 Employees who benefit under a plan.

(a) *Employees benefiting under a plan*—(1) *In general.* Except as provided in paragraph (a)(2) of this section, an employee is treated as benefiting under a plan for a plan year if and only if, for that plan year, the employee would be treated as benefiting under the provisions of § 1.410(b)–3(a), without regard to § 1.410(b)–3(a)(iv).

(2) *Sequential or concurrent benefit offset arrangements*—(i) *In general.* An employee is treated as accruing a benefit under a plan that includes an offset or reduction of benefits that satisfies either paragraph (a)(2)(ii) or (a)(2)(iii) of this section if either the employee accrues a benefit under the plan for the year, or the employee would have accrued a benefit if the offset or reduction portion of the benefit formula were disregarded. In addition, an employee is treated as accruing a meaningful benefit for purposes of prior benefit structure testing under § 1.401(a)(26)–3 if the employee would have accrued a meaningful benefit if the offset or reduction portion of the benefit formula were disregarded.

(ii) *Offset by sequential or grandfathered benefits.* An offset or reduction of benefits under a defined benefit plan satisfies this paragraph (a)(2) if the benefit formula provides that an employee will not accrue additional benefits under the current portion of the benefit formula until the employee has accrued, under such portion, a benefit in excess of such employee's benefit under one or more formulas in effect for prior years that are based wholly on prior years of service. The prior benefit may have accrued under the same or a separate plan, may be provided under the same or a separate plan and may relate to service with the same or previous employers. Benefits will not fail to be treated as based wholly on prior years if they are based, directly or indirectly, on compensation earned after such prior years (including compensation earned in the current year), if they are adjusted to reflect increases in the section 415 limitations, or if they are increased to provide an ad hoc cost of living adjustment designed to adjust, in whole or in part, for inflation. Furthermore, benefits do not fail to be treated as based wholly on prior years merely because the benefits (e.g., early retirement benefits) are subject to an age or years-of-service condition and, in applying the condition or conditions, the current and prior years are taken into account.

(iii) *Concurrent benefit offset arrangements*—(A) *General rule.* An offset or reduction of benefits under a defined benefit plan satisfies the requirements of this paragraph (a)(2)(iii) if the benefit formula provides a benefit that is offset or reduced by contributions or benefits under another plan that is maintained by the same employer and the following additional requirements are met:

(*1*) The contributions or benefits under a plan that are used to offset or reduce the benefits under the positive portion of the fomu1a being tested accrued under such other plan;

(*2*) The employees who benefit under the formula being tested also benefit under the other plan on a reasonable and uniform basis; and

(*3*) The contributions or benefits under the plan that are used to offset or reduce the benefits under the formula being tested are not used to offset or reduce that employee's benefits under any other plan or any other formula.

(B) *Special rules for certain section 414(n) employer-recipients.* The same employer requirement in the concurrent benefit offset rule in paragraph (a)(2)(iii)(A) of this section is waived for certain section 414(n) employer-recipients. Under this exception, an employer-recipient (within the meaning of sections 414 (n) and (o)) may treat contributions or benefits under a plan maintained by a leasing organization as contributions or benefits accrued under the recipient organization plan provided the following requirements are met: the employer-recipient maintains a plan covering leased employees (which employees are treated as employees of the employer-recipient within the meaning of sections 414(n)(2) and 414(o)(2)); the leased employees are also covered under a plan maintained by the leasing organization; and contributions or benefits under the plan maintained by the employer-recipient are offset or reduced by the contributions or benefits under the leasing organization plan that are attributable to service with the recipient organization. Also, for purposes of the benefiting condition requirement in paragraph (a)(2)(iii)(A)(*2*) of this section, the employees of the employer-recipient who are not leased from the leasing organization are not required to benefit under the plan of the leasing organization.

(b) *Former employees benefiting under a plan.* A former employee is treated as benefiting for a plan year if and only if the former employee would be treated as benetiting under the rules in § 1.410(b)–3(b).

§ 1.401(a)(26)–6 Excludable employees.

(a) *In general.* For purposes of applying section 401(a)(26) with respect to either employees, former employees, or both employees and former employees, as applicable, all employees other than excludable employees described in paragraph (b) of this section, all former employees other than excludable former employees described in paragraph (c) of this section, or both, as the case may be, must be taken into account. Except as specifically provided otherwise in this section, the rules of this section are applied by reference only to the particular plan and must be applied on a uniform and consistent basis.

(b) *Excludable employees.* An employee is an excludable employee if the employee is covered by one or more of the following exclusions:

(1) *Minimum age and service exclusions*—(i) *In general.* If a plan

applies minimum age and service eligibility conditions permissible under section 410(a)(1) and excludes all employees who do not meet those conditions from benefiting under the plan, tbn all employees who fail to satisfy those conditions may be treated as excludable employees with respect to that plan. An employee is treated as meeting the age and service requirements on the date any employee with the same age and service would be eligible to commence participation in the plan, as provided in section 410(b)(4)(C).

(ii) *Plans benefiting otherwise excludable employees.* An employer may treat a plan benefiting otherwise excludable employees as two separate plans, one for the otherwise excludable employees and one for the other employees benefiting under the plan. The effect of this rule is that employees who would be excludable under paragraph (b)(1) of this section (applied without regard to section 410(a)(1)(B)), but for the fact that the plan does not apply the greatest permissible minimum age and service conditions, may be treated as excludable employees with respect to the plan. This treatment is only available if each of the following conditions is satisfied:

(A) The plan under which the otherwise excludable employees benefit also benefits employees who are not otherwise excludable.

(B) The plan under which the otherwise excludable employees benefit satisfies section 401(a)(26), both by reference only to otherwise excludable employees and by reference only to employees who are not otherwise excludable.

(C) The contributions or benefits provided to the otherwise excludable employees (expressed as percentages of compensation) are not greater than the contributions or benefits provided to the employees who are not otherwise excludable under the plan.

(D) No highly compensated employee is included in the group of otherwise excludable employees for more than one plan year.

(iii) *Examples.* The following examples illustrate some of the minimum-age-and-service exclusion requirements:

Example 1. Employer X maintains a defined contribution plan, Plan X, under which employees who have not completed 1 year of service are not eligible to participate. Employer X has six employees. Two of the employees participate in Plan X. The other four employees have not completed 1 year of service and are therefore not eligible to participate in Plan X. The four employees who have not completed 1 year of service are excludable employees and may be disregarded for purposes of applying the minimum participation test. Therefore, Plan X satisfies section 401(a)(26) because both of the two employees who must be considered are participants in Plan X.

Example 2. Employer Y has 100 employees and maintains two plans, Plan 1 and Plan 2. Plan 1 provides that employees who have not completed 1 year of service are not eligible to participate. Plan 2 has no minimum age or service requirement. Twenty of Y's employees do not meet the minimum service requirement under Plan 1. Each plan satisfies the ratio test under section 410(b)(1)(B). In testing Plan 1 to determine whether it satisfies section 401(a)(26), the 20 employees not meeting the minimum age and service requirement under Plan 1 are treated as excludable employees. In testing Plan 2 to determine whether it satisfies section 401(a)(26), no employees are treated as excludable employees because Plan 2 does not have a minimum age or service requirement.

(2) *Certain air pilots.* An employee who is excluded from consideration under section 410(b)(3)(B) (relating to certain air pilots) may be treated as an excludable employee.

(3) *Certain nonresident aliens*—(i) *In general.* An employee who is excluded from consideration under section 410(b)(3)(C) (relating to certain nonresident aliens) may be treated as an excludable employee.

(ii) *Special treaty rule.* In addition, an employee who is a nonresident alien (within the meaning of section 7701(b)(1)(B)) and who does receive earned income (within the meaning of section 911(d)(2)) from the employer that constitutes income from sources within the United States (within the meaning of section 861(a)(3)) is permitted to be excluded, if all of the employee's earned income from the employer from sources within the United States is exempt from United States income tax under an applicable income tax convention. This paragraph (b)(3)(ii) applies only if all employees described in the preceding sentence are so excluded.

(4) *Employees covered pursuant to a collective bargaining agreement.* When testing a plan benefiting only noncollectively bargained employees, an employee who is excluded from consideration under section 410(b)(3)(A) (exclusion for employees included in a unit of employees covered by a collective bargaining agreement) may be treated as an excludable employee. This rule may be applied separately to each collective bargaining agreement. See § 1.401(a)(26)–8 for the definitions of the terms "collective bargaining agreement", "collectively bargained employee," and "covered pursuant to a collective bargaining agreement".

(5) *Employees not covered pursuant to a collective bargaining agreement.* When testing a plan that benefits only employees who are included in a group of employees who are covered pursuant to a collective bargaining agreement, an employee who is not included in the group of employees who are covered by the collective bargaining agreement may be treated as an excludable employee.

(6) *Examples.* The following examples illustrate the excludable employee rules that relate to employees covered pursuant to collective bargaining agreements. For purposes of these examples assume that no other exclusion rules are applicable.

Example 1. Employer W has 70 collectively bargained employees and 30 non-collectively bargained employees. Employer W maintains Plan W, which benefits only the 30 non-collectively bargained employees. The 70 collectively bargained employees may be treated as excludable employees and thus may be disregarded in applying section 401(a)(26) to Plan W.

Example 2. Assume the same facts as *Example I,* except that the Commissioner has determined that the employee representative is not a bona fide employee representative under section 7701(a)(46) and thus there are no "collectively bargained employees." In this case, all employees of W must be considered in determining whether section 401(a)(26) is met.

Example 3. Employer X has collectively bargained employees and 70 noncollectively bargained employees. Employer X maintains Plan X, which benefits only the 30 collectively bargained employees. Employer X may treat the non-collectively bargained employees as excludable employees and disregard them in applying section 401(a)(26) to the collectively bargained plan.

Example 4. Assume the same facts as *Example 3,* except that the Commissioner has determined that the employee representative is not a bona fide employee representative under section 7701(a)(46) and thus there is no recognized collective bargaining agreement. In this case, Employer X may not treat the non-collectively bargained employees of X as excludable employees.

Example 5. Assume the same facts as *Example 3,* except that 3 percent of the 30 collectively bargained employees are professionals. In this case, Employer X may not treat the non-collectively bargained employees of X as excludable employees.

Example 6. Employer Y has 100 collectively bargained employees. Thirty of Y's employees are represented by Collective Bargaining Unit 1 and covered under Plan 1. Seventy of Y's employees are represented by Collective Bargaining Unit 2 and covered under Plan 2. For purposes of testing Plan 1, the employees of Collective Bargaining Unit 2 may be treated as excludable employees. Similarly, for purposes of testing Plan 2, the employees of Collective Bargaining Unit 1 may be treated as excludable employees.

(7) *Certain terminating employees*—(i) *In general.* An employee may be treated as an excludable employee for a plan

year with respect to a particular plan if—

(A) The employee does not benefit under the plan for the plan year,

(B) The employee is eligible to participate in the plan,

(C) The plan has a minimum period of service requirement or a requirement that an employee be employed on the last day of the plan year (last-day requirement) in order for an employee to accrue a benefit or receive an allocation for the plan year,

(D) The employee fails to accrue a benefit or receive an allocation under the plan solely because of the failure to satisfy the minimum period of service or last-day requirement,

(E) The employee terminates employment during the plan year with no more than 500 hours of service, and the employee is not an employee as of the last day of the plan year (for purposes of this paragraph (b)(7)(i)(E), a plan that uses the elapsed time method of determining years of service may use either 91 consecutive calendar days or 3 consecutive calendar months instead of 500 hours of service, provided it uses the same convention for all employees during a plan year), and

(F) If this paragraph (b)(7) is applied with respect to any employee with respect to a plan for a plan year, it is applied with respect to all employees with respect to the plan for the plan year.

(ii) *Hours of service.* For purposes of this paragraph (b)(7), the term "hour of service" has the same meaning as set forth in 29 CFR 2530.200b–2 under the general method of crediting service for the employee. If one of the equivalencies set forth in 29 CFR 2530.200b–3 is used for crediting service under the plan, the 500-hour requirement must be adjusted accordingly.

(8) *Employees of qualified separate lines of business.* If an employer is treated as operating qualified separate lines of business for purposes of section 401(a)(26) in accordance with § 1.414(r)–1(b), in testing a plan that benefits employees of one qualified separate line of business, the employees of the other qualified separate lines of business of the employer are treated as excludable employees. See §§ 1.414(r)–1(c)(3) and 1.414(r)–9 (separate application of section 401(a)(26) to the employees of a qualified separate line of business). The rule in this paragraph (b)(8) does not apply to a plan that is tested under the special rule for employer-wide plans in § 1.414(r)–1(c)(3)(ii) for a plan year.

(c) *Former employees*—(1) *In general.* For purposes of applying section 401(a)(26) with respect to former employees, all former employees of the employer are taken into account, except that the employer may treat a former employee described in paragraph (c)(2) through (c)(4) of this section as an excludable former employee. If any of the former employee exclusion rules under paragraphs (c)(2) through (c)(4) of this section is applied, it must be applied to all former employees for the plan year on a consistent basis.

(2) *Employees terminated before a specified date.* The employer may treat a former employee as excludable if—

(i) The former employee became a former employee either prior to January 1, 1984, or prior to the tenth calendar year preceding the calendar year in which the current plan year begins, and

(ii) The former employee became a former employee in a calendar year that precedes the earliest calendar year in which any former employee who benefits under the plan in the current plan year became a former employee.

(3) *Previously excludable employees.* The employer may treat a former employee as excludable if the former employee was an excludable employee (or would have been an excludable employee if these regulations had been in effect) under the rules of paragraphs (a) and (b) of this section during the plan year in which the former employee became a former employee. If the employer treats a former employee as excludable pursuant to this paragraph (c)(3), the former employee is not taken into account with respect to a plan even if the former employee is benefiting under the plan.

(4) *Vested accrued benefits eligible for mandatory distribution.* A former employee may be treated as an excludable former employee if the present value of the former employee's vested accrued benefit does not exceed $3,500. This determination is made in accordance with the rules of sections 411(a)(11) and 417(e).

(d) *Certain police or firefighters.* An employer may apply section 401(a)(26) separately with respect to any classification of qualified public safety employees for whom a separate plan is maintained. Thus, for purposes of testing a separate plan covering a class of qualified public safety employees, all employees who are not in that classification are treated as excludable employees. Also, such employees need not be taken into account in determining whether or not any other plan satisfies section 401(a)(26). For purposes of this paragraph (d), "qualified public safety employee" means any employee of any police department or fire department organized and operated by a State or political subdivision if the employee provides police protection, firefighting services, or emergency medical services for any area within the jurisdiction of a State or political subdivision.

§ 1.401(a)(26)–7 Testing methods.

(a) *Testing on each day of the plan year.* A plan satisfies section 401(a)(26) for a plan year only if the plan satisfies section 401(a)(26) on each day of the plan year. An employee benefits on a day if the employee is a participant for such day and the employee benefits under the plan for the year under the rules in § 1.401(a)(26)–5.

(b) *Simplified testing method.* A plan is treated as satisfying the requirements of paragraph (a) of this section if it satisfies section 401(a)(26) on any single plan day during the plan year, but only if that day is reasonably representative of the employer's workforce and the plan's coverage. A plan does not have to be tested on the same day each plan year.

(c) *Retroactive correction.* If a plan fails to satisfy section 401(a)(26) for a plan year, the plan may be retroactively amended during the same period and under the same conditions as provided for in § 1.401(a)(4)–11(g)(3) through (g)(5) to satisfy section 401(a)(26). A plan merger that occurs by the end of the period provided in § 1.401(a)(4)–11(g)(3)(iv) is treated solely for purposes of section 401(a)(26) as if it were effective as of the first day of the plan year. The rule of this paragraph (c) may be illustrated by the following example.

Example. Assume that an employer with 500 employees maintains two defined contribution plans. Plan A benefits 45 employees. Plan B benefits 50 employees. Immediately before the end of the period provided for in § 1.401(a)(4)–11(g)(3)(iv), the employer expands coverage under Plan A to benefit 20 more employees retroactively for the plan year. Thus, Plan A satisfies paragraph (a) of this section for the plan year. Alternatively, before the end of the period provided for in § 1.401(a)(4)–11(g)(3)(iv), or later if a later period is applicable under section 401(b), the employer could merge Plan A with Plan B to satisfy section 401(a)(26).

§ 1.401(a)(26)–8 Definitions.

In applying this section and §§ 1.401(a)(26)–1 through 1.401(a)(26)–9 the definitions in this section govern unless otherwise provided.

Collective bargaining agreement. Collective bargaining agreement means an agreement that the Secretary of Labor finds to be a collective bargaining agreement between employee representatives and the employer that satisfies § 301.7701–17T. Employees described in section 413(b)(8) who are employees of the union or the plan and are treated as employees of an employer

are not employees covered pursuant to a collective bargaining agreement for purposes of section 401(a)(26) unless the employees are actually covered pursuant to such an agreement.

Collectively bargained employee. Collectively bargained employee means a collectively bargained employee within the meaning of § 1.410(b)–6(d)(2).

Covered by a collective bargaining agreement. Covered by a collective bargaining agreement means covered by a collective bargaining agreement within the meaning of § 1.410(b)–6(d)(2)(iii).

Defined benefit plan. Defined benefit plan means a defined benefit plan within the meaning of § 1.410(b)–9.

Defined contribution plan. Defined contribution plan means a defined contribution plan within the meaning of § 1.410(b)–9.

Employee. Employee means an employee, within the meaning of § 1.410(b)–9.

Employer. Employer means the employer within the meaning of § 1.410(b)–9.

ESOP. ESOP means an employee stock ownership plan within the meaning of section 4975(e)(7) or a tax credit employee stock ownership plan within the meaning of section 409(a).

Former employee. Former employee means a former employee within the meaning of § 1.410(b)–9.

Highly compensated employee. Highly compensated employee means an employee who is highly compensated within the meaning of section 414(q).

Highly compensated former employee. Highly compensated former employee means a former employee who is highly compensated within the meaning of section 414(q)(9).

Multiemployer plan. Multiemployer plan means a multiemployer plan within the meaning of section 414(f).

Noncollectively bargained employee. Noncollectively bargained employee means an employee who is not a collectively bargained employee.

Nonhighly compensated employee. Nonhighly compensated employee' means an employee who is not a highly compensated employee.

Nonhighly compensated former employee. Nonhighly compensated former employee means a former employee who is not a highly compensated former employee.

Plan. Plan means plan as defined in § 1.401(a)(26)–2(c).

Plan year. Plan year means the plan year of the plan as defined in the written plan document. In the absence of a specifically designated plan year, the plan year is deemed to be the calendar year.

Professional employee. Professional employee means a professional employee as defined in § 1.410(b)–9.

Section 401(k) plan. Section 401(k) plan means a plan consisting of elective contributions described in § 1.401(k)–1 (g)(3) under a qualified cash or deferred arrangement described in § 1.401(k)–1(a)(4)(i).

Section 401(m) plan. Section 401(m) plan means a plan consisting of employee contributions described in § 1.401(m)–1(f)(6) or matching contributions described in § 1.401(m)–1(f)(12), or both.

§ 1.401(a)(26)–9 Effective dates and transition rules.

(a) *In general.* Except as provided in paragraphs (b), (c), and (d) of this section, section 401(a)(26) and the regulations thereunder apply to plan years beginning on or after January 1, 1989.

(b) *Transition rules*—(1) *Governmental plans and certain section 403(b) annuities.* Section 401(a)(26) is treated as satisfied for plan years beginning before January 1, 1993, in the case of a plan maintained by the government of any State or political subdivision thereof, or by any agency or instrumentality of either of the foregoing. Also, a section 403(b) plan for employees who perform services for an educational organization described in section 170(b)(1)(A)(ii), maintained by an employer which is a State, a political subdivision of a State, or an agency or instrumentality of any one or more of the foregoing is deemed to satisfy section 401(a)(26) for plan years beginning before January 1, 1993.

(2) *Early retirement "window-period" benefits.* Early retirement benefits available under a plan only to employees who retire within a limited period of time, not to exceed one year, are treated as satisfying section 401(a)(26) if such benefits are provided under plan terms that were adopted and in effect on or before March 14, 1989.

(3) *Employees who do not benefit because of a minimum-period-of-service requirement or a last-day requirement.* For the first plan year beginning after December 31, 1988, and before January 1, 1990, employees who are eligible to participate under the plan and who fail to accrue a benefit solely because of the failure to satisfy either a minimum-period-of-service requirement of 1000 hours of service or less or a last-day requirement may be treated as benefiting under the plan.

(4) *Certain plan terminations*—(i) *In general.* Except as provided in paragraph (b)(4)(ii) of this section, if a plan terminates after section 401(a)(26) becomes effective with respect to the plan (as determined under paragraph (a) of this section), the plan is not treated as a qualified plan upon termination unless it complies with section 401(a)(26) and the regulations thereunder (to the extent they are applicable) for all periods for which section 401(a)(26) is effective with respect to the plan.

(ii) *Exception.* Notwithstanding paragraphs (a) and (b)(4)(i) of this section, a plan does not fail to be treated as a qualified plan upon termination merely because the plan fails to satisfy the requirements of section 401(a)(26) and the regulations thereunder if the plan is terminated with a termination date on or before December 31, 1989, and either of the following conditions is satisfied:

(A) In the case of a defined benefit plan, no highly compensated employee has an accrued benefit under the plan exceeding the lesser of either the benefit the employee had accrued as of the close of the last plan year beginning before January 1, 1989, or the benefit the employee would have accrued as of the close of the last plan year under the terms of the plan in effect and applicable with respect to the employee on December 13, 1988.

(B) In the case of a defined contribution plan, no highly compensated employee receives a contribution allocation for any plan year beginning after December 31, 1988. For this purpose, a contribution allocation with respect to an employee for a plan year beginning before January 1, 1989, may be treated as a contribution allocation for a plan year beginning after December 31, 1988, if the allocation for the prior year exceeds the allocation that the employee would have received for such year under the terms of the plan in effect and applicable with respect to the employee on December 13, 1988. An allocation of forfeitures to highly compensated employees with respect to contributions made for plan years beginning before January 1, 1988, does not cause a defined contribution plan to fail to satisfy the conditions of this paragraph (b)(4)(ii)(B).

(5) *ESOPs and non-ESOPs.* Notwithstanding paragraph (a) of this section and § 54.4975–11(a)(5) of this Chapter, an employer may treat the rule in § 1.401(a)(26)–2(d)(1)(i), regarding mandatory disaggregation of ESOPs and non-ESOPs as not effective for plan years beginning before January 1, 1990.

(c) *Waiver of excise tax on reversions*—(1) *In general.* Pursuant to section 1112(e)(3) of the Tax Reform Act of 1986 (TRA '86), if certain conditions are satisfied, a waiver of the excise tax

under section 4980 applies with respect to any employer reversion that occurs by reason of the termination or merger of a plan before the first year to which section 401(a)(26) applies to the plan. In general, the applicable conditions are that the plan must have been in existence on August 16, 1986; that if section 401(a)(26) was in effect for the plan year including August 16, 1986, the plan would have failed to satisfy the requirements of section 401(a)(26) and would have continued to fail the requirements at all times thereafter; that the plan satisfies the applicable conditions in paragraph (b)(4)(ii)(A) or (B) of this section; and that certain requirements regarding asset or liability transfers and mergers and spinoffs involving the plan after August 16, 1986, are satisfied.

(2) *Termination date.* An employer reversion with respect to a plan is eligible for the section 4980 excise tax waiver only if the employer reversion occurs by reason of the termination of the plan with a termination date prior to the first plan year for which section 401(a)(26) applies to the plan. Solely for purposes of this waiver, the employer reversion is treated as satisfying this paragraph (c)(2) even though the plan's termination date is during the first plan year for which section 401(a)(26) applies to the plan if the plan's termination date is on or before May 31, 1989. If the termination date occurs in the first plan year for which section 401(a)(26) applied to the plan and the employer receives a reversion that is eligible for the waiver of the section 4980 tax, the plan is subject to the interest rate restriction set forth in section 11 12(e)(3)(B) of TRA '86 as amended.

(3) *Failure to satisfy section 401(a)(26).* An employer reversion with respect to a plan is eligible for the excise tax waiver only if the plan was in existence on August 16, 1986, and, if section 401(a)(26) had applied to the plan for the plan year including such date, the plan would have failed to satisfy section 401(a)(26) for the plan year and continuously thereafter until the plan's termination or merger. For purposes of this paragraph (c)(3), a plan is treated as though it would have failed to satisfy section 401(a)(26) before such section actually applied to the plan only if the plan (as defined under section 414(1)) failed to benefit at least the lesser of 50 employees or 40 percent of the employer's employees. In general, this determination is to be made on the basis of only the applicable statutory provisions, without regard to the regulations under section 401(a)(26). Thus, for example, the prior benefit structure rules in § 1.401(a)(26)–3 do not apply in determining whether a plan would have failed to satisfy section 401(a)(26) for plan years beginning prior to the effective date of section 401(a)(26) with respect to the plan.

(d) *Special rule for collective bargaining agreements.* In the case of a plan maintained pursuant to one or more collective bargaining agreements (as defined in § 1.401(a)(26)–8(a)) that were ratified before March 1, 1986, section 401(a)(26) and the regulations thereunder shall not apply to plan years beginning before the earlier of—

(1) January 1, 1991, or

(2) The later of—

(i) January 1, 1989, or

(ii) The date on which the last of such collective bargaining agreements terminates. For purposes of this paragraph (d), any extension or renegotiation of any collective bargaining agreement that is ratified after February 28, 1986, is disregarded in determining the date on which such collective bargaining agreement terminates.

Fred T. Goldberg, Jr.,

Commissioner of Internal Revenue.

Approved: November 18, 1991.

Kenneth W. Gideon,

Assistant Secretary of the Treasury.

[FR Doc. 91–28859 Filed 12–2–91; 8:45 am]

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26 CFR Parts 1 and 602

[T.D. 8376]

RIN 1545–AL23

Qualified Separate Lines of Business

AGENCY: Internal Revenue Service, Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations under section 414(r) of the Internal Revenue Code concerning qualified retirement plans maintained by an employer. The final regulations provide the exclusive rules for determining whether an employer operates qualified separate lines of business under section 414(r) for purposes of applying the minimum coverage requirements of section 410(b) and the minimum participation requirements of section 401(a)(26). This document also contains related amendments to the regulations under sections 401(k) and (m), and 410(b).

These final regulations reflect the enactment of section 414(r) by the Tax Reform Act of 1986, Public Law No. 99–514, 100 Stat. 2085 (TRA '86), and subsequent changes made by the Technical and Miscellaneous Revenue Act, Public Law No. 100–647, 102 Stat. 3342 (1988) (TAMRA), and the Public Debt Limit Increase Act, Public Law No. 101–140, 103 Stat. 830 (1989) (PDLIA '89). The regulations provide the public with the guidance necessary to comply with the law and affect sponsors of and participants in tax-qualified retirement plans and certain other employee benefit plans.

EFFECTIVE DATES: These regulations are effective for plan years beginning on or after January 1, 1992, and are applied to those plan years except as set forth in section 204(b)(1) of PDLIA '89 and § 1.414(r)–1(d)(9).

FOR FURTHER INFORMATION CONTACT: Thomas G. Schendt or Rhonda G. Migdail, at 202–633–0849 (not a toll-free number).

SUPPLEMENTARY INFORMATION: On February 1, 1991, the Internal Revenue Service published in the **Federal Register** proposed amendments to the Income Tax Regulations (26 CFR part 1) under section 414(r) and related provisions of the Internal Revenue Code of 1986 (56 FR 3988). Written comments were received from the public on the proposed regulations. In addition, a public hearing on the proposed regulations was announced on February 1, 1991 (56 FR 4022). The public hearing was held on May 16, 1991. After consideration of all of the written comments received and the statements made at the public hearing, the proposed regulations under section 414(r) are adopted as modified by this Treasury Decision.

Paperwork Reduction Act

The collection of information contained in these final regulations has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1980 (44 U.S.C. 3504(h)) under control number 1545–1221. The estimated average burden per respondent is five hours.

These estimates are an approximation of the average time expected to be necessary for the collection of information. They are based on such information as is available to the Internal Revenue Service. Individual respondents may require greater or less time depending on their particular circumstances.

Comments regarding the accuracy of this burden estimate and suggestions for reducing this burden should be directed to the Internal Revenue Service, Attn: IRS Reports Clearance Office, T:FP,

Washington, DC 20224, and to the Office of Management and Budget, Attention: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503.

Statutory Authority

This document contains amendments to the Income Tax Regulations (26 CFR part 1) under sections 414(r), 401(k) and (m), and 410(b) of the Code. These amendments reflect the enactment of sections 414(r) and 410(b)(5) by sections 1112(a) and 1115(a) of TRA '86 (100 Stat. 2440, 2452), the enactment of section 401(a)(26)(G) by section 1011(h)(3) of TAMRA (102 Stat. 3464), and subsequent statutory changes made by section 3021(b)(2)(A) of TAMRA (102 Stat. 3632) and sections 203 and 204 of PDLIA '89 (103 Stat. 830, 832). These regulations are to be issued under the authority of sections 414(r), 410(b)(6)(G), 401(a)(26)(G), and 7805 of the Code.

Overview

Pursuant to section 414(b) and (c), all employees of corporations that are members of the same controlled group of corporations, and all employees of trades or businesses that are under common control, are treated as employed by a single employer for purposes of the employee benefit provisions of the Code generally. Similarly, all employees of members of an affiliated service group are treated as employed by a single employer pursuant to section 414(m). Accordingly, all employees of a single employer, determined after the application of these provisions, are taken into account for purposes of applying the minimum coverage requirements of section 410(b) and the minimum participation requirements of section 401(a)(26) to a qualified retirement plan maintained by an employer. See also section 414(n) and (o).

Section 410(b)(5) provides an exception to this general rule for purposes of section 410(b) if an employer operates qualified separate lines of business under section 414(r). If the employer is treated as operating qualified separate lines of business under section 414(r), section 410(b)(5) generally permits the employer to apply the minimum coverage requirements separately with respect to the employees of each qualified separate line of business. A similar exception is provided for purposes of applying the minimum participation requirements of section 401(a)(26) and the 55-percent average benefits test of section 129(d)(8).

Legislative Background

Sections 410(b)(5) and 414(r) were added to the Code by sections 1112(a) and 1115(a) of TRA '86. During legislative consideration of TRA '86, Congress expressed dissatisfaction with the existing minimum coverage tests, particularly with the lack of objective criteria under the nondiscriminatory classification test of section 410(b)(1)(B) as in effect at that time. In order to clarify the application of the nondiscriminatory classification test, Congress directed the Internal Revenue Service to establish criteria for determining whether a nondiscriminatory classification exists. Congress also proposed conditioning future use of the test on satisfaction by the employer of a new average benefit percentage test. Under the proposed statutory changes, an employer would be permitted to test a plan for minimum coverage under the nondiscriminatory classification test only if the average employer-provided contributions or benefits of all its nonhighly compensated employees equaled at least 70 percent of the average employer-provided contributions and benefits of all its highly compensated employees. The new average benefit percentage test would be based on the benefits or contributions of all employees of the employer, regardless of what plan they were covered under or, indeed, whether they were covered under any plan of the employer at all.

Thus, under section 410(b), as modified by TRA '86, every plan of the employer must satisfy, on an employer-wide basis, either the percentage test as provided in section 410(b)(1)(A), the ratio test as provided in section 410(b)(1)(B), or the average benefit percentage test as provided in section 410(b)(2). To satisfy the average benefit percentage test of section 410(b)(2), an employer must satisfy the nondiscriminatory classification test of section 410(b)(2)(A)(i) and the average benefit percentage test of section 410(b)(2)(A)(ii).

During legislative consideration of TRA '86, concern was expressed that, where an employer operates separate lines of business that compete in fundamentally different markets, the plans maintained by the employer might not satisfy the average benefit percentage test of section 410(b)(2)(A)(ii), even though the plans could satisfy the nondiscriminatory classification test of section 410(b)(2)(A)(i). The argument was made that it would be inappropriate to require the employer to satisfy the average benefit percentage test on an employer-wide basis if the level of benefits varied significantly among the employer's separate lines of business for competitive market reasons. Satisfying the test could require the employer either to increase benefits provided to employees in one line of business substantially above the level offered by its competitors in that line of business, or to decrease benefits in its other lines of business substantially below the level offered by its competitors in those lines of business. In either event, the employer could be placed at a competitive disadvantage.

Congress addressed these concerns by establishing the qualified-separate-line-of-business rules of sections 410(b)(5) and 414(r). Under these rules, if an employer is treated as operating qualified separate lines of business under section 414(r), the employer need not satisfy the percentage test, the ratio test, or the average benefit percentage test on an employer-wide basis. Rather, the employer is permitted to test its plans for minimum coverage on a qualified-separate-line-of-business basis (i.e., separately with respect to the employees of each qualified separate line of business). See section 410(b)(5)(A); H.R. Conf. Rep. No. 841, 99th Cong., 2d Sess. 11–523 (1986). However, even if an employer is treated as operating qualified separate lines of business under section 414(r), Congress still required every plan of the employer to satisfy the nondiscriminatory classification test on an employer-wide basis. See section 410(b)(5)(B).

Development of Final Regulations and Summary of Significant Modifications

The approach taken in the proposed regulations for determining lines of business allowed the employer the flexibility to determine its own lines of business. This approach shifted the determination of an employer's lines of business away from essentially unanswerable questions—such as where one economic market ends and another begins, or whether one product or service is sufficiently differentiated from another product or service—and placed the emphasis on the second requirement under the statute, i.e., that those lines of business be organized and operated separately from one another. See H.R. Conf. Rep. No. 841, 99th Cong., 2d Sess. II–523 to –524 (1986) (indicating that the manner in which the employer organizes itself is of primary relevance, and that a separate line of business will be a separate self-sustaining unit). By focusing the inquiry on separateness, objective tests can be provided that describe the requirements for

determining whether a line of business is operated separately. These objective tests provide certainty to the employer and the Service and permit the regulations to be applied in a uniform manner.

In general, these final regulations retain the objective approach taken in the proposed regulations. The final regulations have revised the proposed regulations in response to comments and have incorporated a number of helpful suggestions received from employers during the comment period. In developing the final regulations, the Treasury and the Service have placed a high priority on harmonizing basic concepts used in various portions of the regulations and on simplifying the operation of certain mechanical rules. Emphasis has also been placed on increasing access to the safe harbors and the determination letter process, as well as on providing more flexibility in the methods for determining the employees of a qualified separate line of business. Changes have also been made to clarify the proposed regulations.

The following is a brief summary of the more significant substantive modifications in the final regulations.

- The exclusive-service standard has been eliminated from the separate workforce and separate management tests. The substantial-service standard, which previously had applied only for purposes of determining the employees of a qualified separate line of business, has been modified and expanded to apply both for purposes of the separateness tests and for determining the employees of a qualified separate line of business.
- The separate management test has been further liberalized by lowering the 90 percent threshold to 80 percent and by modifying the concept of top-paid employee to exclude employees who provide less than one-quarter of their services to a line of business.
- The separate tangible asset test has been eliminated.
- New administrative safe harbors have been provided for lines of business acquired in merger or acquisition transactions and for lines of business that provide benefits comparable to benefits provided by other lines.
- Access to the dominant line of business method of determining employees of a separate line of business has been expanded, enabling more employers to use the method.
- Access to the individual determination process has been expanded in a number of respects.
- Certain employer-wide plans are permitted to be tested on an employer-wide basis even though the employer is treated as operating qualified separate lines of business.
- The requirements for determining that a plan of a separate line of business satisfies the nondiscriminatory classification test on an employer-wide basis have been liberalized.
- Employers are permitted to apply the minimum participation rules on a qualified-separate-line-of-business basis even if the employer chooses to apply the minimum coverage rules on an employer-wide basis.

The specific modifications in the final regulations are described in detail below as part of the discussion of the section to which they relate.

Overview of the Regulations

Section 414(r) generally provides that an employer is treated as operating qualified separate lines of business during any year if the employer operates separate lines of business for bona fide business reasons and satisfies certain other conditions under the Code. The rules in the regulations are the exclusive rules for determining whether an employer is treated as operating qualified separate lines of business.

The final regulations require that a qualified separate line of business satisfy the requirements in § 1.414(r)–1 in order to satisfy section 414(r). An employer is treated as operating qualified separate lines of business only if: (1) The employer identifies all the property and services it provides to customers and designates the property and services provided by each of its lines of business; (2) each line of business is organized and operated separately from the remainder of the employer and is therefore a separate line of business; and (3) each separate line of business meets the additional statutory requirements (including administrative scrutiny) and thus constitutes a qualified separate line of business. The regulations provide a flowchart illustrating the application of these requirements. See § 1.414(r)–0(c).

An employer is treated as operating qualified separate lines of business only if all the property and services provided by the employer to its customers are provided exclusively by qualified separate lines of business. Thus, if an employer is treated as operating qualified separate lines of business, every portion of the employer must be included in a qualified separate line of business.

I. Line of Business

Under the final regulations, as under the proposed regulations, an employer must first determine its lines of business in order to demonstrate that it maintains qualified separate lines of business. A line of business is a portion of an employer that is identified by the property or services it provides to customers of the employer. Section 1.414(r)–2 of the final regulations provides rules for determining the employer's lines of business.

In determining its lines of business, the employer first identifies all the property and services it provides to its customers and then designates the property and services provided by each of its lines of business. Thus, an employer may use its discretion to determine its lines of business in a manner that conforms to its business operations and that also satisfies the remaining requirements of section 414(r). Once the employer has designated its lines of business, the designations must be applied consistently for purposes of all requirements of the regulations. The one constraint, intended to address cases of obvious abuse, is that the manner in which the employer designates its lines of business must be reasonable and must comport with its bona fide business operations. Subject to this constraint, the employer essentially is free to designate its lines of business in any manner it chooses.

This approach was favorably received by commentators, as it accommodates the diverse organizational and operational characteristics of employers and provides each employer with the flexibility to determine the lines of business it operates for purposes of section 414(r). The final regulations do not modify these provisions.

II. Separate Line of Business

Under the proposed regulations, in order to demonstrate that it maintained qualified separate lines of business, an employer was required to show that its lines of business were organized and operated separately from one another, and therefore were separate lines of business. Whether a line of business was a separate line of business was determined by satisfying each of the five objective criteria specified in the proposed regulations. These criteria focused on the degree of organizational and operational independence of each line of business. Thus, a line of business was required to meet the separate organizational unit test, the separate financial accountability test, the separate workforce test, the separate management test and the separate tangible asset test. The preamble to the proposed regulations noted that the crafting of these criteria depended on empirical data that was not generally available during the drafting of the

proposed regulations. Comments on the objective separateness criteria were specifically requested.

In general, the final regulations follow the approach taken in the proposed regulations and require a line of business to satisfy the specified objective criteria. However, to accommodate many of the commentators' suggestions, the final regulations make a number of adjustments to the separateness criteria. Section 1.414(r)–3 of the final regulations provides rules for determining whether a line of business is a separate line of business.

a. Separate Organizational Unit and Separate Financial Accountability

The separate organizational unit test and the separate financial accountability test have been retained in the final regulations. Thus, each line of business must be formally organized by the employer as a separate organizational unit (or units) within the employer, i.e., a corporation, a partnership, a division, or other similar unit. Similarly, each line of business must be a separate profit center (or centers) within the employer. For this purpose, the employer's books and records must indicate separate revenue and expense information for each profit center comprising the line of business.

b. Separate Workforce and Separate Management

Under the proposed regulations, each line of business was required to have its own separate workforce. Satisfaction of this test depended upon the degree to which each line shared personnel with other portions of the employer. Thus, a line of business had its own separate workforce if at least 90 percent of the employees of the employer who provide any services to the line of business provided their services exclusively to the line of business.

Similarly, each line of business was required to have its own separate management. The proposed regulations provided that a line of business had its own separate management only if at least 90 percent of the top-paid employees who provided services to the line of business provided their services exclusively to the line of business. Top-paid employees were defined as the top 10 percent, by compensation, of all employees who provided services to the line of business.

The final regulations continue to require that a separate line of business have a separate workforce and separate management. However, both of these criteria have been modified in significant respects based on comments and empirical data received during the comment period.

Under the proposed regulations, employers needed to determine which employees provided "exclusive" services to a line of business for purposes of determining whether a line of business satisfied the separate workforce and management tests. By contrast, when assigning employees to qualified separate lines of business for purposes of applying certain nondiscrimination (e.g., minimum coverage) and other rules, employers needed to determine which employees provided "substantial" (i.e., at least 75 percent) of their services to the line. The comments on the proposed regulations indicated that the separate workforce and management tests were too rigid. This was confirmed by empirical data submitted during the comment period. Further, the Treasury and the Service determined that considerable simplification could be achieved by harmonizing the critical level of service required for purposes of testing separateness and for purposes of assigning employees. Thus, under the final regulations, the separate workforce and management tests are based on the same substantial-service standard that is used for purposes of assigning employees among an employer's qualified separate lines of business. Use of this standard, in lieu of the exclusive-service standard, has the effect of liberalizing both the separate workforce and management tests.

The comments on the proposed regulations indicated that many employers had particular difficulty in satisfying the separate management test. Empirical data received during the comment period indicated that, in addition to the expansion of the substantial service standard described above, further modification to that test was necessary and appropriate. In response, two additional changes have been made to the separate management test. First, the 90 percent threshold has been reduced to 80 percent. In addition, the definition of top-paid employee has been modified to exclude those employees who provide less than 25 percent of their services to the line of business.

As an alternative to adjusting the objective separateness criteria under the proposed regulations, a number of commentators suggested that it was appropriate to modify the separate management test and the separate workforce test by disregarding employees in support functions, such as financial, tax, accounting, legal, and data processing functions. This suggestion has not been adopted in the final regulations. The determination of those employees in support functions is essentially a subjective determination and, thus, inconsistent with providing objective criteria for demonstrating that a line of business is a separate line of business.

c. Separate Tangible Assets

Many commentators noted that the data necessary to demonstrate satisfaction of the separate tangible asset test was information that employers do not currently maintain and that was not readily available. Commentators also noted that it was difficult for service-intensive businesses in which tangible assets were not a material income-producing factor to satisfy this requirement. In response to these concerns, the separate tangible asset test has been eliminated in the final regulations.

d. Rules Relating to Certain Nonresident Aliens

Under the proposed regulations, for purposes of the separate workforce and separate management test, generally all employees who rendered services to the employer were required to be taken into account, including employees who were "excludable employees" for qualified plan purposes. An employer, however, was permitted to exclude nonresident aliens who received no income from sources within the United States, but only if the nonresident alien provided services exclusively to a line of business. Thus, nonresident aliens who provided services to more than one line of business (i.e., residual shared employees) were required to be taken into account.

A number of comments suggested that the proposed regulations be modified to permit an employer to disregard all nonresident aliens with no income from sources within the United States for purposes of satisfying the separate workforce and separate management tests. Commentators argued that it was frequently difficult or impossible to obtain the necessary data. After careful consideration of the concerns expressed in comments, the final regulations do not adopt the suggested modification. The rule adopted in the final regulations is necessary to provide consistent treatment of businesses, regardless of whether their workforces, including management employees, are primarily based in the United States or primarily based outside the United States. Because section 414(r) is a relief provision from the generally applicable minimum coverage and participation requirements, and its availability is

dependent upon an employer demonstrating that the separateness criteria have been satisfied, all employers, whether foreign or domestic, must demonstrate that they satisfy the separateness requirements.

III. Qualified Separate Line of Business

The third requirement an employer must satisfy to demonstrate that it maintains qualified separate lines of business is that it meets the three statutory requirements of section 414(r)(2). To satisfy these requirements, (1) each separate line of business must have at least 50 employees, (2) the employer must notify the Secretary that it treats itself as operating qualified separate lines of business, and (3) each line must satisfy administrative scrutiny.

Section 1.414(r)–4 of the regulations provides rules for determining whether a separate line of business satisfies the 50-employee requirement and the notice requirement. A separate line of business satisfies administrative scrutiny if it satisfies either the statutory safe harbor or one of the alternative administrative safe harbors, or if the employer requests and receives an individual determination from the Commissioner. Section 1.414(r)–5 provides rules for determining whether a separate line of business satisfies either the statutory safe harbor or one of the alternative administrative safe harbors. Section 1.414(r)–6 of the regulations provides rules for requesting an individual determination from the Commissioner as to whether a separate line of business satisfies administrative scrutiny.

a. Fifty-Employee Requirement

The 50-employee requirement of section 414(r)(2)(A) must be satisfied on each day of the testing year. The proposed regulations provided that, in satisfying this requirement, the employer was required to take into account all employees who provided services exclusively to the separate line of business, including collectively bargained employees. However, in accordance with section 414(r)(2)(A), those employees who would be excluded when determining the number of employees in the top-paid group for purposes of section 414(q), subject to certain modifications, were not taken into account. See § 1.414(q)–1T, Q&A–9(g). For example, employees who normally work less than 17½ hours per week, or who normally do not work more than six months a year, are not taken into account.

Several commentators criticized these rules on the grounds that they did not include an alternative simplified test permitting plans to test for compliance on a representative day during the testing year comparable to that permitted under section 401(a)(26) (relating to minimum participation). After careful consideration of these comments, the final regulations retain the rules as set forth in the proposed regulations. The Treasury and the Service believe that the 50-employee requirement contained in section 414(r)(2)(A) represents a Congressional judgment that, in order to qualify as a separate line of business, the business must employ a significant number of employees on a consistent basis during the year.

b. Notice Requirement

Under the proposed regulations and under the final regulations, an employer satisfies the notice requirement of section 414(r)(2)(B) only if it notifies the Secretary that the employer treats itself as operating qualified separate lines of business under section 414(r). This notice must be made in the time and manner prescribed in the final regulations and in revenue procedures, notices and other guidance of general applicability.

The notice required by section 414(r) specifying each of the employer's qualified separate lines of business is given with respect to all the qualified separate lines of business of the employer. In general, the notice is given with respect to all plans of that employer for plan years beginning in the testing year (i.e., the calendar year). Thus, except as otherwise permitted, the separate application of the requirements of section 410(b) or 401(a)(26) with respect to the employees of each separate line of business must be consistent for all plans of the employer with plan years beginning in the same testing year.

The Service expects to incorporate the required notice into the procedure for requesting a determination letter with respect to the qualified status of a plan of the employer (Form 5300). For an employer that does not wish to apply for a determination letter with respect to the qualified status of its plans, it is contemplated that notice will be given on a revised Form 5310. In addition, once notice has been given for one testing year, it is anticipated that the notice will apply with respect to subsequent testing years unless the employer takes timely action to provide a new notice.

Notice 90–57, 1990–2 C.B 344, provided that notice under section 414(r)(2)(B) would not be required until further guidance is issued. It is anticipated that further guidance describing these notice procedures will be issued in the near future.

c. Administrative Scrutiny

To satisfy the administrative scrutiny requirement of section 414(r)(2)(C), a separate line of business may meet either the statutory safe harbor test or one of the administrative safe harbors as provided in § 1.414(r)–5. A separate line of business that does not satisfy any of these safe harbors nonetheless satisfies the administrative scrutiny requirement if the employer requests and receives from the Commissioner, pursuant to § 1.414(r)–6, an individual determination that the separate line of business satisfies administrative scrutiny. Each separate line of business of an employer must satisfy the administrative scrutiny requirement, but need not satisfy this requirement in the same manner as the employer's other separate lines of business.

1. *Statutory safe harbor.* Under the final regulations, as under the proposed regulations, a qualified separate line of business satisfies the safe harbor of section 414(r)(3) if the percentage of highly compensated employees of the separate line of business falls within a range that is at least 50 percent but no more than 200 percent of the highly compensated employee percentage of the employer as a whole. Section 1.414(r)–5(b) provides the requirements for the application of this safe harbor. Additionally, under a special rule, if at least 10 percent of all highly compensated employees of the employer perform services exclusively for a particular separate line of business, that separate line of business will be deemed to satisfy the 50-percent requirement of the statutory safe harbor. However, a separate line of business that satisfies this special 10-percent rule still must satisfy the 200-percent requirement of the statutory safe harbor.

2. *Administrative safe harbors.* The legislative history of section 414(r) provides that the Secretary is to establish guidelines pursuant to section 414(r)(2)(C) of the Code identifying those circumstances that warrant additional scrutiny, e.g., if benefits provided to employees in a particular line of business are significantly better or worse than benefits provided in other lines, or if benefits provided to highly compensated employees are significantly better than benefits provided to nonhighly compensated employees. Where it is determined that special scrutiny is needed, the separate line of business will only satisfy administrative scrutiny if the employer

receives an individual determination to this effect from the Commissioner.

The proposed regulations satisfied the statutory requirement of providing guidelines through the development of three administrative safe harbors. These administrative safe harbors delineated situations that the Service had determined passed administrative scrutiny without the need for an individual determination.

The final regulations retain the three administrative safe harbors set forth in the proposed regulations, with modifications to permit greater access to the safe harbors. The final regulations have also been modified to add two additional administrative safe harbors. The five administrative safe harbors are set forth in § 1.414(r)-5(c) through (g) of the final regulations.

i. Industry category safe harbor— One administrative safe harbor contained in the proposed regulations was the industry category safe harbor. This safe harbor was satisfied only if the separate line of business was in a different industry or industries from every other separate line of business of the employer. The proposed regulations provided that the Commissioner would prescribe these industry categories by revenue procedure or other guidance of general applicability.

This safe harbor has been retained in the final regulations. However, the final regulations have been modified to permit an employer to disregard foreign operations in determining whether a separate line of business is in a different industry or industries from every other separate line of business of the employer.

Concurrently with the issuance of the final regulations, the Internal Revenue Service is issuing a revenue procedure setting forth the industry categories for purposes of this administrative safe harbor. A proposed revenue procedure was contained in an appendix to the proposed regulations, which provided a list of industry categories. The 12 industry categories set forth in the proposed revenue procedure were developed by the Treasury and the Service based on the Census Bureau's Standard Industrial Classification codes ("SIC codes") at the two-digit level, with modifications. Certain SIC codes were eliminated because they were determined to be inappropriate for this purpose. For example, Business Services (two-digit SIC code 73) includes paralegal services while (two-digit SIC code 81) includes lawyers. Other SIC codes were combined in an attempt to minimize overlap in the industry categories of a particular property or service.

In general, the revenue procedure (Rev. Proc. 91-64, 1991-50 I.R.B. (December 16, 1991) is consistent with the proposed revenue procedure. Commentators requested that the 12 industry categories set forth in the proposed revenue procedure be expanded (e.g., to the full two-digit, three-digit or four-digit SIC codes). After careful consideration of those comments, however, the Treasury and the Service continue to believe that it is inappropriate to expand the categories as suggested for the reasons set forth above. As noted in the preamble to the proposed regulations, the industry categories are provided through a revenue procedure, rather than in the regulations, in order to facilitate future modifications based on the experience of taxpayers and the Service with the categories. Thus, future modifications to the categories may be made based on that experience.

ii. FAS 14 safe harbor—The second administrative safe harbor contained in the proposed regulations was the reportable business segments safe harbor. This safe harbor required that a separate line of business be reported as one or more reportable industry segments in accordance with the Statement of Financial Accounting Standards No. 14, Financial Reporting for Segments of a Business Enterprise ("FAS 14"). This safe harbor was satisfied if the employer reported a separate line of business as a reportable industry segment on its annual report required to be filed in conformity with Form 10-K, Annual Report Pursuant to section 13 or 15(d) of the Securities Exchange Act of 1934.

This safe harbor has been retained in the final regulations, but has been modified in response to comments. First, commentators noted that employers may actually report as industry segments portions of the business that are not required to be reported as industry segments. Since the manner in which an employer meets its FAS 14 reporting requirements is indicative of actual business operations, the safe harbor can now be satisfied if the separate line of business is actually reported as an industry segment, without regard to whether it is a reportable industry segment. In addition, commentators noted that certain foreign-owned employers are required to file different, but comparable, forms under the Securities Exchange Act of 1934. Thus, the safe harbor has been expanded to cover employers who are required to file Form 20-F with Item 18 financials in lieu of the Form 10-K.

iii. Minimum or maximum benefits safe harbor—The third and final administrative safe harbor provided under the proposed regulations was the minimum or maximum benefits safe harbor. If the highly compensated employee percentage ratio of the separate line of business was less than 50 percent, then, under the minimum benefit requirement, at least 80 percent of the nonhighly compensated employees in that separate line of business were required to benefit under a plan, and each of these employees was required to receive at least a specified minimum benefit. For defined contribution plans, the minimum benefit was an allocation rate of at least three percent of an employee's compensation for the year. For defined benefit plans, the minimum benefit was the employer-derived accrued benefit that would result in an accrual rate equal to 0.75 percent of compensation. The employees who were considered for this 80 percent test included all employees who satisfied the lowest age and service requirements under any plan of the employer. For purposes of the minimum benefit safe harbor, elective contributions and employer matching contributions were not taken into account.

If the highly compensated employee percentage ratio of the separate line of business was more than 200 percent, then, under the maximum benefit requirement in the proposed regulations, each highly compensated employee who benefited under a plan in that separate line of business was required to receive no more than a specified maximum benefit. For defined contribution plans, the maximum benefit was an allocation rate of no more than 10 percent of an employee's compensation for the year. For defined benefit plans, the maximum benefit was calculated in the same manner as the minimum benefit, except that it equalled the employer-derived accrued benefit that would result in an accrual rate equal to 2.5 percent of compensation. Unlike the minimum benefit determination, early retirement subsidies and employer matching contributions were taken into account.

The employer was permitted to provide for the minimum benefit in a combination of defined benefit and defined contribution plans as long as the combined percentage of the minimum benefit provided to the employee in each plan equalled at least 100 percent. Similarly, under the maximum benefit rules, if benefits were provided through a combination of defined benefit and defined contribution plans, the combined percentage of the benefits provided could not exceed 100 percent of the maximum.

Further, the minimum or maximum benefit limits required that a plan provide for specific benefit formulas that could be satisfied on a plan design basis. An employee's accrual or allocation rate under a plan, however, was required to be determined without regard to any plan provision, the effect of which was to make the operation of the minimum or maximum benefits formula contingent on the failure of the separate line of business otherwise to satisfy the requirement of administrative scrutiny.

Many commentators argued that it was inappropriate for the age and service eligibility requirements for a plan in one separate line of business to have an impact on the minimum benefit testing of another separate line of business. Commentators also argued that it was inequitable to count employer matching contributions against the maximum benefit limitation but not include credit for the same type of contributions towards the minimum benefit requirement. Commentators also requested that the minimum benefit test be applied on the basis of average benefit accruals.

The final regulations reflect many of these suggestions. First, the minimum benefit requirement has been modified to exclude nonhighly compensated employees who do not meet the lowest age and service eligibility requirements of any plan that benefits employees in the separate line of business (rather than the lowest age and service eligibility requirements determined on an employer-wide basis).

In addition, the minimum benefit standard can be satisfied on the basis of the average benefit accruals or allocations provided to nonhighly compensated employees in a separate line of business. In contrast to the 80 percent requirement in the general rule, the averaging is based on 100 percent of the nonhighly compensated employees in the separate line of business. Also, in order to use the averaging approach, the employer must still provide the minimum benefit to at least 60 percent of the individual nonhighly compensated employees in the separate line of business. A parallel change has been made to the maximum benefit safe harbor, so that a separate line of business will satisfy the safe harbor if the average of the accrual rates or allocation rates of the highly compensated employees is less than 80 percent of the maximum benefit under the general rule. This averaging option permits a separate line of business to satisfy the minimum and maximum benefit requirements on an operational rather than a design basis.

The proposed regulations had excluded employer matching contributions from the minimum benefit determination because of a concern that treating matching contributions as minimum benefit allocations could cause a plan to violate the contingent benefit rule of section 401(k)(4)(A) and cause the matching contributions not to be treated as matching contributions within the meaning of § 1.401(m)–1(f)(12)(ii). If the employer uses the averaging option in order to satisfy the minimum benefit safe harbor, the contingency issue is not relevant in determining employees' average allocations. Consequently, the final regulations permit matching contributions to be counted for purposes of determining whether the average allocation satisfies the three percent minimum benefit requirement in the context of averaging.

Commentators noted that the safe harbor did not accommodate plans that determine benefits on a basis other than three- or five-year average annual compensation. The final regulations have not been modified to accommodate these alternative plan designs because no single specified benefit percentage could be developed that would provide benefits comparable to the benefits specified in the regulations for all employees.

iv. Average benefits safe harbor—A number of commentators noted that the minimum or maximum benefits safe harbor provided an absolute standard. The comments suggested that it might also be appropriate to provide a standard that took into account the relative level of benefits of one line compared to the level of benefits in other lines. In response to these comments, an additional administrative safe harbor has been added to the final regulations.

If the highly compensated employee percentage ratio of the separate line of business is less than 50 percent, the separate line of business will satisfy this new administrative safe harbor if the actual benefit percentage of the nonhighly compensated employees of the separate line of business is at least equal to the actual benefit percentage of all other nonhighly compensated employees of the employer. For this purpose, the actual benefit percentage is calculated in the same manner as under the section 410(b) average benefit percentage test, taking into account all employees employed on the first testing day and based on the benefits provided under plans of the employer in plan years ending in the testing year. Similarly, if the highly compensated employee percentage ratio of the separate line of business is greater than 200 percent, the separate line of business will satisfy the new administrative safe harbor if the actual benefit percentage of the highly compensated employees of the separate line of business does not exceed the actual benefit percentage of all other highly compensated employees of the employer.

v. Merger and acquisition safe harbor—The final regulations have also adopted an administrative safe harbor for separate lines of business that are acquired through certain mergers and acquisitions entitled to the transition relief provided under section 410(b)(6)(C). This safe harbor is satisfied if the three specified requirements are met. The first requirement is that the employer designate the acquired business as a line of business. The second requirement is that the line of business satisfy the separateness criteria. The third requirement is that there not be any significant changes in the workforce of the acquired separate line of business. Under the final regulations, a significant change in the workforce of the acquired separate line of business occurs if fewer than 90 percent of the employees of the acquired separate line of business were employees of the line for the immediately receding year or if more than 10 percent of the employees of the acquired separate line of business for the immediately preceding testing year are not employees of the separate line of business in the current testing year. This administrative safe harbor is available for a four-year period.

3. *Individual determinations.* A separate line of business that does not satisfy either the statutory safe harbor or any of the administrative safe harbors nonetheless satisfies the requirement of administrative scrutiny if the employer requests and receives from the Service an individual determination that the separate line of business satisfies administrative scrutiny. Section 1.414(r)–6 of the regulations provides the rules and conditions that apply to an employer's request for that determination.

Under the proposed regulations, this determination process was limited to those situations in which the separate line of business did not satisfy any of the administrative safe harbors, but provided benefits that were within a specified range of the minimum or maximum benefit safe harbor. This method of obtaining a determination has

been retained in the final regulations. A number of commentators suggested that greater access to the determination process would be appropriate and suggested a number of possible changes. In response to these comments, the final regulations have expanded access to the determination process in a number of respects.

Under the final regulations, an employer is permitted to request an individual determination if the separate line of business falls within a specified range of the statutory safe harbor or within a specified range of the average benefits safe harbor. In addition, an employer is permitted to request an individual determination if 90 percent of the property or services provided by the separate line of business falls within one or more of the specified industry categories and if no more than 10 percent of the property or services provided by any other separate line of business falls within the same industry category or categories. In cases where an employer is not required to file a Form 10–K or Form 20–F, a determination may be requested if there is a certification from a certified public accountant that the separate line of business would have been reportable as one or more industry segments on either the Form 10–K or the Form 20–F if the employer had been required to file the applicable form. Finally, a determination may be requested if the separate line of business manages a government facility pursuant to a government contract that specifies the benefits to be provided under a qualified plan.

Once an employer satisfied the conditions to request a determination, the proposed regulations enumerated the factors that would be taken into account in determining whether to grant an individual determination. This enumeration has been retained in the final regulations, but has been expanded. Thus, additional factors to be taken into account are whether the separate line of business is in certain regulated industries and the degree to which the separate line of business has its own tangible assets.

As under the proposed regulations, the final regulations limit the determination process to the determination of whether a separate line of business satisfies administrative scrutiny. It is not available to determine whether other requirements of these regulations are satisfied. For example, the Service will not issue determination letters or rulings with respect to whether a designated line of business is separate, or whether a separate line of business satisfies administrative scrutiny under the statutory safe harbor or one of the alternative administrative safe harbors. The Service has determined that, where the separate line of business does not satisfy any of the safe harbors and does not fall within the circumstances specified in the final regulations for obtaining an individual determination, the separate line of business will not satisfy administrative scrutiny.

IV. Separate Operating Units

Section 414(r)(7) provides that the term "separate line of business" includes an operating unit in a separate geographic area separately operated for bona fide business reasons. As contemplated in the legislative history, the distinguishing characteristic between a line of business and an operating unit is that a line of business provides different property or services from other portions of the employer, while an operating unit provides the same property or services as another portion of the employer but in a separate geographic area. In all other respects, the statute and legislative history apply the same requirements to an operating unit as apply to a line of business (e.g., operation for bona fide business reasons, separateness, 50 employees, notice, and administrative scrutiny). See section 414(r)(1), (2), and (7); H.R. Conf. Rep. No. 841, 99th Cong., 2d Sess. II–523 to 526(1986).

Because the proposed regulations permitted the employer to designate two or more lines of business that provide the same property or services, the concept of an operating unit was subsumed within the concept of a line of business. Consistent with the statute and legislative history, the proposed regulations required an operating unit to satisfy the same requirements applicable to a line of business. Thus, an employer was permitted to designate an operating unit as a line of business and treat it as a qualified separate line of business if it satisfied the requirements provided in the proposed regulations.

Some commentators suggested that it would be appropriate to recognize a separate operating unit as a separate line of business if it met only certain of the separateness criteria. After consideration of these comments, the final regulations do not adopt the suggested modifications. Requiring a separate operating unit to satisfy the same separateness criteria as a line of business is consistent with the statutory requirements and the legislative history. Moreover, the final regulations have expanded access to the determination process, and, as under the proposed regulations, the degree to which a separate line of business is operated in a distinct geographic area from the employer's other lines of business is a factor taken into account in the Commissioner's determination of whether a separate line of business satisfies administrative scrutiny.

V. Determination of Employees of a Qualified Separate Line of Business

For purposes of testing plans benefiting employees of a qualified separate line of business under sections 410(b), 401(a)(4), and 401(a)(26), and for purposes of applying the statutory safe harbor and certain other administrative safe harbors, an employer must determine which employees are treated as employees of each qualified separate line of business.

The proposed regulations provided the procedures for assigning employees among an employer's qualified separate lines of business. Consistent with the statute and the legislative history, the employees of a qualified separate line of business consist of all employees who provide substantial services to the qualified separate line of business, and all other employees who are allocated in accordance with the regulations to the qualified separate line of business.

a. Assignment of Substantial-Service Employees

The proposed regulations required employees to be assigned to a qualified separate line of business if they provided substantial services to the qualified separate line of business. For purposes of the proposed regulations, an employee provided substantial services to a qualified separate line of business if at least 75 percent of the employee's services were provided to the qualified separate line of business, or if at least 50 percent of the employee's services were provided to the qualified separate line of business and the employee's regular place of work was at a facility used exclusively by the qualified separate line of business.

The final regulations continue to require that substantial-service employees be assigned to the qualified separate line of business with respect to which the substantial services are provided but modify this assignment rule in two significant respects. First, only those employees who provide at least 75 percent of their services to the qualified separate line of business are required to be treated as substantial-service employees. Thus, employees who provide at least 50 percent of their services to a qualified separate line of business and whose regular place of work is at a facility used exclusively by

the qualified separate line of business are no longer required to be treated as substantial-service employees with respect to the line of business. Second, the final regulations further liberalize these assignment rules by permitting employers to treat employees who provide between 50 percent and 75 percent of their services to a particular qualified separate line of business as substantial-service employees with respect to that line of business and, thus, assign those employees to that qualified separate line of business, regardless of whether they work at an exclusive facility. This option may be exercised by the employer on an employee-by-employee basis. If the employer does not elect this option with respect to an employee, that employee is treated as a residual shared employee and assigned to a qualified separate line of business of the employer under the allocation method selected by the employer. As under the proposed regulations, the final regulations provide that the determination of whether the 75-percent and 50-percent thresholds are satisfied must be made in a manner that is reasonably reliable and uniform with respect to all similarly-situated employees.

The proposed regulations did not address situations where employees are transferred from one qualified separate line of business of the employer to another. Commentators suggested that short-term transfers of employees between qualified separate lines of business created difficulties for employers. Since these employees are expected to return to their original qualified separate line of business, employers generally wanted to continue to provide these employees with the same benefits as under that qualified separate line of business. Under the final regulations, a substantial-service employee who is temporarily transferred from one qualified separate line of business to another may continue to be treated as a substantial-service employee of the first qualified separate line of business in the year of the transfer and in the subsequent year.

b. Assignment of Residual Shared Employees

The proposed regulations referred to employees who did not provide substantial-services to any qualified separate line of business of the employer as "residual shared employees." All residual shared employees were required to be assigned under the same allocation method, and each residual shared employee was required to be allocated to only one qualified separate line of business. The proposed regulations provided three alternative allocation methods, i.e., the dominant line method, the pro-rata method and the HCE percentage method. These three methods have been retained in the final regulations, but with certain liberalizing and clarifying modifications made in response to comments.

1. *Dominant line of business method of allocation.* Under the first method for allocating residual shared employees, an employer is permitted to allocate all its residual shared employees to its dominant line of business. For this purpose, the dominant line of business is determined based on the number of substantialservice employees assigned to the qualified separate line of business. Generally, under the proposed regulations, a dominant line of business was that qualified separate line of business that employed at least 55 percent of all substantial-service employees who provided their services to any qualified separate line of business. Under an alternative definition of dominant line, the 55-percent threshold was reduced to 45 percent if each qualified separate line of business of the employer satisfied the administrative scrutiny requirement under either the statutory safe harbor or the minimum or maximum benefits safe harbor.

The final regulations reduce the 55-percent threshold to 50 percent. The final regulations also modify the alternative definition of dominant line by substituting a 35-percent requirement for the 45-percent requirement in the proposed regulations. In addition, under the final regulations, access to this alternative definition has been expanded to a qualified separate line of business that accounts for at least 60 percent of the employer's gross revenues or 60 percent of all the employer's employees (including collectively bargained employees).

2. *Pro-rata method of allocation.* The second method permits the employer to allocate residual shared employees among its qualified separate lines of business on a pro-rata basis. See H.R. Conf. Rep. No. 841, 99th Cong., 2d Sess. II–524 (1986). Under this method, all residual shared employees are allocated among the employer's qualified separate lines of business in proportion to the percentage of all substantial-service employees who provide their services to each qualified separate line of business. This allocation method has been retained in the final regulations without substantive changes.

3. *HCE percentage ratio method of allocation.* The third method of allocation permits the employer to allocate residual shared employees among its qualified separate lines of business in a manner consistent with the statutory safe harbor for satisfying administrative scrutiny. In the proposed regulations, a highly compensated residual shared employee was required to be allocated to the qualified separate line of business with the lowest highly compensated employee percentage ratio less than 50 percent. Similarly, a nonhighly compensated residual shared employee was required to be allocated to the qualified separate line of business with the highest highly compensated employee percentage ratio greater than 200 percent. This procedure was continued until all qualified separate lines of business of the employer had a highly compensated employee percentage ratio between 50 and 200 percent or, if sooner, until no residual shared employees remained to be allocated. Any remaining residual shared employees were permitted to be allocated to any qualified separate line of business as long as their allocation did not cause the qualified separate line of business to violate the statutory safe harbor. This method of allocation facilitated the satisfaction of the statutory safe harbor through appropriate allocation of residual shared employees.

The final regulations modify the HCE percentage method of allocation contained in the proposed regulations by providing employers more freedom to choose which residual shared employees are allocated to a particular qualified separate line of business. For example, employers are permitted to allocate highly compensated residual shared employees to a particular line of business that has an HCE percentage ratio of less than 50 percent even though there is another qualified separate line of business which has an even lower HCE percentage ratio.

VI. Vertical Integration

For purposes of testing separateness under the proposed regulations as well as under the final regulations, a line of business must take into account all employees whose services contribute to the preparation of property for sale to customers or the provision of services to customers by that line of business. A line of business that is vertically integrated with any other line of business of the employer generally will not satisfy the separateness criteria because too many employees generally will be shared between the vertically integrated lines of business.

Consistent with the legislative history of section 414(r), the proposed regulations contained an optional rule to assist an employer in satisfying the separateness criteria in certain limited circumstances where one line of business (the "upstream line of business") provides property or service to another line of business (the "downstream line of business"), i.e., where the two lines of business are vertically integrated with one another. See H.R. Conf. Rep. No. 841, 99th Cong., 2d Sess. II–523 (1986). In order to take advantage of this optional rule, employers had to satisfy two requirements. First, the number of units of the property or service provided to customers of the employer by the upstream line of business was required to equal at least 50 percent of the total number of units of the same type of property or service provided by the upstream line of business to all persons (including customers of the employer, the downstream line of business, and all other lines of business of the employer). Second, the downstream line of business was required either to use, consume, or modify substantially the property or service provided by the upstream line of business, or to provide the same property or service to customers of the employer at a different level in the chain of commercial distribution than the upstream line of business.

If the requirements of this optional rule were satisfied, the downstream line of business was treated as if the relevant property or service had been provided to it by a person other than the employer (rather than by the upstream line of business). Accordingly, that portion of an employee's services that contributed solely to the provision of the property or service from the upstream line of business to the downstream line of business was not considered under this optional rule to be provided to the downstream line of business. This treatment applied for purposes of the separateness requirements of § 1.414(r)–3, as well as the 50-employee requirement of § 1.414(r)–4(b), and the determination of the employees of a qualified separate line of business under § 1.414(r)–7.

A number of comments were received regarding the requirement that at least 50 percent of the number of units of the same type of property or service provided by the upstream line of business to all persons be provided to customers of the employer. Some commentators suggested that the 50-percent threshold was too high; others suggested that this requirement should be eliminated. The Treasury and the Service believe that this requirement is an objective way of demonstrating that the upstream line is an independently viable business. Since the legislative history indicates that special rules are appropriate for vertically integrated businesses that are independently viable, this requirement has been retained in the final regulations. However, in response to the comments received, and based on the limited empirical data received during the comment period with respect to this portion of the regulations, the 50-percent threshold has been reduced to 25 percent. Further, examples in the final regulations clarify that whether the property or service provided by the upstream line of business to customers of the employer is of the same type as that provided to its downstream line of business may be determined without distinguishing among subcategories of property or service (e. g., leaded and unleaded gasoline are both treated as gasoline products).

VII. Separate Application of Statutory Requirements

a. Section 410(b)

Section 410(b)(5)(A) provides that, if an employer is treated as operating qualified separate lines of business under section 414(r), the employer is permitted to apply the requirements of section 410(b) separately with respect to the employees of each qualified separate line of business. Under section 410(b)(5), a plan satisfies the requirements of section 410(b) only if (1) the plan satisfies the reasonable classification test under section 410(b)(5)(B) on an employer-wide basis, and (2) the plan satisfies section 410(b) on a qualified-separate-line-of-business basis. In general, these requirements have been retained in the final regulations. Section 1 .414(r)–8 of the regulations applies these statutory requirements.

1. *Employer-wide application.* Section 410(b)(5)(B) provides that a plan must benefit a classification of employees found by the Secretary to be nondiscriminatory on an employer-wide basis. A plan benefiting employees of a separate line of business satisfies this requirement only if the plan satisfies either the ratio percentage test of § 1.410(b)–2(b)(2) or the nondiscriminatory classification test of § 1.410(b)–4 (without regard to the average benefit percentage test of § 1.410(b)–5) on an employer-wide basis. For this purpose, the nonexcludable employees of all the other qualified separate lines of business are taken into account.

Although the nondiscriminatory classification test is applied in the same manner as it would be under § 1.410(b)–4, the proposed regulations provided that, in the case of a plan that fell between the safe and unsafe harbors, the employer's satisfaction of the qualified separate-line-of-business requirements was an additional favorable circumstance to be taken into account for purposes of satisfying § 1.410(b)–4(c)(3). Except in unusual circumstances, this fact was determinative.

Several commentators suggested that plans falling into the unsafe harbor contained in the current regulations under section 410(b) may have received favorable determinations from the Service under the provisions of section 410(b) as in effect before TRA '86. Some of these commentators suggested that employers with plans that fall below the unsafe harbors should nevertheless be able to receive a favorable determination from the Service with respect to the employer-wide application of section 410(b)(5)(B). The Treasury and the Service believe that objective standards are more administrable and are consistent with the legislative history. Thus, the suggestion to permit favorable determinations with respect to whether these employers satisfy the nondiscriminatory classification standard of section 410(b)(5)(B) has not been adopted. However, the final regulations have been liberalized to take these comments into account. Thus, under these final regulations, solely for purposes of the employer-wide application of section 410(b)(5)(B), the unsafe harbor percentage in § 1.410(b)–4(c)(4)(ii) is reduced by five percentage points if the plan (including any component plans or rate groups that are used to satisfy section 401(a)(4)) has a ratio percentage of at least 90 percent with respect to employees of the qualified separate line of business.

2. *Qualified-separate-line-of-business application.* Under both the proposed and final regulations, a plan satisfies section 410(b) on a qualified-separate-line-of-business basis if the plan satisfies either the ratio percentage test of § 1.410(b)–2(b)(2) or the average benefit test of § 1.410(b)–2(b)(3) (including the nondiscriminatory classification test of § 1.410(b)–4 and the average benefit percentage test of § 1.410(b)–5). In testing a plan on a qualified-separate-line-of-business basis, the employees of all other qualified separate lines of business are excluded. See § 1.410(b)–6(e).

3. *Special rule for employer-wide plans.* Under the proposed regulations, if the employer chose to apply the requirements of section 410(b) on a qualified-separate-line-of-business basis, it was required to do so with respect to all its plans, all its employees, and all its qualified separate lines of business. Several commentators criticized the requirement in the proposed regulations that all plans be tested on a qualified-separate-line-of-business basis and suggested that an employer be permitted to test certain plans on an employer-wide basis. The comments indicated a particular concern where, in addition to the plans maintained by separate lines of business, an employer maintains an additional or supplemental plan for all its employees (e.g., an employer-wide section 401(k) plan). The final regulations retain the general rule that an employer choosing to apply the requirements of section 410(b) on a qualified-separate-lineof-business-basis must do so with respect to all its plans, all its employees and all its qualified separate lines of business. However, in response to comments, the final regulations also adopt a special rule for certain employer-wide plans. Under the final regulations, a plan is not required to be tested on a qualified-separate-line-of-business basis if the plan satisfies the percentage test of section 410(b)(1)(A) (i.e., the plan benefits at least 70 percent of the nonhighly compensated employees of the employer).

4. *Definition of "plan".* Under both the proposed and final regulations, for purposes of satisfying sections 410(b) and 401(a)(4), the term "plan" means a plan as determined under § 1.410(b)–7. Therefore, pursuant to § 1.410(b)–7(c)(5), the portion of the plan that benefits employees of one qualified separate line of business is treated as a separate plan from the other portions of the same plan that benefit employees of other qualified separate lines of business unless the plan is an employer-wide plan tested under the special rule described above.

5. *Coordination with section 401(a)(4).* The proposed regulations provided that, if section 401(a)(4) requires a group of employees under the plan to satisfy section 410(b), the group of employees must satisfy section 410(b) in the same manner described above as if they were the only employees covered under the plan. See §§ 1.414(r)–8(c), 1.401(a)(4)–4(b), and 1.401(a)(4)–9(c)(1). This rule has been retained in the final regulations.

b. Section 401(a)(26)

Section 401(a)(26)(G) provides that, with the consent of the Secretary, the employer may choose to apply section 401(a)(26) on a qualified-separate-line-of-business basis. Under the proposed regulations, if the employer chose to apply the requirements of section 401(a)(26) in this manner, it was required to do so with respect to all its plans, all its employees, and all its qualified separate lines of business.

The proposed regulations further provided that, if an employer chose to apply section 401(a)(26) on a qualified-separate-line-of-business basis, the consent of the Secretary would be granted only on the condition that the employer also applied section 410(b) on a qualified-separate-line-of-business basis. This limitation has been eliminated under the final regulations. Thus, an employer is permitted to apply section 401(a)(26) on a qualified-separate-line-of-business basis without regard to whether it also applies to section 410(b) on that basis.

c. Section 129(d)(8)

The application of the separate line of business rules to section 129(d)(8) is reserved in the final regulations. Until guidance is issued relating to the application of section 414(r) for purposes of section 129(d)(8) of the Code, an employer will be treated as operating qualified separate lines of business for purposes of section 129(d)(8) if it reasonably determines that it meets the requirements of section 414(r). See Public Debt Limit Increase Act, Public Law No. 101–140, section 204(b), 103 Stat. 830, 833 (1989). The Treasury and the Service welcome comments on the application of the separate line of business requirements set forth in the regulations for purposes of section 129(d)(8).

d. Other Code Sections

As under the proposed regulations, the final regulations provide that under no circumstances may the requirements of any section of the Code (other than those referred to above) be applied separately with respect to the employees of a qualified separate line of business unless the section specifically cross-references, or is specifically cross-referenced by, section 414(r). Thus, for example, the separate line of business rules do not apply (without limitation) to sections 79(d)(3), 105(h), 117(d)(3), 120(c)(2), 125(g)(3), 127(b)(2), 129(d)(3), 132, 195, 401(a)(3) (as in effect on September 1, 1974), 414(q)(4), 501(c)(17)(A)(ii), 501(c)(17)(B)(iii), 501(c)(18)(B), and 505(b)(1)(A).

VIII. Certain Governmental and Tax-Exempt Employers

The application of the qualified-separate-line-of-business rules to plans of governmental and tax-exempt employers was reserved under the proposed regulations. Commentators requested clarification of the application of section 414(r) to these employers in light of the reservation. Accordingly, the final regulations provide that the qualified-separate-line-of-business rules apply to plans of governmental and tax-exempt employers that are subject to the requirements of sections 410(b) and 401(a)(26). Nevertheless, the Treasury and the Service recognize that plans maintained by governmental and tax-exempt employers may have some unique features that arise because the sponsoring employer is tax exempt. While a limited number of comments have been received on such features, additional comments are specifically requested from governmental and tax-exempt employers regarding the appropriate modifications to the regulations to take into account the operation of governmental and tax-exempt employers. A section in the final regulations has been reserved for rules that will address these unique features.

In the interim, while these regulations are generally effective for plan years beginning on or after January 1, 1992, the Treasury and the Service recognize that, in some respects, the unique nature of governmental and tax-exempt employers may make exact adherence to some of the provisions of the regulations impossible. For example, governmental and tax-exempt employers generally do not provide property or services to customers for consideration, as required by § 1.414(r)–2. Similarly, such employers are generally not organized around separate profit centers as required by § 1.414(r)–3. Thus, pending issuance of further guidance, in these and other limited respects, a reasonable good faith effort by governmental and tax-exempt employers to satisfy the requirements of section 414(r) consistent with the statutory and regulatory requirements will be acceptable. Compliance is reasonable and in good faith in this context only if the employer makes every reasonable effort to satisfy all relevant portions of this regulation.

IX. Testing Year Basis of Application

As under the proposed regulations, for purposes of determining whether an employer operates qualified separate lines of business for bona fide business reasons, the employer must apply the

requirements of §§ 1.414(r)–1 through 1.414(r)–7 of the final regulations on the basis of the testing year. The testing year is the calendar year. Similarly, an employer's plans are tested under sections 401(a)(4), 401(a)(26) and 410(b) separately with respect to the employees of each qualified separate line of business for all plan years that begin in the testing year.

X. Averaging Rules

For purposes of determining the percentages used to test whether lines of business satisfy the requirements of the regulations, the proposed regulations permitted the employer to use up to a three-year moving average, absent large fluctuations. In determining whether the specific percentages had been satisfied, this rule permitted the employer to average the results for the current testing year with the results for the preceding one or two testing years. However, only years after the effective date of the proposed regulations were permitted to be taken into account.

In general, the averaging rules were favorably received by the commentators, but some suggested that the averaging period should be extended. Other commentators suggested that the averaging rules should also permit an employer to take into account years before the effective date. In response to these comments, the final regulations provide for an averaging period of up to 5 years and permit years before the effective date of the final regulations to be taken into account, provided the employer has the information necessary to use the applicable provision.

XI. Failure to Comply

a. Line of Business Fails to Comply With the Final Regulations

If an employer applies sections 401(a)(26) and 410(b) to its plans on a qualified-separate-line-of-business basis and any of its lines of business fail to meet the requirements of these final regulations, then all of its lines of business will fail to meet the requirements of section 414(r). In that event, each plan must satisfy sections 401(a)(26) and 410(b) on an employer-wide basis in order to satisfy section 401(a).

b. Plan Failure to Comply with Section 410(b)

If an employer applies section 410(b) separately with respect to the employees of each qualified separate line of business, and a plan fails to meet the requirements of section 410(b) or 401(a)(4) on that basis, that plan will fail to satisfy section 401(a). Furthermore, the plan may not attempt to meet the requirements of sections 410(b) and 401(a)(4) on an employer wide basis unless it is being tested under the special rule for employer-wide plans described above. However, this failure generally will not affect the employer's treatment under section 414(r) as operating qualified separate lines of business.

Additional Authority

The rules in the regulations regarding section 414(r) are the exclusive rules for determining whether the requirements of that section are met. The regulations also provide, however, that the Commissioner may, in revenue rulings, notices, and other guidance of general applicability, provide any additional rules that may be necessary or appropriate in applying the definition of a separate line of business under section 414(r).

Effective Date and Reliance on the Proposed Regulations

These regulations are generally effective for plan years beginning on or after January 1, 1992. However, in the case of any plan year beginning on or before the date the Service begins issuing determinations under section 414(r)(2)(C), an employer is treated as operating separate lines of business if the employer reasonably determines that it meets the requirements of section 414(r) (other than paragraph (2)(C) thereof). Whether an employer reasonably determines that it meets the requirements of section 414(r) generally will be determined on the basis of all relevant facts and circumstances, including the extent to which the employer has resolved unclear issues in its favor. For plan years beginning after the effective date of section 414(r) and before the effective date of these final regulations, operation in accordance with these final regulations or in accordance with the proposed regulations published in the **Federal Register** on February 1, 1991 (56 FR 3968), is a reasonable interpretation of section 414(r).

Special Analyses

It has been determined that these rules are not major rules as defined in Executive Order 12291. Therefore, a Regulatory Impact Analysis is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) and the Regulatory Flexibility Act (5 U.S.C. chapter 6) do not apply to these regulations and, therefore, an initial Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Internal Revenue Code, the notice of proposed rulemaking for these regulations was submitted to the Administrator of the Small Business Administration for comment on their impact on small business.

Drafting Information

The principal authors of these final regulations are Thomas G. Schendt and Rhonda G. Migdail of the Office of the Associate Chief Counsel (Employee Benefits and Exempt Organizations), Internal Revenue Service. However, personnel from other offices of the Service and Treasury Department participated in their development.

List of Subjects

26 CFR Part 1 (1.401–0 through 1.419(A)–2T)

Bonds, Employee benefit plans, Income taxes, Reporting and recordkeeping requirements, Securities, Trusts and trustees.

26 CFR Part 602

Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR parts 1 and 602 are amended as follows:

PART 1—INCOME TAX: TAXABLE YEARS BEGINNING AFTER DECEMBER 31, 1953

Paragraph 1. The authority for Part 1 is amended by adding the following citations:

Authority: 26 U.S.C. 7805 * * * Sections 1.414(r)–0 through 1.414(r)–7 also issued under 26 U.S.C. 414(r). Section 1.414(r)–8 also issued under 26 U.S.C. 410(b) and 414(r). Section 1.414(r)–9 also issued under 26 U.S.C. 401(a)(26) and 414(r). Section 1.414(r)–10 also issued under 26 U.S.C. 129 and 414(r). Section 1.414(r)–1 also issued under 26 U.S.C. 414(r).

Par. 2. Section 1.401(k)–0 is amended by adding a new heading for paragraph (e)(9) in § 1.401(k)–1 to the table of contents to read as set forth below.

§ 1.401(k)–0 Certain cash or deferred arrangements, table of contents.

* * * * *

(e) * * *

(8) * * *

(9) Consistent application of separate lines of business rules.

* * * * *

Par. 3. Section 1.401(k)–1(e) is amended by adding a new paragraph (e)(9) to read as set forth below.

§ 1.401(k)–1 Certain cash or deferred arrangements.

* * * * *

(e) *Additional requirements for qualified cash or deferred arrangements.* * * *

(9) *Consistent application of separate line of business rules.* If an employer is treated as operating qualified separate lines of business under section 414(r) in accordance with § 1.414(r)–1(b) for purposes of applying section 410(b), and applies the special rule for employer-wide plans in § 1.414(r)–1(c)(2)(ii) to the portion of the plan that consists of contributions under the cash or deferred arrangement, then the requirements of section 401(k) and this section must be applied on an employer-wide rather than a qualified-separate-line-of-business basis to all of the plans or portions of plans taken into account in determining whether the cash or deferred arrangement is a qualified cash or deferred arrangement, regardless of whether those plans or portions of plans also satisfy the requirements necessary to apply the special rule in § 1.414(r)–1(c)(2)(ii). Conversely, if an employer is treated as operating qualified separate lines of business under section 414(r) in accordance with § 1.414(r)–1(b) for purposes of applying section 410(b), and does not apply the special rule for employer-wide plans in § 1.414(r)–1(c)(2)(ii) to the portion of the plan that consists of contributions under the cash or deferred arrangement, then the requirements of section 401(k) and this section must be applied on a qualified-separate-line-of-business rather than an employer-wide basis to all of the plans or portions of plans taken into account in determining whether the cash or deferred arrangement is a qualified cash or deferred arrangement, regardless of whether one or more of those plans or portions of plans is tested under the special rule § 1.414(r)–1(c)(2)(ii). This requirement applies solely for purposes of determining whether the cash or deferred arrangement is a qualified cash or deferred arrangement under section 401(k) and this section. The rules of this paragraph are illustrated by the following example.

Example. (i) Employer A maintains a profit-sharing plan that includes a cash or deferred arrangement in which all of the employees of Employer A are eligible to participate. Employer A is treated as operating qualified separate lines of business under section 414(r) in accordance with § 1.414(r)–1(b) for purposes of applying section 410(b). However, Employer A applies the special rule for employer-wide plans in § 1.414(r)–1(c)(2)(ii) to the portion of its profit-sharing plan that consists of elective contributions under the cash or deferred arrangement (and to no other plans or portions of plans). Employer A makes qualified nonelective contributions to the profit-sharing plan for the 1995 plan year, and the profit-sharing plan provides that these qualified nonelective contributions may be used to satisfy the actual deferral percentage test.

(ii) Under these facts, the requirements of sections 401(a)(4) and 410(b) must be applied on an employer-wide rather than a qualified-separate-line-of-business basis in determining whether the qualified nonelective contributions made to the profit-sharing plan satisfy the requirements of § 1.401(k)–1(b)(5), and thus whether they may be taken into account under the actual deferral percentage test. Therefore, in order for the nonelective contributions to be used to satisfy the actual deferral percentage test, both (1) the total amount of nonelective contributions under the profit-sharing plan, including the qualified nonelective contributions to be used to satisfy the actual deferral percentage test, and (2) the total amount of nonelective contributions under the profit-sharing plan, excluding the qualified nonelective contributions to be used to satisfy the actual deferral percentage test, must satisfy the requirements of section 401(a)(4) on an employer-wide basis. Of course, in order for the profit-sharing plan to satisfy section 401(a), it must still satisfy sections 410(b) and 401(a)(4) on a qualified-separate-line-of-business basis.

* * * * *

Par. 4. Section 1.401(m)–0 is amended by adding the new heading for paragraph (c)(3) in § 1.401(m)–1 to the table of contents to read as set forth below.

§ 1.401(m)–0 Employee and matching contributions, table of contents.

* * * * *

(c) * * *

(2) * * *

(3) Consistent application of separate line of business rules.

* * * * *

Par. 5. Section 1.401(m)–1(c) is amended by adding a new paragraph (c)(3) to read as set forth below.

§ 1.401(m)–1 Employee and matching contributions.

* * * * *

(c) *Additional requirements.* * * *

(3) *Consistent application of separate line of business rules.* If an employer is treated as operating qualified separate lines of business under section 414(r) in accordance with § 1.414(r)–1(b) for purposes of applying section 410(b), and applies the special rule for employer-wide plans in § 1.414(r)–1(c)(2)(ii) to the portion of the plan that consists of matching contributions or to the portion of the plan that consists of employee contributions (the "matching and employee contribution portions"), then the requirements of this section, section 401(m), and § 1.401(m)–2 must be applied on an employer-wide rather than a qualified-separate-line-of-business basis to all of the plans or portions of plans taken into account in determining whether those requirements are satisfied by the matching and employee contribution portions of the plan (regardless of whether the other plans or portions of plans also satisfy the requirements necessary to apply the special rule in § 1.414(r)–1(c)(2)(ii)). Conversely, if an employer is treated as operating qualified separate lines of business under section 414(r) in accordance with § 1.414(r)–1(b) for purposes of applying section 410(b), and does not apply the special rule for employer-wide plans in § 1.414(r)1–(c)(2)(ii) to either the matching or employee contribution portions of the plan, then the requirements of this section, section 401(m) and § 1.401(m)–2 must be applied on a qualified-separate-line-of-business rather than an employer-wide basis to all of the plans or portions of plans taken into account in determining whether those requirements are satisfied by the matching and employee contribution portions of the plan (regardless of whether one or more of the other plans or portions of plans is tested under the special rule § 1.414(r)–1(c)(2)(ii)). This requirement applies solely for purposes of determining whether the requirements of this section, section 401(m), and § 1.401(m)–2 are satisfied by the matching and employee contribution portions of the plan. The rules of this paragraph are illustrated by the following example.

Example. (i) Employer A maintains a profit-sharing plan that includes a cash or deferred arrangement in which all of the employees of Employer A are eligible to participate. Under the profit-sharing plan, each $1.00 of elective contributions under the cash or deferred arrangement is matched by $0.50 of employer contributions. Employer A is treated as operating qualified separate lines of business under section 414(r) in accordance with § 1.414(r)–1(b) for purposes of applying section 410(b). However, Employer A applies the special rule for employer-wide plans in § 1.414(r)–1(c)(2)(ii) to the portion of its profitsharing plan that consists of matching contributions. Employer A makes qualified nonelective contributions to the profit-sharing plan for the 1995 plan year.

(ii) Under these facts, the requirements of sections 401(a)(4) and 410(b) must be applied on an employer-wide rather than a qualified-separate-line-of-business basis in determining whether these qualified nonelective contributions (and any elective contributions under the cash or deferred arrangement) satisfy the requirements of § 1.401(m)–1(b)(5), and thus whether they may be taken into account under the actual contribution percentage test. Thus, in order for the nonelective contributions to be used to satisfy the actual contribution percentage test, both (1) the total amount of nonelective

contributions under the profit-sharing plan, including the qualified nonelective contributions to be used to satisfy the actual contribution percentage test, and (2) the total amount of nonelective contributions under the profit-sharing plan, excluding the qualified nonelective contributions to be used to satisfy the actual contribution percentage test, must satisfy the requirements of section 401(a)(4) on an employer-wide basis. Further, in order for any elective contributions under the cash or deferred arrangement to be used to satisfy the actual contribution percentage test, the total amount of elective contributions, including any treated as matching contributions under the actual contribution percentage test, must satisfy the requirements of section 401(k)(3) on an employer-wide basis. Of course, in order for the profit-sharing plan to satisfy section 401(a), it must still satisfy sections 410(b) and 401(a)(4) on a qualified-separate-line-of-business basis.

* * * * *

Par. 6. Section 1 .410(b)–6(e) is revised as set forth below.

§ 1.410(b)–6 Excludable employees.

* * * * *

(e) *Employees of qualified separate lines of business.* If an employer is treated as operating qualified separate lines of business for purposes of section 410(b) in accordance with § 1.414(r)–1 (b), in testing a plan that benefits employees of one qualified separate line of business, the employees of the other qualified separate lines of business of the employer are treated as excludable employees. The rule in this paragraph (e) does not apply for purposes of satisfying the nondiscriminatory classification requirement of section 410(b)(5)(B). See §§ 1.414(r)–1(c)(2) and 1.414(r)–8 (separate application of section 410(b) to the employees of a qualified separate line of business). In addition, the rule in this paragraph (e) does not apply to a plan that is tested under the special rule for employer-wide plans in § 1.414(r)–1(c) (2) (ii) for a plan year.

* * * * *

Par. 7. Section 1.410(b)–7 is amended by revising paragraphs (c)(4), (d)(4) and (e) as set forth below.

§ 1.410(b)–7 Definition of plan and rules governing plan disaggregation and aggregation.

* * * * *

(c) *Mandatory disaggregation of certain plans.* * * *

(4) *Plans benefiting employees of qualified separate lines of business.* If an employer is treated as operating qualified separate lines of business for purposes of section 410(b) in accordance with § 1.414(r)–1(b), the portion of a plan that benefits employees of one qualified separate line of business is treated as a separate plan from the portions of the same plan that benefit employees of the other qualified separate lines of business of the employer. See §§ 1.414(r)-1(c)(2) and 1.414(r)–8 (separate application of section 410(b) to the employees of a qualified separate line of business). If a plan satisfies the reasonable classification requirement of § 1.410(b)–4(b) before the application of this paragraph (c)(4), then any portion of that plan that is treated as a separate plan as a result of the application of this paragraph (c)(4) is deemed to satisfy that requirement. The rule in this paragraph (c)(4) does not apply to a plan that is tested under the special rule for employer-wide plans in § 1.414(r)–1(c) (2) (ii) for a plan year.

* * * * *

(d) *Permissive aggregation for ratio percentage and nondiscriminatory classification tests.* * * *

(4) *Special rule for plans benefiting employees of a qualified separate line of business.* For purposes of paragraph (d)(1) of this section, an employer that is treated as operating qualified separate lines of business for purposes of section 410(b) in accordance with § 1.414(r)–1(b) is permitted to aggregate the portions of two or more plans that benefit employees of the same qualified separate line of business (regardless of whether the employer elects to aggregate the portions of the same plans that benefit employees of the other qualified separate lines of business of the employer), provided that none of the plans is tested under the special rule for employer-wide plans in § 1.414(r)–1 (c)(2)(ii). Thus, the employer is permitted to apply paragraph (d)(1) of this section with respect to two or more separate plans determined after the application of paragraphs (b) and (c)(5) of this section, but may not aggregate a plan that is tested under the special rule for employer-wide plans in § 1.414(r)–1(c)(2)(ii) for a plan year with any portion of a plan that does not rely on that special rule for the plan year. In all other respects, the provisions of this paragraph (d) regarding permissive aggregation apply, including (but not limited to) the disaggregation rules under paragraph (d)(2) of this section (including the mandatory disaggregation rule of paragraph (c)(5) of this section), and the prohibition on duplicative aggregation under paragraph (d)(3) of this section. This paragraph (d)(4) applies only in the case of an employer that is treated as operating qualified separate lines of business for purposes of section 410(b) in accordance with § 1.414(r)–1(b). See §§ l.414(r)–1(c)(2) and 1.414(r)–8 (separate application of section 410(b) to the employees of a qualified separate line of business).

* * * * *

(e) *Determination of plans in testing group for average benefit percentage test*—(1) *In general.* For purposes of applying the average benefit percentage test of § 1.410(b)–5 with respect to a plan, all plans in the testing group must be taken into account. For this purpose, the plans in the testing group are the plan being tested and all other plans of the employer that could be permissively aggregated with that plan under paragraph (d) of this section. Whether two or more plans could be permissively aggregated under paragraph (d) of this section is determined (i) without regard to the rule in paragraph (d)(4) of this section that portions of two or more plans benefiting employees of the same line of business may not be aggregated if any of the plans is tested under the special rule for employer-wide plans in § 1.414(r)–1(c)(2)(ii), (ii) without regard to paragraph (d)(5) of this section, and (iii) by applying paragraph (d)(2) of this section without regard to paragraphs (c)(1) through (c)(3) of this section.

(2) *Examples.* The following example illustrates the rules of this paragraph (e).

Example 1. Employer X is treated as operating two qualified separate lines of business for purposes of section 410(b) in accordance with section 414(r), QSLOB1 and QSLOB2. Employer X must apply the rules in § 1.414(r)–8 to determine whether its plans satisfy section 410(b) on a qualified-separate-line-of-business basis. Employer X maintains the following plans:

(a) Plan A, the portion of Employer X' s employer-wide section 401(k) plan that benefits all noncollectively bargained employees of QSLOB1,

(b) Plan B, the portion of Employer X' s employer-wide section 401(k) plan that benefits all noncollectively bargained employees of QSLOB2,

(c) Plan C, a defined benefit plan that benefits all hourly noncollectively bargained employees of QSLOB1,

(d) Plan D, a defined benefit plan that benefits all collectively bargained employees of QSLOB1,

(e) Plan E, an ESOP that benefits all noncollectively bargained employees of QSLOB1,

(f) Plan F, a profit-sharing plan that benefits all salaried noncollectively bargained employees of QSLOB1.

Assume that Plan F does not satisfy the ratio percentage test of § 1.410(b)–2(b)(2) on a qualified-separate-line-of-business basis, but does satisfy the nondiscriminatory classification test of § 1.410(b)–4 on both an employer-wide and a qualified-separate-line-of-business basis. Therefore, to satisfy section 410(b), Plan F must satisfy the average benefit percentage test of § 1.410(b)–5 on a qualifiedseparatelineofbu5ine55 basis. The plans in the testing group used to

determine whether Plan F satisfies the average benefit percentage test of § 1.4 10(b)–5 are Plans A, C, E, and F.

Example 2. The facts are the same as in *Example 1*, except that Employer X applies the special rule for employer-wide plans in § 1.414(r)–1(c)(2)(ii) to its employer-wide section 401(k) plan. To satisfy section 410(b), Plan F must satisfy the average benefit percentage test of § 1.4 10(b)–5. Since paragraph (c)(4) of this section no longer applies to Plans A and B, they are treated as a single plan (Plan AB). The plans in the testing group used to determine whether Plan F satisfies the average benefit percentage test of § 1.4 10(b)–5 are therefore Plans A, B, C, E, and F. However, the employees of QSLOB 2 continue to be excludable employees for purposes of determining whether Plan F satisfies the average benefit percentage test. See § 1.410(b)–6(e).

* * * * *

Par. 8. Sections 1.414(r)–0 through 1.414(r)–1 are added to read as set forth below.

§ 1.414(r)–0 Table of contents.

(a) *In general.* Sections 1.414(r)–1 through 1.414(r)–11 provide rules for determining whether an employer is treated as operating qualified separate lines of business under section 414(r) of the Internal Revenue Code of 1986 as added to the Code by section 1115(a) of the Tax Reform Act of 1986 (Pub. L. No. 99–514), as well as rules for applying the requirements of sections 410(b), 401(a)(26), and 129(d)(8) separately with respect to the employees of each qualified separate line of business of an employer. Paragraph (b) of this section contains a listing of the headings of §§ 1.414(r)–1 through 1.414(r)–11. Paragraph (c) of this section provides a flowchart showing how the major provisions of §§ 1.414(r)–1 through 1.414(r)–6 are applied.

(b) *Table of contents.* The following is a listing of the headings of §§ 1.414(r)–1 through 1.414(r)–11.

§ 1.414(r)–1 Requirements applicable to qualified separate lines of business.

(a) In general.
(b) Conditions under which an employer is treated as operating qualified separate lines of business.
(1) In general.
(2) Qualified separate line of business.
(i) In general.
(ii) Line of business.
(iii) Separate line of business.
(iv) Qualified separate line of business.
(A) In general.
(B) Fifty-employee requirement.
(C) Notice requirement.
(D) Requirement of administrative scrutiny.
(3) Determining the employees of a qualified separate line of business.
(c) Separate application of certain Code requirements to employees of a qualified separate line of business.
(1) In general.
(2) Separate application of section 410(b).
(i) General rule.
(ii) Special rule for employer-wide plans.
(3) Separate application of section 401(a)(26).
(i) General rule.
(ii) Special rule for employer-wide plans.
(4) Separate application of section 129(d)(8) [Reserved].
(5) Separate application of other Code requirements.
(d) Application of requirements.
(1) In general.
(2) Interpretation.
(3) Separate operating units.
(4) Certain mergers and acquisitions.
(5) Governmental and tax-exempt employers.
(i) General rule.
(ii) Additional rules [Reserved].
(6) Testing year basis of application.
(i) Section 414(r).
(ii) Sections 410(b), 401(a)(26), and 129(d)(8).
(7) Averaging rules.
(8) Definitions.
(9) Effective dates.
(i) General rule.
(ii) Reasonable compliance.
(A) In general.
(B) Determination of reasonable compliance.
(C) Effect on other plans.
(e) Additional rules.

§ 1.414(r)–2 Line of business.

(a) General rule.
(b) Employer determination of its lines of business.
(1) In general.
(2) Property and services provided to customers.
(3) Employer designation.
(i) In general.
(ii) Ability to combine unrelated types of property or services in a single line of business.
(iii) Ability to separate related types of property or services into two or more lines of business.
(iv) Affiliated service groups.
(c) Examples.
(1) In general.
(2) Examples illustrating employer designation.
(3) Examples illustrating property and services provided to customers.

§ 1.414(r)–3 Separate line of business.

(a) General rule.
(b) Separate organization and operation.
(1) In general.
(2) Separate organizational unit.
(3) Separate financial accountability.
(4) Separate employee workforce.
(5) Separate management.
(c) Supplementary rules.
(1) In general.
(2) Determination of separate employee workforce.
(3) Determination of separate management.
(4) Employees taken into account.
(i) General rule.
(ii) Exclusion of certain nonresident aliens.
(5) Services taken into account.
(i) Provision of services to a separate line of business.
(ii) Period for which services are provided.
(iii) Determination of services.
(6) Examples of the separate employee workforce requirement.
(7) Examples of the separate management requirement.
(d) Optional rule for vertically integrated lines of business.
(1) In general.
(2) Requirements.
(3) Optional rule.
(i) Treatment of employees.
(ii) Purposes for which optional rule applies.
(4) Examples.

§ 1.414(r)–4 Qualified separate line of business—fifty-employee and notice requirements

(a) In general.
(b) Fifty-employee requirement.
(c) Notice requirement.
(1) General rule.
(2) Effect of notice.

§ 1.414(r)–5 Qualified separate line of business—administrative scrutiny requirement—safe harbors.

(a) In general.
(b) Statutory safe harbor.
(1) General rule.
(2) Highly compensated employee percentage ratio.
(3) Employees taken into account.
(4) Ten-percent exception.
(5) Determination based on preceding testing year.
(6) Examples.
(c) Safe harbor for separate lines of business in different industries.
(1) In general.
(2) Optional rule for foreign operations.
(3) Establishment of industry categories.
(4) Examples.
(d) Safe harbor for separate lines of business that are acquired through certain mergers and acquisitions.
(1) General rule.
(2) Employees taken into account.
(3) Transition period.
(4) Examples.
(e) Safe harbor for separate lines of business reported as industry segments.
(1) In general.
(2) Reported as an industry segment in conformity with Form 10–K or Form 20–F.
(3) Timely filing of Form 10–K or 20–F.
(4) Examples.
(f) Safe harbor for separate lines of business that provide same average benefits as other separate lines of business.
(1) General rule.
(2) Separate lines of business benefiting disproportionate number of nonhighly compensated employees.
(i) Applicability of safe harbor.
(ii) Requirement.
(3) Separate lines of business benefiting disproportionate number of highly compensated employees.
(i) Applicability of safe harbor.
(ii) Requirement.
(4) Employees taken into account.
(5) Example.

(g) Safe harbor for separate lines of business that provide minimum or maximum benefits.
(1) In general.
(2) Minimum benefit required.
(i) Applicability.
(ii) Requirement.
(iii) Defined benefit minimum.
(A) In general.
(B) Normal form and equivalent benefits.
(C) Compensation definition.
(D) Average compensation requirement.
(E) Special rules.
(iv) Defined contribution minimum.
(A) In general.
(B) Modified allocation definition for averaging.
(3) Maximum benefit permitted.
(i) Applicability.
(ii) Requirement.
(iii) Defined benefit maximum.
(A) In general.
(B) Determination of defined benefit maximum.
(C) Adjustment for different compensation definitions.
(D) Adjustment for certain subsidies.
(iv) Defined contribution maximum.
(4) Duplication of benefits or contributions.
(i) Plans of the same type.
(ii) Plans of different types.
(iii) Special rule for floor-offset arrangements.
(5) Certain contingency provisions ignored.
(6) Employees taken into account.

§ 1.4 14(r)–6 Qualified separate line of business—administrative scrutiny requirement—individual determinations.

(a) In general.
(b) Conditions under which an employer is permitted to request an individual determination.
(c) Factors taken into account in determining whether to grant an individual determination.
(1) In general.
(2) Differences in property or services.
(3) Separateness of organization and operation.
(4) Nature of business competition.
(5) Historical factors.
(6) Geographic factors.
(7) Safe harbors.
(8) Size.
(9) Allocation method.
(10) Other lines of business.
(11) Regulated industries.
(12) Other relevant factors.

§ 1.414(r)–7 Determination of the employees of an employer's qualified separate lines of business.

(a) Introduction.
(1) In general.
(2) Purposes for which this section applies.
(b) Assignment procedure.
(1) In general.
(2) Assignment for the first testing day.
(3) Assignment of new employees for subsequent testing days.
(4) Special rule for employers using annual option under section 410(b).
(c) Assignment and allocation of residual shared employees.
(1) In general.
(2) Option for assigning certain residual shared employees.
(3) Dominant line of business method of allocation.
(i) In general.
(ii) Dominant line of business.
(iii) Employee assignment percentage.
(A) Determination of percentage.
(B) Employees taken into account.
(iv) Option to apply reduced percentage.
(v) Examples.
(4) Pro-rata method of allocation.
(i) In general.
(ii) Allocation procedure.
(iii) Examples.
(5) HCE percentage ratio method of allocation.
(i) In general.
(ii) Highly compensated employee percentage assignment ratio.
(iii) Allocation procedure.
(d) Optional rule for assigning certain transferred employees.
(1) In general.
(2) Requirements.
(3) Optional rule.

§ 1.414(r)–8 Separate application of section 410(b).

(a) General rule.
(b) Rules of separate application.
(1) In general.
(2) Satisfaction of section 410(b)(5)(B) on an employer-wide basis.
(i) General rule.
(ii) Application of facts and circumstances requirements under nondiscriminatory classification test.
(iii) Application of unsafe harbor percentage to plans satisfying ratio-percentage test at 90 percent level.
(3) Satisfaction of section 410(b) on a qualified-separate-line-of-business basis.
(4) Examples.
(c) Coordination of section 401(a)(4) with section 410(b).
(1) General rule.
(2) Examples.
(d) Supplementary rules.
(1) In general.
(2) Definition of plan.
(3) Employees of a qualified separate line of business.
(4) Contributions and benefits attributable to a qualified separate line of business.
(5) Consequences of failure.

§ 1.414(r)–9 Separate application of section 401(a)(26).

(a) General rule.
(b) Requirements applicable to a plan.
(c) Supplementary rules.
(1) In general.
(2) Definition of plan.
(3) Employees of a qualified separate line of business.
(4) Consequences of failure.

§ 1.414(r)–10 Separate application of section 129(d)(8).

[Reserved].

§ 1.414(r)–11 Definitions and special rules.

(a) In general.
(b) Definitions.
(1) In general.
(2) Substantial-service employee.
(3) Top-paid employee.
(4) Residual shared employee.
(5) Testing year.
(6) Testing day.
(7) First testing day.
(8) Section 401(a)(26) testing day.
(c) Averaging rules.
(1) In general.
(2) Specified provisions.
(3) Averaging of large fluctuations not permitted.
(4) Consistency requirements.

(c) *Flowchart.* The following is a flowchart showing how the major provisions of §§ 1.414(r)–1 through 1.414(r)–6 are applied.

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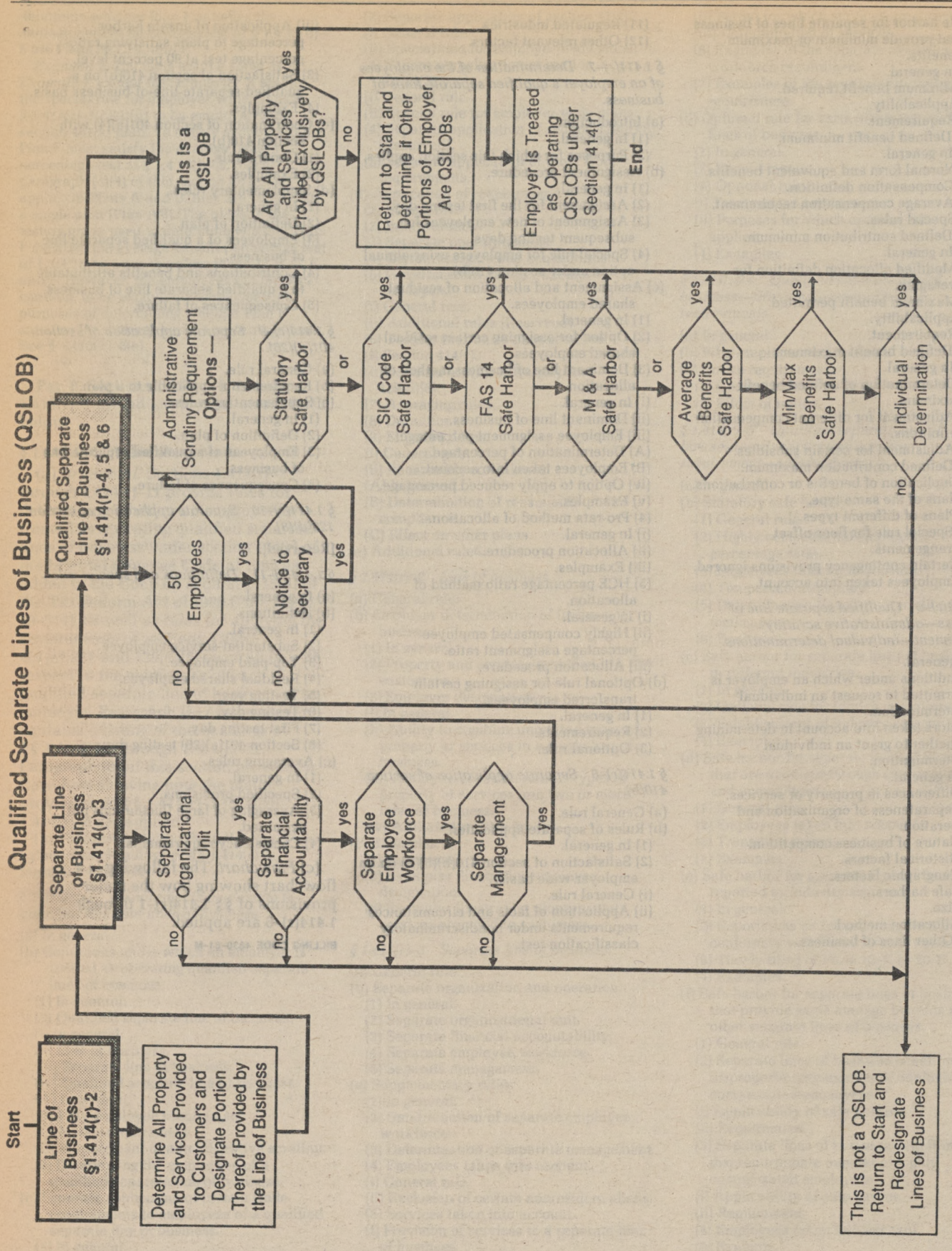

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§ 1.414(r)–1 Requirements applicable to qualified separate lines of business.

(a) *In general.* Section 414(r) prescribes the conditions under which an employer is treated as operating qualified separate lines of business. If an employer is treated as operating qualified separate lines of business under section 414(r), certain requirements under the Code may be applied separately with respect to the employees of each qualified separate line of business. These requirements are limited to the minimum coverage requirements of section 410(b) (including the nondiscrimination requirements of section 401(a)(4)), the minimum participation requirements of section 401(a)(26), and the 55-percent average benefits test of section 129(d)(8). This section provides the exclusive rules for determining whether an employer is treated as operating qualified separate lines of business under section 414(r), as well as rules for applying the requirements of sections 410(b), 401(a)(26), and 129(d)(8) separately with respect to the employees of a qualified separate line of business.

(b) *Conditions under which an employer is treated as operating qualified separate lines of business*—(1) *In general.* An employer is treated as operating qualified separate lines of business under section 414(r) only if all property and services provided by the employer to its customers are provided exclusively by qualified separate lines of business. Thus, once an employer has determined its qualified separate lines of business under paragraph (b)(2) of this section, no portion of the employer may remain that is not included in a qualified separate line of business. In addition, once the employer has determined the employees of its qualified separate lines of business under paragraph (b)(3) of this section, every employee must be treated as an employee of a qualified separate line of business, and no employee may be treated as an employee of more than one qualified separate line of business.

(2) *Qualified separate line of business*—(i) *In general.* A qualified separate line of business is a portion of the employer that is a line of business within the meaning of paragraph (b)(2)(ii) of this section, that is also a separate line of business within the meaning of paragraph (b)(2)(iii) of this section, and, finally, that satisfies the requirements of section 414(r)(2) in accordance with paragraph (b)(2)(iv) of this section.

(ii) *Line of business.* A line of business is a portion of an employer that is identified by the property or services it provides to customers of the employer. For this purpose, the employer is permitted to determine the lines of business it operates by designating the property and services that each of its lines of business provides to customers of the employer. Rules for determining an employer's lines of business are provided in § 1.414(r)–2.

(iii) *Separate line of business.* A separate line of business is a line of business that is organized and operated separately from the remainder of the employer. The determination of whether a line of business is organized and operated separately from the remainder of the employer is made on the basis of objective criteria. These criteria generally require that the line of business be organized into one or more separate organizational units (e.g., corporations, partnerships, or divisions), that the line of business constitute one or more distinct profit centers within the employer, and that no more than a moderate overlap exist between the employee workforce and management employed by the line of business and those employed by the remainder of the employer. Rules for determining whether a line of business is organized and operated separately from the remainder of the employer and thus constitutes a separate line of business are provided in § 1.414(r)–3. These rules include an optional rule for vertically integrated lines of business.

(iv) *Qualified separate line of business*—(A) *In general.* A qualified separate line of business must satisfy the three statutory requirements in section 414(r)(2). A separate line of business that satisfies these three statutory requirements in accordance with paragraphs (b)(2)(iv)(B) through (b)(2)(iv)(D) of this section constitutes a qualified separate line of business.

(B) *Fifty-employee requirement.* Under section 414(r)(2)(A), a separate line of business must have at least 50 employees. Rules for determining whether this requirement is satisfied are provided in § 1.414(r)–4(b).

(C) *Notice requirement.* Under section 414(r)(2)(B), the employer must notify the Secretary that it treats itself as operating qualified separate lines of business under section 414(r) for purposes of applying the requirements of section 410(b), 401(a)(26), or 129(d)(8) separately with respect to the employees of the separate line of business. Rules and procedures for complying with this requirement are provided in § 1.414(r)–4(c).

(D) *Requirement of administrative scrutiny.* Under section 414(r)(2)(C), a separate line of business must pass administrative scrutiny. A separate line of business may satisfy this requirement in one of two ways. First, a separate line of business that satisfies any of the safe harbors in § 1.414(r)–5 satisfies the requirement of administrative scrutiny. These safe harbors implement the statutory safe harbor of section 414(r)(3) as well as the guidelines prescribed under section 414(r)(2)(C). Second, a separate line of business that does not satisfy any of the safe harbors in § 1.414(r)–5 nonetheless satisfies the requirement of administrative scrutiny if the employer requests and receives an individual determination from the Commissioner that the separate line of business satisfies the requirement of administrative scrutiny. Rules and procedures applicable to requesting and receiving an individual determination are provided in § 1.414(r)–6. A separate line of business is permitted to satisfy the requirement of administrative scrutiny in any manner permitted under this paragraph (b)(2)(iv)(D), regardless of how any other separate line of business of the employer satisfies the requirement.

(3) *Determining the employees of a qualified separate line of business.* In order to apply certain provisions under these regulations, it is necessary to determine the employees of a qualified separate line of business. For these purposes, the employees of a qualified separate line of business consist of all employees who are substantial-service employees with respect to the qualified separate line of business, and all other employees who are assigned to the qualified separate line of business. Rules for making these determinations are provided in § 1.414(r)–7. These rules apply solely for the purposes specified in these regulations (see § 1.414(r)–7(a)(2) for a comprehensive listing of these purposes). These rules do not apply for any other purpose (e.g., the determination under § 1.414(r)–3 of whether a line of business is organized and operated separately from the remainder of the employer).

(c) *Separate application of certain Code requirements to employees of a qualified separate line of business*—(1) *In general.* If an employer is treated as operating qualified separate lines of business under section 414(r) in accordance with paragraph (b) of this section, the requirements of sections 410(b), 401(a)(26), and 129(d)(8) may be applied separately with respect to the employees of each qualified separate line of business. Paragraphs (c)(2) through (c)(4) of this section provide for the separate application of these requirements. In general, the requirements of a Code section are applied separately with respect to the

employees of a qualified separate line of business by treating those employees as if they were the only employees of the employer. Paragraph (c)(5) of this section prescribes the limited conditions under which other Code requirements may be applied separately with respect to the employees of a qualified separate line of business.

(2) *Separate application of section 410(b)*—(i) *General rule.* Except as provided in paragraph (c)(2)(ii) of this section, an employer is permitted to apply the requirements of section 410(b) separately with respect to the employees of each qualified separate line of business operated by the employer only if the employer does so with respect to all its plans, all its employees, and all its qualified separate lines of business. For this purpose, the requirements of section 410(b) encompass the requirements of section 401(a)(4) (including, but not limited to, the permitted disparity rules of section 401(*l*), the actual deferral percentage test of section 401(k)(3) and the actual contribution percentage test of section 401(m)(2)). Rules for applying section 410(b) separately with respect to the employees of a qualified separate line of business are provided in § 1.414(r)–8. An employer may apply the rules of section 414(r) for purposes of section 410(b) even if it does not apply the rules of section 414(r) for purposes of section 401(a)(26).

(ii) *Special rule for employer-wide plans.* Notwithstanding paragraph (c)(2)(i) of this section, an employer that is treated as operating qualified separate lines of business for purposes of section 410(b) in accordance with paragraph (b) of this section may apply the requirements of section 410(b) on an employer-wide rather than a qualified-separate-line-of-business basis with respect to any plan (within the meaning of § 1.414(r)–8(d)(2), but without regard to the mandatory disaggregation rule of § 1.410(b)–7(c)(4) for portions of a plan that benefit employees of different qualified separate lines of business) that benefits a group of employees that satisfies the percentage test of section 410(b)(1)(A) (i.e., benefits at least 70 percent of the employer's nonexcludable nonhighly compensated employees). If section 401(a)(4) requires that a group of employees under the plan described in the preceding sentence satisfy section 410(b) for purposes of satisfying section 401(a)(4), the percentage test of section 410(b)(1)(A) must be satisfied by each such group of employees. See § 1.414(r)–8(c). The rules of this paragraph (c)(2)(ii) are illustrated by the following example.

Example. Employer A maintains a single profit-sharing plan, Plan W, and three pension plans, Plans X, Y and Z, each benefiting employees of a different one of Employer A's three qualified separate lines of business. Contributions to the profit-sharing plan are made pursuant to a cash or deferred arrangement in which all employees of Employer A are eligible to participate. Assume that, as a result, Plan W satisfies the requirements to be tested under this paragraph (c)(2)(ii). None of the pension plans benefits more than 70 percent of the nonexcludable employees of Employer A. Employer A is treated as operating qualified separate lines of business for purposes of applying section 410(b) to its qualified plans. The requirements of sections 410(b) and 401(a)(4) must therefore be applied to Plans X, Y and Z separately with respect to the employees of each of the three qualified separate line of business operated by Employer A. Since Plan W benefits at least 70 percent of the nonexcludable employees of Employer A, however, the requirements of sections 410(b) and 401(a)(4) (including section 401(k)) may be applied to Plan W on an employer-wide basis.

(3) *Separate application of section 401(a)(26)*—(i) *General rule.* Except as provided in paragraph (c)(3)(ii) of this section, an employer is permitted to apply the requirements of section 401(a)(26) separately with respect to the employees of each qualified separate line of business operated by the employer only if the employer does so with respect to all its plans, all its employees, and all its qualified separate lines of business. Rules for applying the requirements of section 401(a)(26) separately with respect to the employees of a qualified separate line of business are provided in § 1.414(r)–9. An employer may apply the rules of section 414(r) for purposes of section 401(a)(26) even if it does not apply the rules of section 414(r) for purposes of section 410(b).

(ii) *Special rule for employer-wide plans.* Notwithstanding paragraph (c)(3)(i) of this section, an employer that is treated as operating qualified separate lines of business for purposes of section 410(b) in accordance with paragraph (b) of this section may apply the requremens of section 401(a)(26) on an employer-wide rather than a qualified-separate-line-of-business basis with respect to any plan (within the meaning of § 1.414(r)–9(c)(2), but without regard to the mandatory disaggregation rule of § 1.401(a)(26)–2(d)(6) for portions of a plan that benefit employees of different qualified separate lines of business), but only if the special rule for employer-wide plans in paragraph (c)(2)(ii) of this section is applied to the same plan for the same plan year.

(4) *Separate application of section 129(d)(8).* [Reserved]

(5) *Separate application of other Code requirements.* Under no circumstance may the requirements of any section of the Code (other than a section described in paragraphs (c)(2) through (c)(4) of this section) be applied separately with respect to the employees of a qualified separate line of business unless the section specifically cross-references, or is specifically cross-referenced by, section 414(r). The Code sections whose requirements may not be applied separately with respect to the employees of a qualified separate line of business include, but are not limited to, sections 79(d)(3), 105(h), 117(d)(3), 120(c)(2), 125(g)(3), 127(b)(2), 129(d)(3), 132, 195, 401(a)(3) (as in effect on September 1, 1974), 414(q)(4), 501(c)(17)(A)(ii), 501(c)(17)(B)(iii), 501(c)(18)(B), and 505(b)(1)(A).

(d) *Application of requirements*—(1) *In general.* The requirements of paragraphs (b) and (c) of this section must be applied in accordance with the rules in this paragraph (d).

(2) *Interpretation.* The provisions of this section and of §§ 1.414(r)–2 through 1.414(r)–11 are to be interpreted in a reasonable manner consistent with the purpose of section 414(r) to recognize an employer's operation of qualified separate lines of business for bona fide business reasons and not for reasons of evading the requirements of any section of the Code, including sections 410(b), 401(a)(26), and 129(d)(8). See section 414(r)(1) and (r)(7). Thus, for example, an employer is not permitted to apply these regulations in a manner that may literally comply with the other provisions of this section and of §§ 1.414(r)–2 through 1.414(r)–11, but that does not reflect the employer's operation of qualified separate lines of business for bona fide business reasons.

(3) *Separate operating units.* No additional requirements beyond those provided in these regulations apply to a separate operating unit. Thus, a separate operating unit that satisfies the requirements of paragraph (b)(2) of this section is deemed to satisfy the geographic separation requirement of section 414(r)(7) and accordingly is treated as a qualified separate line of business for all purposes under this section, including the separate application of section 401(a)(26).

(4) *Certain mergers and acquisitions.* A portion of an employer that is acquired in a transaction described in section 410(b)(6)(C) and § 1.410(b)–2(f) (i.e., an asset or stock acquisition, merger, or other similar transaction involving a change in the employer of the employees of a trade or business) is deemed to satisfy the requirements to be

a qualified separate line of business, other than the 50-employee requirement and the notice requirement of pararaphs (b)(2)(iv)(R) and (b)(2)(iv)(C) of this section, respectively. In addition, the acquired employees are not taken into account, and the property and services provided by the acquired portion to customers of the employer are disregarded, for purposes of determining whether the employer's remaining lines of business satisfy the requirements of §§ 1.414(r)–3 through 1.414(r)–6. The rules in this paragraph (d)(4) apply only for those testing years with first testing days that fall within the transition period described in section 410(b)(6)(C). For this purpose, the transition period described in section 410(b)(6)(C) lasts only for so long as the conditions in that section are satisfied. For the definition of "first testing day," see § 1.414(r)–11(b)(7). See § 1.414(r)–5(d)(4), *Example 1*, for an example of the application of the rule in this paragraph (d)(4). See also § 1.414(r)–5(d) for an administrative safe harbor applicable to certain separate lines of business acquired in a transaction described in this section.

(5) *Governmental and tax-exempt employers*—(i) *General rule.* Except as provided in paragraph (d)(5)(ii) of this section, the rules of this section are applicable in determining whether section 401(a)(26) is satisfied by a plan maintained by an employer that is exempt from tax under Subtitle A of the Internal Revenue Code (including a governmental plan within the meaning of section 414(d)). Similarly, except as provided in paragraph (d)(5)(ii) of this section, the rules of this section are applicable in determining whether section 410(b) is satisfied by a plan that is subject to section 410(b) (including by virtue of § 1410(b)–2(e)) and is maintained by an employer that is exempt from tax under Subtitle A of the Internal Revenue Code (including a governmental plan within the meaning of section 414(d)).

(ii) *Additional rules.* [Reserved]

(6) *Testing year basis of application*—(i) *Section 414(r).* Whether an employer is treated as operating qualified separate lines of business under section 414(r) in accordance with paragraph (b) of this section is determined on a year-by-year basis with respect to the testing year. It is therefore possible for an employer to satisfy paragraph (b) of this section for one testing year and to fail to satisfy it for another testing year. It is also possible for an employer to satisfy paragraph (b) of this section for two testing years but to have designated its lines of business differently in each of those two testing years. In determining whether an employer satisfies paragraph (b) of this section for a testing year, the requirements of that paragraph are applied solely with respect to the testing year. Thus, all property and services provided by the employer to its customers during the testing year must be provided exclusively by portions of the employer that for the testing year constitute qualified separate lines of business. Furthermore, each employee of the employer must respectively be treated as an employee of one and only one of those qualified separate lines of business for all purposes with respect to the testing year.

(ii) *Sections 410(b), 401(a)(26), and 129(d)(8).* For purposes of paragraph (c) of this section, relating to the separate application of sections 410(b), 401(a)(26), and 129(d)(8) to the employees of a qualified separate line of business, the determination whether an employer operates qualified separate lines of business in accordance with paragraph (b) of this section for a testing year generally applies for all plan years beginning in the testing year. Rules for the separate application of sections 410(b), 401(a)(26), and 129(d)(8) are respectively provided in §§ 1.414(r)–8, 1.414(r)–9, and 1.414(r)–10.

(7) *Averaging rules.* The employer is permitted to apply certain provisions of these regulations on the basis of a consecutive-year average (not to exceed five consecutive years) under the averaging rules of § 1.414(r)–11(c).

(8) *Definitions.* In applying the provisions of this section and of § § 1.414(r)–2 through 1.414(r)–11, the definitions in §§ 1.414(r)–11(b) and 1.410(b)–9 govern, unless otherwise provided.

(9) *Effective*—(i) *General rule.* The provisions of this section and of § § 1.414(r)–2 through 1.414(r)–11 apply to plan years and testing years beginning on or after January 1, 1992.

(ii) *Reasonable compliance*—(A) *In general.* With respect to plan years beginning before the date on which the Commissioner begins issuing determinations under section 414(r)(2)(C), and on or after the first day of the first plan year to which section 414(r) applies under section 1112(a) of the Tax Reform Act of 1986, an employer is treated as operating qualified separate lines of business if the employer reasonably determines that it meets the requirements of section 414(r) (other than the requirement of administrative scrutiny under section 414(r)(2)(C)).

(B) *Determination of reasonable compliance.* Whether an employer reasonably determines that it meets the requirements of section 414(r) generally will be determined on the basis of all relevant facts and circumstances, including the extent to which the employer has resolved unclear issues in its favor. For the period described in paragraph (d)(9)(ii)(A) of this section, the Internal Revenue Service will consider the employer's compliance with the terms of these final regulations (other than the requirement of administrative scrutiny under paragraph (b)(2)(iv)(D) of this section) to constitute a reasonable determination that the employer meets the requirements of section 414(r) (other than the requirement of administrative scrutiny under section 414(r)(2)(C)).

(C) *Effect on other plans.* If an employer sponsors a plan that has a plan year beginning within the period described in paragraph (d)(9)(ii)(A) of this section, the employer's reasonable determination of its qualified separate lines of business for the testing year in which that plan year begins, and the allocation of employees to those qualified separate lines of business, must also be used for purposes of applying § 1.414(r)–8 and § 1.414(r)–9 for plan years that begin in that testing year but after the end of the period described in paragraph (d)(9)(ii)(A) of this section.

(e) *Additional rules.* The Commissioner may, in revenue rulings, notices, and other guidance of general applicability, provide any additional rules that may be necessary or appropriate in applying the qualified separate line of business requirements of section 414(r). These additional rules may include, for example, new safe harbors in § 1.414(r)–5 and new conditions under which an individual determination may be requested under § 1.414(r)–6.

§ 1.414(r)–2 Line of business.

(a) *General rule.* A line of business is a portion of an employer that is identified by the property or services it provides to customers of the employer. For this purpose, an employer is permitted to determine its lines of business by designating the property or services that each of its lines of business provides to customers of the employer. Paragraph (b) of this section explains how an employer determines its lines of business for a testing year. Paragraph (c) of this section provides examples illustrating the application of this section.

(b) *Employer determination of its lines of business*—(1) *In general.* An employer determines its lines of business for a testing year first by identifying all the property and services it provides to its customers during the testing year, and then by designating which portion of the property and services is provided by each of its lines of business.

(2) *Property and services provided to customers.* Property, whether real or

personal, tangible or intangible, is provided by an employer to a customer during a testing year if the employer provides the property to or on behalf of the customer during the testing year for consideration. Similarly, services are provided by an employer to a customer during a testing year if the employer renders the services to or on behalf of the customer during the testing year for consideration. An individual item of property or service is taken into account under this paragraph (b)(2) only if the employer provides the item during the testing year to a person other than the employer in the ordinary course of a trade or business conducted by the employer during the testing year, and the person to whom the employer provides the item is acting in the capacity as a customer of the employer. It is not necessary that both property or services actually be provided, and consideration for the property or services actually be paid, during the current testing year. For an employer to be considered to provide property and services to customers for consideration during a testing year under this paragraph (b)(2), it is sufficient that: The property or services actually be provided to customers during the testing year; the consideration actually be paid by customers during the testing year; or the employer actually incur significant costs during the testing year associated with the provision of the property or services to a specified customer or specified customers.

(3) *Employer designation*—(i) *In general.* Once the employer has identified all the property and services it provides to its customers during the testing year under paragraph (b)(2) of this section, the employer determines its lines of business for the testing year by designating which portion of those property and services is provided by each of its lines of business. For this purpose, the employer must apportion all the property and services identified under paragraph (b)(2) of this section among its lines of business. An employer generally is not required to designate its lines of business for the testing year in the same manner as it designates its lines of business for any other testing year.

(ii) *Ability to combine unrelated types of property or services in a single line of business.* For purposes of this paragraph (b)(3), there is no requirement that a line of business provide only one type of property or service, or only related types of property or services. Nor is there any requirement that a line of business provide solely property or solely services. Thus, the employer is permitted to combine in a single line of business dissimilar types of property or services that are otherwise unrelated to one another.

(iii) *Ability to separate related types of property or services into two or more lines of business.* For purposes of this paragraph (b)(3), there is no requirement that all property or services of related types or the same type be provided by a single line of business. Thus, the employer is permitted to designate two or more lines of business that provide related types of property or services, or the same type of property or service. An employer might designate two or more lines of business that provide property or services of related types or the same type, for example, where the lines of business manufacture, prepare, or provide the property or services in different geographic areas (e.g., in different regions of the country or the world), or at different levels in the chain of commercial distribution (e.g., wholesale versus retail), or in different types of transactions (e.g, sale versus lease), or for different types of customers (e. g., governmental versus private), or subject to different legal constraints (e. g., regulated versus unregulated), or if the lines of business have developed differently (e.g., one line of business was acquired while another line of business developed internally). Notwithstanding the foregoing, an employer is not permitted to designate two or more lines of business that provide property or services of related types or the same type, if the employer's designation is unreasonable. An employer's designation would be unreasonable, for example, if the designation separated two types of property or services in different lines of business, but the employer did not provide those types of property or services separately from one another to its customers. Similarly, an employer's designation would be unreasonable if it separated two types of property or services in different lines of business, but the provision of one type of property or service was merely ancillary or incidental to, or regularly associated with, the provision of the other type of property or service. See generally § 1.414(r)–1(d)(2) (requiring an employer's operation of qualified separate lines of business to be for bona fide business reasons).

(iv) *Affiliated service groups.* An employer is not permitted to designate its lines of business in a manner that results in separating employees of an affiliated service group (within the meaning of section 414(m)) from other employees of the employer. See section 414(r)(8).

(c) *Examples*—(1) *In general.* Paragraphs (c)(2) and (c)(3) of this section provide examples that illustrate the application of this section.

(2) *Examples illustrating employer designation.* The following examples illustrate the application of paragraph (b)(3) of this section relating to an employer's designation of the property or services provided to customers by each of its lines of business.

Example 1. Employer A is a domestic conglomerate engaged in the manufacture and sale of consumer food and beverage products and the provision of data processing services to private industry. Employer A provides no other property or services to its customers. Pursuant to paragraph (b)(3) of this section, Employer A apportions all the property and services it provides to its customers among three lines of business, one providing all its consumer food products, a second providing all its consumer beverage products, and a third providing all its data processing services. Employer A has three lines of business for purposes of this section.

Example 2. The facts are the same as in *Example 1,* except that Employer A determines that neither the consumer food products line of business nor the consumer beverage products line of business would satisfy the separateness criteria of §1.414(r)–3 for recognition as a separate line of business. Accordingly, pursuant to paragraph (b)(3) of this section, Employer A apportions all the property and services it provides to its customers between only two lines of business, one providing all its consumer food and beverage products, and a second providing all its data processing services. Employer A has two lines of business for purposes of this section.

Example 3. The facts are the same as in *Example 2,* except that Employer A also owns and operates a regional commuter airline, a professional basketball team, a pharmaceutical manufacturer, and a leather tanning company. Pursuant to paragraph (b)(3) of this section, Employer A apportions all the property and services it provides to its customers among three lines of business, one providing all its consumer food and beverage products, a second providing all its data processing services, and a third providing all the other property and services provided to customers through Employer A's regional commuter airline, professional basketball team, pharmaceutical manufacturer, and leather tanning company. Even though the third line of business includes dissimilar types of property and services that are otherwise unrelated to one another, paragraph (b)(3)(ii) of this section permits Employer A to combine these property and services in a single line of business. Employer A has three lines of business for purposes of this section.

Example 4. The facts are the same as in *Example 2,* except that Employer A has recently acquired Corporation L, whose only product is a well-known brand of gourmet ice

cream. Although Employer A manufactures and sells other ice cream products, it does not manufacture or market the newly acquired brand of gourmet ice cream except through Corporation L. Pursuant to paragraph (b)(3) of this section, Employer A apportions all the property and services it provides to its customers among three lines of business, one providing only the newly acquired brand of gourmet ice cream, a second providing all its other consumer food and beverage products (including the other ice cream products manufactured and sold by Employer A) and a third providing all its data processing services. Even though the gourmet ice cream line of business provides the same type of property as the consumer food and beverage line of business (i.e., ice cream), paragraph (b)(3)(iii) of this section permits Employer A to separate its ice cream products between two different lines of business. Employer A has three lines of business for purposes of this section.

Example 5. The facts are the same as in *Example 2,* except that Employer A operates the data processing services portion of its business in two separate subsidiaries, one serving customers in the eastern half of the United States and the other serving customers in the western half of the United States. Pursuant to paragraph (b)(3) of this section, Employer A apportions all the property and services it provides to its customers among three lines of business, one providing all its consumer food and beverage products, a second providing data processing services to customers in the eastern half of the United States, and a third providing data processing services to customers in the western half of the United States. Even though the second and third lines of business provide the same type of service (i.e., data processing services), paragraph (b)(3)(iii) of this section permits Employer A to separate its data processing services into two lines of business. Employer A has three lines of business for purposes of this section.

Example 6. Employer B is a diversified engineering firm offering civil, chemical, and aeronautical engineering services to government and private industry. Employer B provides no other property or services to its customers. Employer B operates the aeronautical engineering services portion of its business as two separate divisions, one serving federal government customers and the other serving customers in private industry. Pursuant to paragraph (b)(3) of this section, Employer B apportions all the property and services it provides to its customers among four lines of business, one providing all its civil engineering services, a second providing all its chemical engineering services, a third providing aeronautical engineering services to federal government customers, and a fourth providing aeronautical engineering services to customers in private industry. Even though the third and fourth lines of business include the same type of service (i.e., aeronautical engineering services), paragraph (b)(3)(iii) of this section permits Employer B to separate its aeronautical engineering services into two lines of business. Employer B has four lines of business for purposes of this section.

Example 7. Among its other business activities, Employer C manufacturers industrial diesel generators. At no additional cost to its buyers, Employer C warrants the proper functioning of its diesel generators for a one-year period following sale. Pursuant to its warranty, Employer C provides labor and parts to repair or replace any components that malfunction within the one-year warranty period. Because Employer C does not provide the industrial diesel generators, on the one hand, and the warranty repair services and replacement parts, on the other hand, separately from one another to its customers, under paragraph (b)(3)(iii) of this section it would be unreasonable for Employer C to separate these property and services in different lines of business.

Example 8. Among its other business activities, Employer D leases office photocopying equipment. Employer D also provides photo-copying supplies and repair services to its lessees for a separate charge. Employer D generally does not provide such supplies and repair services to persons other than its lessees. Lessees of Employer D's equipment are permitted to use photo-copying supplies and repair services from suppliers other than Employer D. Because the provision of the photo-copying supplies and repair services are merely ancillary or incidental to the provision of the leased photo-copiers, under paragraph (b)(3)(iii) of this section it would be unreasonable for Employer D to separate these property and services in different lines of business.

Example 9. Employer E operates a medical clinic. The employees of the clinic include physicians, nurses, and laboratory technicians, all of whom participate in providing medical and related services to patients of the clinic. Under paragraph (b)(3)(iii) of this section, it would be unreasonable for Employer E to separate the services of the physicians, nurses, and laboratory technicians in different lines of business.

Example 10. Employer F is a law firm. The employees of the firm include lawyers, paralegals, and secretaries, all of whom participate in rendering legal and related services to clients of the firm. Under paragraph (b)(3)(iii) of this section, it would be unreasonable for Employer F to separate the services of the lawyers, paralegals, and secretaries in different lines of business.

Example 11. Employer G is a management consulting firm. The employees of the firm include management consultants, secretaries, and other support staff personnel, all of whom participate in rendering management consulting and related services to clients of the firm. Under paragraph (b)(3)(iii) of this section, it would be unreasonable for Employer G to separate the services of the management consultants, secretaries, and other support staff personnel in different lines of business.

(3) *Examples illustrating property and services provided to customers.* The following examples illustrate the application of paragraph (b)(2) of this section relating to property and services provided to customers of the employer.

Example 1. Employer H operates several dairy farms and dairy product processing plants. The dairy farms provide their entire output of milk and milk by-products to Employer H's dairy product processing plants. Under paragraph (b)(2) of this section, the dairy farms' provision of milk and milk by-products to the dairy product processing plants does not constitute the provision of property or services to customers of Employer H, because the milk and milk by-products are not provided to a person other than Employer H.

Example 2. The facts are the same as in *Example 1,* except that the dairy farms also sell milk and milk by-products to retail distributors unrelated to Employer H. Although the dairy farms' provision of milk and milk by-products to Employer H's dairy product processing plants does not constitute the provision of property or services to customers of Employer H, the dairy farms' provision of milk and, milk by-products to independent retail distributors does constitute the provision of property or services to customers of Employer H under paragraph (b)(2) of this section.

Example 3. Among its other business activities, Employer J manufactures automobiles. Employer J operates a cafeteria at one of its automobile manufacturing facilities. The cafeteria is intended primarily for use by employees of Employer J, but nonemployees are not prohibited from using the cafeteria. The cafeteria charges the same prices to employees and non-employees. Under paragraph (b)(2) of this section, the provision of cafeteria services to employees of Employer J does not constitute the provision of property or services to customers of Employer J, because the cafeteria services are provided to the employees in their capacity as employees of Employer J and not as customers of Employer J.

Example 4. Employer K sells books and periodicals to members of the public and provides telecommunications services to private industry. Employer K periodically acquires and disposes of businesses in both asset and stock transactions. In addition, for its own investment purposes, Employer K acquires and disposes of corporate and other securities. Under paragraph (b)(2) of this section, the sale by Employer K of businesses and investment securities does not constitute the provision of property or services to customers of Employer K, because the sales are not made in the ordinary course of a trade or business conducted by Employer K. However, the sale of published materials and the provision of telecommunications services to persons unrelated to Employer K does constitute the provision of property or services to customers of Employer K.

Example 5. Employer L is active in the financial services industry. Subsidiary 1 of Employer L is a brokerage firm that is regulated as a broker-dealer under applicable federal and state law. In its capacity as a dealer, Subsidiary 1 holds in its own inventory securities of unrelated corporations and regularly sells these securities to unrelated persons. Under paragraph (b)(2) of this section, the sale by Subsidiary 1 of the securities to unrelated persons constitutes the provision of property or services to customers of Employer L, because the sales are made in

the ordinary course of Subsidiary 1's trade or business as a broker-dealer.

Example 6. The facts are the same as in *Example 5.* Subsidiary 2 of Employer L is an insurance company that is regulated under applicable state insurance laws. In managing its investments, Subsidiary 2 regularly makes use of the brokerage services of Subsidiary 1 (which Subsidiary 1 regularly provides to unrelated persons as well). Under paragraph (b)(2) of this section, Subsidiary 1's provision of brokerage services to Subsidiary 2 does not constitute the provision of property or services to customers of Employer L, because the brokerage services are not provided to a person other than Employer L. However, Subsidiary 1's provision of brokerage services to unrelated persons does constitute the provision of property or services to customers of Employer L.

Example 7. Employer M is a shipbuilder. In a testing year, Employer M enters into a contract with a customer to construct a new cargo ship for delivery two years later. Employer M incurs significant costs designing and planning for the production of the new ship during the testing year, but receives no payments from the customer during that year. Under paragraph (b)(2) of this section, Employer M is treated as providing the cargo ship to the customer during the testing year.

Example 8. The facts are the same as in *Example 7,* except that, pursuant to a request from the customer, Employer M also incurred significant costs developing a prototype and submitting a bid on the new cargo ship in the prior testing year, and that these costs were not reimbursed by the customer. Under paragraph (b)(2) of this section, Employer M is also treated as providing the cargo ship to the customer in the prior testing year.

§ 1.414(r)–3 Separate line of business.

(a) *General rule.* A separate line of business is a line of business (as determined under § 1.414(r)–2) that is organized and operated separately from the remainder of the employer. Paragraph (b) of this section sets forth the rules for determining whether a line of business is organized and operated separately from the remainder of the employer. Paragraph (c) of this section provides certain supplementary rules necessary to apply the requirements of paragraph (b) of this section, as well as examples illustrating the application of those requirements. Paragraph (d) of this section provides an optional rule for lines of business that are vertically integrated.

(b) *Separate organization and operation*—(1) *In general.* A line of business is organized and operated separately from the remainder of the employer for a testing year only if it satisfies all the requirements of paragraphs (b)(2) through (b)(5) of this section for the testing year.

(2) *Separate organizational unit.* The line of business must be formally organized as a separate organizational unit or group of separate organizational units within the employer. For this purpose, an organizational unit is a corporation, partnership, division, or other unit having a similar degree of organizational formality. This requirement must be satisfied on every day of the testing year.

(3) *Separate financial accountability.* The line of business must be a separate profit center or group of separate profit centers within the employer. This requirement must be satisfied on every day of the testing year. In addition, the employer must maintain books and records that provide separate revenue and expense information that is used for internal planning and control with respect to each profit center comprising the line of business.

(4) *Separate employee workforce.* The line of business must have its own separate employee workforce. A line of business has its own separate employee workforce only if at least 90 percent of the employees who provide services to the line of business are substantial service employees with respect to the line of business. See paragraph (c)(2) of this section to determine how the percentage in the preceding sentence is calculated for the testing year.

(5) *Separate management.* The line of business must have its own separate management. A line of business has its own separate management only if at least 80 percent of the employees who are top-paid employees with respect to the line of business are substantial-service employees with respect to the line of business. See paragraph (c)(3) of this section to determine how the percentage in the preceding sentence is calculated for the testing year.

(c) *Supplementary rules*—(1) *In general.* This paragraph (c) provides certain supplementary rules necessary to apply the requirements of paragraph (b) of this section, as well as examples illustrating the application of those requirements.

(2) *Determination of separate employee workforce.* The percentage in paragraph (b)(4) of this section is the fraction (expressed as a percentage)—

(i) The numerator of which is the number of substantial-service employees with respect to the line of business within the meaning of § 1.414(r)–11(b)(2); and

(ii) The denominator of which is the total number of employees who provide services to the line of business within the meaning of paragraph (c)(5) of this section.

(3) *Determination of separate management.* The percentage in paragraph (b)(5) of this section is the fraction (expressed as a percentage)—

(i) The numerator of which is the number of employees who are both top-paid employees and substantial-service employees with respect to the line of business within the meaning of § 1.414(r)–11(b)(3) and (2), respectively; and

(ii) The denominator of which is the total number of top-paid employees with respect to the line of business within the meaning of § 1.414(r)–11(b)(3).

(4) *Employees taken into account*—(i) *General rule.* For purposes of applying this paragraph (c), only employees who are employees of the employer on the first testing day are taken into account. For this purpose, there are no excludable employees (except as provided in paragraph (c)(4)(ii) of this section). Consequently, all employees who are employees on the first testing day are taken into account, including collectively bargained employees. For the definition of "first testing day," see § 1.414(r)–11(b)(7).

(ii) *Exclusion of certain nonresident aliens.* For purposes of determining the fractions in paragraphs (c)(2) and (c)(3) of this section with respect to a line of business, an employer is permitted to exclude all employees who are described in section 410(b)(3)(C) (i.e., nonresident aliens who receive no earned income within the meaning of section 911(d)(2) from the employer that constitutes income from sources within the United States within the meaning of section 861(a)(3)) who are substantial-service employees with respect to that line of business within the meaning of § 1.414(r)–11(b)(2). Thus, for example, if a nonresident alien employee described in the preceding sentence provides 75 percent of the employee's services to one line of business, and 25 percent to another line of business, the employer is permitted to disregard the employee in determining the separate workforce and separate management fractions in paragraphs (c)(2) and (c)(3) of this section with respect to the first line of business, but not the second line of business.

(5) *Services taken into account*—(i) *Provision of services to a line of business.* An employee provides services to a line of business if more than a negligible portion of the employee's services contributes to providing the property or services provided by the line of business to customers of the employer. All of the services of each employee who provides services to the employer contribute, whether directly or indirectly, to the provision of property or services to customers of the employer, and therefore each employee who provides

services to the employer must be treated as providing more than a negligible portion of the employee's services to one or more lines of business operated by the employer.

(ii) *Period for which services are provided.* Only services performed by an employee during the testing year that contribute to providing the property or services provided by a line of business to customers are taken into account. An employee's services during the testing year are considered to contribute to providing the property or services provided by a line of business to customers of the employer if—

(A) The employee's services during the testing year contribute to providing such property or services to customers of the employer during the testing year; or

(B) It is reasonably anticipated that the employee's services during the testing year will contribute to providing such property and services to customers of the employer after the close of the testing year.

(iii) *Determination of services.* The determination of whether an employee provides services to a line of business, and the determination of the percentage of an employee's services provided to a line of business, must be made in a manner that is reasonably reliable with respect to all employees and uniform with respect to similarly-situated employees.

(6) *Examples of the separate employee workforce requirement.* The following examples illustrate the application of the separate employee workforce requirement in paragraph (b)(4) of this section and the supplementary rules of this paragraph (c). Unless otherwise specified, it is assumed that the employees and their services described in these examples are taken into account under paragraphs (c) (4) and (5) of this section for the testing year.

Example 1. Employer A operates three lines of business as determined under § 1.414(r)–2. One of Employer A's lines of business manufactures and sells tires and other automotive products. Employee M is a tire press operator in Employer A's tire factory. Employee N is the manager of the tire factory. Under these facts, the services of Employees M and N contribute to providing tires to customers of Employer A. Both employees therefore provide services to Employer A's tire and automotive products line of business within the meaning of paragraph (c)(5) of this section.

Example 2. The facts are the same as in *Example 1.* In addition, none of the services of Employees M and N that contribute to providing property or services to customers contribute to providing any property or service other than tires to customers of Employer A. Under these facts, Employees M and N provide at least 75 percent of their respective services to Employer A's tire and automotive products line of business. Therefore Employees M and N are substantial-service employees with respect to Employer A's tire and automotive products line of business within the meaning of § 1.414(r)–11(b)(2), and do not provide any services within the meaning of paragraph (c)(5) of this section to any of Employer A's other lines of business.

Example 3. The facts are the same as in *Example 2.* Employer A's second line of business manufactures and sells construction machinery, and Employer A's third line of business manufactures and sells agricultural equipment. As part of these lines of business, Employer A operates a construction machinery factory and an agricultural equipment factory on the same site as the tire factory described in *Example 2.* Employer A's facilities at the site include a health clinic and a fitness center that serve the employees of the construction machinery factory, the agricultural equipment factory, and the tire factory. Employee O is a nurse in the health clinic, and Employee P is a fitness instructor in the fitness center. Both employees therefore provide services within the meaning of paragraph (c)(5) of this section to Employer A's tire and automotive products line of business, construction machinery line of business, and agricultural equipment line of business. In addition, under these facts, Employer A determines (in accordance with paragraph (c)(5)(iii) of this section) that approximately 33 percent of the services of Employees O and P are provided to each of Employer A's three lines of business. As a result, neither Employee O or P provide at least 75 percent of their respective services to any of Employer A's lines of business. Therefore, Employees O and P are not substantial-service employees with respect to any of Employer A's three lines of business within the meaning of § 1.414(r)–11(b)(2).

Example 4. The facts are the same as in *Example 3.* Employee Q is the president and chief executive officer of Employer A and is responsible for reviewing the performance of all Employer A's lines of business. Under these facts, the services of Employee Q contributes to providing property and services to customers of each of Employer A's three lines of business. Employee Q therefore provides services to each of these three lines of business. Employer A determines (in accordance with paragraph (c)(5)(iii) of this section) that Employee Q provides the following percentages of his services to Employer A's three lines of business: tire and automotive products—40 percent; construction machinery—40 percent, and agricultural equipment—20 percent. Employee Q does not provide at least 75 percent of his services to any of Employer A's lines of business. Therefore, Employee Q is not a substantial-service employee with respect to any of Employer A's three lines of business within the meaning of § 1.414(r)–11(b)(2).

Example 5. The facts are the same as in *Example 4,* except that Employer A also owns 75 percent of Corporation X. Corporation X is not treated as part of Employer A within the meaning of § 1.410(b)–9. Employee R is an accountant in the accounting department of Employer A. Employee R devotes all of his time to maintaining the accounting books and records of the tire and automotive products line of business of Employer A and the accounting books and records of Corporation X. Employer A determines (in accordance with paragraph (c)(5)(iii) of this section) that Employee R provides 40 percent of his services directly to the tire and automotive products line of business. Employer A also determines (in accordance with paragraph (c)(5)(iii) of this section) that Employee R provides the following percentages of the remainder of Employee R's services (i.e., his provision of services of maintaining the accounting books and records of Corporation X) indirectly to Employer A's three lines of business by virtue of the services he provides to Corporation X: tire and automotive products—25 percent; construction machinery—20 percent, and agricultural equipment—15 percent. Therefore, Employee R provides 65 percent of his services to the tire and automotive products line of business of Employer A (i.e., 40 percent directly and 25 percent indirectly).

Example 6. The facts are the same as in *Example 5.* Employee S is a lawyer in the legal department located at the headquarters who devotes all her time to product liability suits filed against the construction machinery line of business. Under these facts, the services of Employee S contribute to providing property and services to customers of Employer A in the construction machinery line of business, and therefore Employee S provides services to that line of business. Because Employee S's services do not contribute to providing property or services in any other of Employer A's lines of business within the meaning of paragraph (c)(5) of this section, Employee S provides more than 75 percent of her services to the construction machinery line of business and therefore is a substantial-service employee with respect to Employer A's construction machinery line of business within the meaning of § 1.414(r)–11(b)(2).

Example 7. The facts are the same as in *Example 6.* Employer A also maintains a separate facility that houses a centralized procurement, marketing, and billing operation for all of its lines of business. None of the procurement, marketing, or billing employees specializes in any particular line of business. Under these facts, the services of the procurement, marketing, and billing employees contribute to providing property and services to customers of Employer A in each of Employer A's three lines of business. Employer A determines (in accordance with paragraph (c)(5)(iii) of this section) that each of the procurement, marketing, and billing employees provides approximately an equal proportion of their services to each of Employer A's three lines of business. These employees therefore provide services to all of Employer A's lines of business within the meaning of paragraph (c)(5) of this section. However, none of them provides at least 75 percent of his services to any line of business. Therefore, these employees are not

substantial-service employees with respect to any of Employer A's three lines of business within the meaning of § 1.414(r)–11(b)(2).

Example 8. The facts are the same as in *Example 7.* Employee T works for the construction machinery line of business. During the testing year, he is temporarily detailed to the agricultural equipment line of business. His temporary detail lasts for one week, after which he returns to his regular duties with the construction machinery line of business. Under these facts, Employee T does not provide more than a negligible portion of his services during the testing year to the agricultural equipment line of business. Accordingly, Employee T does not provide services to the agricultural equipment line of business within the meaning of paragraph (c)(5) of this section. In addition, because Employee T provides at least 75 percent of his services to the construction machinery line of business, Employee T is a substantial-service employee with respect to Employer A's agricultural equipment line of business within the meaning of § 1.414(r)–11(b)(2).

Example 9. The facts are the same as in *Example 8,* except that, during the testing year but before the first testing day, Employee T retires from employment with Employer A. Under paragraph (c)(5)(ii) of this section, Employee T is not taken into account in determining whether Employer A's construction machinery line of business has its own separate employee workforce within the meaning of paragraph (b)(4) of this section.

Example 10. Employer B is a multinational controlled group of corporations that engages in the exploration, production, refining, and marketing of petrochemical products. Employer B operates two lines of business as determined under § 1.414(r)–2. The first line of business (the "exploration, production, and refining line of business") provides lubricating oil, gasoline, and other petrochemical products to wholesale customers of Employer B as well as to the second line of business. The wholesale customers of Employer B include independent jobbers, independent franchisees that operate retail filling stations under Employer B's trademark and tradename, as well as chemical and plastics manufacturers. The second line of business (the "retail marketing line of business") provides lubricating oil and gasoline products to retail customers of Employer B through filling stations owned and operated by Employer B. Employee U is an attendant at a filling station owned and operated by Employer B. Employee U performs no other services for Employer B. Under these facts, Employee U provides at least 75 percent of his services to Employer B's retail marketing line of business and therefore is a substantial-service employee with respect to that line of business within the meaning of § 1.414(r)–11(b)(2), and does not provide any services within the meaning of paragraph (c)(5) of this section to any of Employer B's other lines of business.

Example 11. The facts are the same as in *Example 10.* Employer B operates a refinery that produces lubricating oil, gasoline, and other petrochemical products. Employee V is an operating engineer at the refinery who is involved at a stage in the refining process before lubricating oil and gasoline products have been separated from other types of petrochemical products. Employee V performs no other services for Employer B. Under these facts, Employee V's services contribute to providing property and services to customers of Employer B in both the exploration, production, and refining line of business and the retail marketing line of business. Employee V therefore provides services to both lines of business within the meaning of paragraph (c)(5) of this section. See paragraph (d) of this section, however, for an optional rule for vertically integrated lines of business.

Example 12. The facts are the same as in *Example 11.* Employee W is a petroleum engineer who conducts geological studies of potential future drilling sites. Although Employee W's services during the testing year will not contribute to providing lubricating oil, gasoline, and other petrochemical products to customers of Employer B during the testing year, it is reasonably anticipated (in accordance with paragraph (c)(5)(ii)(B) of this section) that her services during the testing year will contribute to providing such products to customers of Employer B after the close of the testing year. Under these facts, Employee W provides her services to both of Employer B's lines of business within the meaning of paragraph (c)(5) of this section.

(7) *Examples of the separate management requirement.* The following examples illustrate the application of the separate management requirement in paragraph (b)(5) of this section and the supplementary rules of this paragraph (c).

Example 1. Employer C operates three lines of business as determined under § 1.414(r)–2. One of its lines of business is the operation of a chain of athletic equipment and apparel stores. Of Employer C's total workforce, 10,500 employees provide more than a negligible amount of the services they provide to Employer C to the athletic equipment and apparel stores line of business, and 10,000 of these employees provide at least 25 percent of their services to the athletic equipment and apparel stores line of business, within the meaning of paragraph (c)(5) of this section. Of the 1,000 employees who constitute the top 10 percent by compensation of these 10,000 employees, 930 are substantial-service employees with respect to that line of business. Because 930 is 93 percent of 1,000, at least 80 percent of the top-paid employees who provide services to the line of business are substantial-service employees with respect to that line of business. Employer C's athletic equipment and apparel stores line of business therefore has its own separate management and thus satisfies the requirement of paragraph (b)(5) of this section.

Example 2. The facts are the same as in *Example 1.* Employee X is a vice president of the accounting department located at the headquarters, who devotes all of his time supervising the staff of Employer C's accounting department. Employer C determines (in accordance with paragraph (c)(5)(iii) of this section) that 10 percent of Employee X's services contribute to providing property and services to customers of Employer C's athletic equipment and apparel stores line of business and 45 percent of Employee X's services contribute to providing property and services to customers of each of Employer C's other two lines of business. Because Employee X does not provide at least 25 percent of his services to Employer C's athletic equipment and apparel stores line of business, Employee X is not one of the 10,000 employees described in *Example 1* and therefore cannot be a top-paid employee within the meaning of § 1.414(r)–11(b)(3) with respect to the athletic equipment and apparel stores line of business. Therefore, Employee X is not taken into account in determining whether the athletic equipment and apparel stores line of business satisfies the separate management requirement of paragraph (b)(5) of this section.

Example 3. Employer D operates four lines of business as determined under § 1.414(r)–2. One of its lines of business is a machine tool shop. Sixty of Employer D's employees provide at least 25 percent of their services to the machine tool shop line of business. Of the six employees who constitute the top 10 percent by compensation of those 60 employees, four are substantial-service employees with respect to the line of business. Because four is 67 percent of six, 80 percent of the top-paid employees with respect to the machine tool shop line of business are not substantial-service employees with respect to that line of business. Therefore the machine tool shop line of business does not satisfy the separate management requirement of paragraph (b)(5) of this section.

Example 4. The facts are the same as in *Example 3,* except that, in addition, another of Employer D's lines of business is an automotive repair shop, and 80 of Employer D's employees provide at least 25 percent of their services to that line of business. Employer D combines the machine shop line of business with the automotive repair shop line of business and treats them as a single line of business. As a result, Employer D has three lines of business as determined under § 1.414(r)–2. Assume that 150 of Employer D's employees provide more than 25 percent of their services to the machine tool shop/automotive repair shop line of business within the meaning of paragraph (c)(5) of this section. Of the 15 employees who constitute the top 10 percent by compensation of these 150 employees, 12 are substantial-service employees with respect to that line of business. Because 12 is 80 percent of 15, at least 80 percent of the top-paid employees with respect to the machine tool shop/automotive repair shop line of business are substantial-service employees with respect to that line of business. Therefore, the machine tool shop/automotive repair shop line of business satisfies the separate management requirement of paragraph (b)(5) of this section.

(d) *Optional rule for vertically integrated lines of business*—(1) *In general.* If two lines of business satisfy the requirements of this paragraph (d) with respect to a type of property or

service for a testing year, the employer is permitted to apply the optional rule in this paragraph (d) for the testing year.

(2) *Requirements.* Two lines of business satisfy the requirements of this paragraph (d) with respect to a type of property or service only if—

(i) One of the lines of business (the "upstream line of business") provides property or services to the other line of business (the "downstream line of business");

(ii) The upstream line of business provides the same type of property or service to customers of the employer (in accordance with the employer's designation for the testing year under § 1.414(r)–2);

(iii) The number of units of the property or service provided to customers of the employer by the upstream line of business equals at least 25 percent of the total number of units of the same type of property or service provided by the upstream line of business to all persons (including customers of the employer, the downstream line of business, and all other lines of business of the employer), when measured on a uniform basis; and

(iv) The downstream line of business uses, consumes, or substantially modifies the property or service in the course of itself providing property or services to customers of the employer or, alternatively, provides the property or service to customers of the employer at a different level in the chain of commercial distribution than the upstream line of business (e.g., retail versus wholesale).

(3) *Optional rule—(i) Treatment of employees.* For purposes of determining the lines of business to which an employee provides services under paragraph (c)(5) of this section, an employee is not treated as providing services to the downstream line of business if—

(A) The employee is considered to provide services to the downstream line of business under paragraph (c)(5) of this section (applied without regard to the optional rule in this paragraph (d)); and

(B) The employee is so considered solely because the employee's services contribute to providing the property or service from the upstream line of business to the downstream line of business.

(ii) *Purposes for which optional rule applies.* If an employee applies the optional rule in this paragraph (d), the treatment specified in paragraphs (d)(3)(i) (A) and (B) of this section applies for all the following purposes and only for the following purposes—

(A) The separate employee workforce and separate management requirements of paragraphs (b)(4) and (b)(5) of this section;

(B) The 50-employee requirement of § 1.414(r)–4(b); and

(C) The determination of the employees of a qualified separate line of business under § 1.414(r)–7.

(4) *Examples.* The following examples illustrate the application of the optional rule in this paragraph (d).

Example 1. Employer E operates two lines of business as determined under § 1.414(r)–2, one engaged in upholstery textile manufacturing and the other in furniture manufacturing. During the testing year, the upholstery textile line of business provides 300,000 yards of upholstery textiles to customers of Employer E and 100,000 yards of upholstery textiles to Employer E's furniture line of business. The furniture line of business uses the upholstery textiles provided to it by the upholstery textile line of business in the manufacture of upholstered furniture for sale to customers of Employee E. Thus, the upholstery textile line of business provides 75 percent of its total output of upholstery textiles during the testing year to customers of Employer E. In addition, the furniture line of business substantially modifies the upholstery textiles provided to it by the upholstery textile line of business in providing upholstered furniture products to customers of Employee E. Under these facts, Employer E's two lines of business satisfy the requirements of this paragraph (d) with respect to upholstery textiles for the testing year.

Example 2. Employer B is a multinational controlled group of corporations that engages in the exploration, production, refining, and marketing of petrochemical products. See *Example 10* under paragraph (c)(7) of this section. Employer B operates two lines of business as determined under § 1.414(r)–(2). The first line of business ("the exploration, production, and refining line of business") provides lubricating oil, gasoline, and other petrochemical products to wholesale customers of Employee B as well as the second line of business. The wholesale customers of Employee B include independent jobbers, independent franchisees that operate retail filling stations under Employee B's trademark and tradename, as well as chemical and plastics manufacturers. The second line of business (the "retail marketing line of business") provides lubricating oil and gasoline products to retail customers of Employee B through filing stations owned and operated by Employee B. During the testing year, the exploration, production and refining line of business provides 25,000 gallons of lubricating oil, 100,000 gallons of unleaded and 150,000 gallons of leaded gasoline to the retail marketing line of business, and 75,000 gallons of lubricating oil, 500,000 gallons of unleaded gasoline and 15,000 gallons of leaded gasoline to wholesale customers of Employer B. Thus, the exploration, production, and refining line of business provides 75 percent of its output of lubricating oil during the testing year to wholesale customers of Employer B. In addition, because unleaded and leaded gasoline is the same type of property (i.e., gasoline), the exploration, production, and refining line of business provides 67 percent of its output of gasoline products during the testing year to wholesale customers of Employer B. Furthermore, the retail line of business provides lubricating oil and gasoline products to customers of Employer B at different levels in the chain of commercial distribution than the exploration, production, and refining line of business. Under these facts, Employer B's two lines of business satisfy the requirements of this paragraph (d) with respect to both lubricating oil and gasoline products for the testing year.

Example 3. The facts are the same as in *Example 2.* Employer B operates a refinery that produces lubricating oil, gasoline, and other petrochemical products. Employee V is an operating engineer at the refinery who is involved at a stage in the refining process before lubricating oil and gasoline products have been separated from other types of petrochemical products. Employee V performs no other services for Employer B. Absent application of the optional rule in this paragraph (d), Employee V would be considered to provide services to both of Employer B's lines of business. See *Example 11* under paragraph (c)(7) of this section. However, because Employee V's services to the retail marketing line of business contribute solely to providing lubricating oil and gasoline products from the exploration, production, and refining line of business to the retail marketing line of business, under the optional rule in paragraph (d)(3)(i) of this section Employee V is not treated as providing services to the retail marketing line of business.

Example 4. The facts are the same as in *Example 3.* Employee W is a petroleum engineer who conducts geological studies of potential future drilling sites. Employee W performs no other services for Employer B. Absent application of the optional rule in this paragraph (d), Employee W would be considered to provide services to both of Employer B's lines of business. See *Example 12* under paragraph (c)(7) of this Section. However, because Employee W's services to the retail marketing line of business contribute solely to providing lubricating oil and gasoline products from the exploration, production, and refining line of business to the retail marketing line of business, under the optional rule in paragraph (d)(3)(i) of this section Employee W is not treated as providing services to the retail marketing line of business.

Example 5. The facts are the same as in *Example 4.* Employee Y is a vice president in Employer B's home office. As part of his senior management responsibilities, Employee Y helps to set the rate of production at Employer B's refineries in the United States and also helps to set the price charged at the pump at the retail filling stations owned and operated by Employer B in this country. Absent application of the optional rule in this paragraph (d), Employee X would be considered to provide services to

both of Employer B's lines of business within the meaning of paragraph (c)(5) of this section for purposes of satisfying the separate workforce requirement of paragraph (b)(4) of this section. Because Employee X helps to set the price charged at the pump by Employer B's retail marketing line of business, Employee X's services to the retail marketing line of business are not limited to contributing solely to providing lubricating oil and gasoline products from the exploration, production, and refining line of business to the retail marketing line of business, as required under paragraph (d)(3)(i)(B) of this section. Accordingly, even though Employer B's two lines of business satisfy the requirements of this paragraph (d) with respect to both lubricating oil and gasoline products for the testing year, and even though Employer B applies the optional rule in this paragraph (d), Employee X is still considered to provide services to both of Employer B's lines of business.

§ 1.414(r)–4 Qualified separate line of business—fifty employee and notice requirements.

(a) *In general.* This section sets forth the rules for determining whether a separate line of business (as determined under § 1.414(r)–3) satisfies the 50-employee and notice requirements of § 1.414(r–1(b)(2)(iv) (B) and (C), respectively.

(b) *Fifty-employee requirement.* A separate line of business satisfies the 50-employee requirement of § 1.414(r)–1(b)(2)(iv)(B) for a testing year only if on each day of the testing year there are at least 50 employees who provide services to the separate line of business for the testing year and do not provide services to any other separate line of business of the employer for the testing year within the meaning of § 1.414(r)–3(c)(5). For this purpose, all employees of the employer are taken into account (including collectively bargained employees), except employees described in § 1.414(q)–1T, Q&A–9(g)(i.e., the same employees, subject to certain modifications, who are excluded in determining the number of employees in the top-paid group under section 414(q)(4)).

(c) *Notice requirement—(1) General rule.* A separate line of business satisfies the notice requirement of § 1.414(r)–1(b)(2)(iv)(C) for a testing year only if the employer notifies the Secretary that it treats itself as operating qualified separate lines of business for the testing year in accordance with § 1.414(r)–1(b). The employer's notice for the testing year must specify each of the qualified separate lines of business operated by the employer and the section or sections of the Code to be applied on a qualified-separate-line-of-business basis. See § 1.414(r)–1(c). The employer's notice must take the form, must be filed at the time and the place, and must contain any additional information prescribed by the Commissioner in revenue procedures, notices, or other guidance of general applicability. No other notice, whether actual or constructive, satisfies the requirement of this paragraph (c).

(2) *Effect of notice.* Once an employer has provided the notice prescribed in this paragraph (c) for a testing year, and the time for filing the notice for the testing year has expired without its being modified, withdrawn, or revoked, the employer is deemed to have irrevocably elected to apply the requirements of the section or sections of the Code specified in the notice separately with respect to the employees of each qualified separate line of business specified in the notice for all plan years that begin in the testing year. The Commissioner may, in revenue procedures, notices, or other guidance of general applicability, provide for exceptions to the rule in this paragraph (c)(2) as well as for the effect that will be given to the employer's notice for purposes of any future testing year.

§ 1.414(r)–5 Qualified separate line of business—administrative scrutiny requirement—safe harbors.

(a) *In general.* A separate line of business (as determined under § 1.414(r)–3 satisfies the administrative scrutiny requirement of § 1.414(r)–1(b)(2)(iv)(D) for a testing year if the separate line of business satisfies any of the safe harbors in paragraphs (b) through (g) of this section for the testing year. The safe harbor in paragraph (b) of this section implements the statutory safe harbor of section 414(r)(3). The safe harbors in paragraphs (c) through (g) of this section constitute the guidelines provided for under section 414(r)(2)(C). A separate line of business that does not satisfy any of the safe harbors in this section nonetheless satisfies the requirement of administrative scrutiny if the employer requests and receives an individual determination from the Commissioner under § 1.414(r)–6 that the separate line of business satisfies the requirement of administrative scrutiny.

(b) *Statutory safe harbor*—(1) *General rule.* A separate line of business satisfies the safe harbor in this paragraph (b) for the testing year only if the highly compensated employee percentage ratio of the separate line of business is—

(i) At least 50 percent; and

(ii) Non more than 200 percent.

(2) *Highly compensated employee percentage ratio.* For purposes of this paragraph (b), the highly compensated employee percentage ratio of a separate line of business is the fraction (expressed as a percentage), the numerator of which is the percentage of the employees of the separate line of business who are highly compensated employees, and the denominator of which is the percentage of all employees of the employer who are highly compensated employees.

(3) *Employees taken into account.* For purposes of this paragraph (b), the employees taken into account are the same employees who are taken into account for purposes of applying section 410(b) with respect to the first testing day. For this purpose, employees described in section 410 (b)(3) and (b)(4) are excluded. However, section 410(b)(4) is applied with reference to the lowest minimum age requirement applicable under any plan of the employer, and with reference to the lowest service requirement applicable under any plan of the employer, as if all the plans were a single plan under § 1.410(b)–6(b)(2). The employees of the separate line of business are determined by applying § 1.414(r)–7 to the employees taken into account under this paragraph (b)(3). An employee is treated as a highly compensated employee for purposes of this paragraph (b) if the employee is treated as a highly compensated employee for purposes of applying section 410(b) with respect to the first testing day. For the definition of "first testing day," see § 1.414(r)–11(b)(7).

(4) *Ten-percent exception.* A separate line of business is deemed to satisfy paragraph (b)(1)(i) of this section for the testing year if at least 10 percent of all highly compensated employees of the employer provide services to the separate line of business during the testing year and do not provide services to any other separate line of business of the employer during the testing year within the meaning of § 1.414(r)–3(c)(5).

(5) *Determination based on preceding testing year.* A separate line of business that satisfied this safe harbor for the immediately preceding testing year (without taking into account the special rule in this paragraph (b)(5)) is deemed to satisfy the safe harbor for the current testing year. The preceding sentence applies to a separate line of business only if the employer designated the same line of business in the immediately preceding testing year as in the current testing year and either—

(i) The highly compensated employee percentage ratio of the separate line of business for the current testing year does not deviate by more than 10 percent (not 10 percentage points) from

the highly compensated employee percentage ratio of the separate line of business for the immediately preceding testing year; or

(ii) At least 95 percent of the employees of the separate line of business for the current testing year were also employees of the separate line of business for the immediately preceding testing year, and no more than five percent of the employees of the separate line of business for the immediately preceding testing year are not employees of the separate line of business for the current testing year.

(6) *Examples.* The following examples illustrate the application of the safe harbor in this paragraph (b).

Example 1. (i) Employer A operates three separate lines of business as determined under § 1.414(r)–3, that respectively consist of a railroad, an insurance company, and a newspaper. Employer A employs a total of 400 employees, 100 of whom are highly compensated employees. Thus, the percentage of all employees of Employer A who are highly compensated employees in 25 percent. After applying § 1.414(r)–7, the distribution of highly and nonhighly compensated employees among Employer A's separate lines of business is as follows:

	Employer-wide	Railroad	Insurance company	Newspaper
Number of Employees	400	100	150	150
Number of HCEs	100	20	50	30
Number of Non-HCEs	300	80	100	120
HCE Percentage	25%	20%	33%	20%
HCE Percentage Ratio	(100/400)	(20/100)	(50/150)	(30/150)
	N/A	80%	133%	80%
		(20%/25%)	(33%/25%)	(20%/25%)

(ii) Because the highly compensated employee percentage ratio of each separate line of business is at least 50 percent and no more than 200 percent, each of Employer A's separate lines of business satisfies the requirements of the safe harbor in this paragraph (b).

Example 2. (i) Employer B operates three separate lines of business as determined under § 1.414(r)–3, that respectively consist of a dairy products manufacturer, a candy manufacturer, and a chain of housewares stores. Employer B employs a total of 1,000 employees, 100 of whom are highly compensated employees. Thus, the percentage of all employees of Employer B who are highly compensated employees is 10 percent. After applying § 1.414(r)–7, the distribution of highly and nonhighly compensated employees among Employer B's separate lines of business is as follows:

	Employer-wide	Dairy products	Candy	Housewares stores
Number of Employees	1,000	200	500	300
Number of HCEs	100	5	50	45
Number of Non-HCEs	900	195	450	255
HCE Percentage	10%	2.5%	10%	15%
HCE Percentage Ratio	(100/1,000)	(5/200)	(50/500)	(45/300)
	N/A	25%	100%	150%
		(2.5%/10%)	(10%/10%)	(15%/10%)

(ii) Because the highly compensated employee percentage ratio for the dairy products line of business is less than 50 percent, it does not satisfy the requirements of the statutory safe harbor in this paragraph (b). However, because Employer B's other two separate lines of business (candy manufacturing and housewares stores) each has a highly compensated employee percentage ratio that is no less than 50 percent and no greater than 200 percent, they each satisfy the statutory safe harbor in this paragraph (b).

Example 3. (i) The facts are the same as in *Example 2*, except that Employer B operates only two separate lines of business as determined under § 1.414(r)–3, one consisting of the dairy products manufacturer and the candy manufacturer, and the other consisting of the chain of housewares stores. After applying § 1.414(r)–7, the distribution of highly and nonhighly compensated employees among Employer B's separate lines of business is as follows:

	Employer-Wide	Candy/Dairy Products	Housewares Stores
Number of Employees	1,000	700	300
Number of HCEs	100	55	45
Number of Non-HCEs	900	645	255
HCE Percentage	10%	7.9%	15%
HCE Percentage Ratio	(100/1,000)	(55/700)	(45/300)
	N/A	79%	150%
		(7.9%/10%)	(15%/10%)

(ii) Because the highly compensated employee percentage ratio for both of Employer B's separate lines of business is at least 50 percent and no more than 200 percent, they each satisfy the requirements of the statutory safe harbor in this paragraph (b).

(c) *Safe harbor for separate lines of business in different industries*—(1) *In general.* A separate line of business satisfies the safe harbor in this paragraph (c) for the testing year if it is in a different industry or industries from every other separate line of business of the employer. For this purpose, a

separate line of business is in a different industry or industries from every other separate line of business of the employer only if—

(i) The property or services provided to customers of the employer by the separate line of business (as designated by the employer for the testing year under § 1.414(r)–2) fall exclusively within one or more industry categories established by the Commissioner for purposes of this paragraph (c); and

(ii) None of the property or services provided to customers of the employer by any of the employer's other separate lines of business (as designated by the employer for the testing year under § 1.414(r)–2) falls within the same industry category or categories.

(2) *Optional rule for foreign operations.* For purposes of satisfying this paragraph (c), an employer is permitted to disregard any property or services provided to customers of the employer during the testing year by a foreign corporation or foreign partnership (as defined in section 7701(a)(5)), to the extent that income from the provision of the property or services is not effectively connected with the conduct of the trade or business within the United States within the meaning of section 864(c). Thus, for example, an employer is permitted to take into account only property and services provided to customers of the employer by its domestic subsidiaries and property and services provided by its foreign subsidiaries that generate income effectively connected with the conduct of a trade or business within the United States in determining whether the property or services provided to customers of the employer by a separate line of business fall exclusively within one or more industry categories and also whether the property or services provided by any other separate line of business fall within the same industry category or categories.

(3) *Establishment of industry categories.* The Commissioner shall, by revenue procedure or other guidance of general applicability, establish industry categories for purposes of this paragraph (c).

(4) *Examples.* The following examples illustrate the application of the safe harbor in this paragraph (c). For purposes of these examples, it is assumed that, pursuant to paragraph (c)(3) of this section, the Commissioner has established the following industry categories (among others): transportation equipment and services; banking, insurance, and finance; machinery and electronics; and entertainment, sports, and hotels.

Example 1. Among its other business activities, Employer C operates a commercial airline that constitutes a separate line of business under § 1.414(r)–3. In addition, no other separate line of business of Employer C provides to customers of Employer C any property or services in the transportation equipment and services industry category. Under these facts, the separate line of business described in this example satisfies the safe harbor in this paragraph (c).

Example 2. The facts are the same as in *Example 1,* except that Employer C also operates a trucking company that constitutes another separate line of business of Employer C under § 1.414(r)–3. Because the commercial airline and the trucking company both provide to customers of Employer C services in the transportation equipment and services industry category, neither separate line of business satisfies the safe harbor in this paragraph (c).

Example 3. Among its other business activities, Employer D operates a commercial bank and luxury hotel that together constitute a single separate line of business under § 1.414(r)–3. No other separate line of business of employer D provides to customers of Employer D property or services in either the banking, insurance, or financial industry category, or the entertainment, sports, or hotel industry category. Under these facts, the separate line of business described in this example satisfies the safe harbor in this paragraph (c).

Example 4.. The facts are the same as in *Example 3,* except that Employer D also manufactures computers in the United States and abroad. Employer D apportions its computer operations by designating these operations between two separate lines of business, one consisting of its domestic operations located in the United States and the second consisting of its foreign operations by a foreign subsidiary. Because both lines of business provide property and services in the machinery and electronics industry category to customers of Employer D, neither separate line of business would satisfy the safe harbor in this paragraph (c). However, pursuant to the optional rule in paragraph (c)(2) of his section, Employer D disregards the property and services provided by its foreign computer subsidiary. As a result, no other separate line of business of Employer D provides to customers of Employer D any property or services in the machinery and electronics industry category. Under these facts, Employer D's domestic computer operations separate line of business satisfies the safe harbor in this paragraph (c).

(d) *Safe harbor for separate lines of business that are acquired through certain mergers and acquisitions*—(1) *General rule.* A portion of the employer that is acquired through a transaction described in section 410(b)(6)(C) and § 1.410(b)–2(f) (i.e., an asset or stock acquisition, merger, or other similar transaction involving a change in the employer of the employees of a trade or business) (the "acquired line of business") satisfies the safe harbor in this paragraph (d) for each testing year in the transition period provided in paragraph (d)(3) of this section if each of the following requirements is satisfied—

(i) For each testing year within the transition period the employer designates the acquired line of business as a line of business within the meaning of § 1.414(r)–2;

(ii) On the first testing day in each testing year in the transition period:

(A) The acquired line of business constitutes a separate line of business within the meaning of § 1.414(r)–3 (taking into account § 1.414(r)–1(d)(4));

(B) At least 90 percent of the employees who are substantial-service employees with respect to the acquired line of business were also substantial-service employees with respect to the acquired line of business for the immediately preceding testing year; and

(C) No more than 10 percent of the employees who were substantial-service employees with respect to the acquired line of business for the immediately preceding testing year are not substantial-service employees with respect to the acquired line of business in the respective testing year.

See § 1.414(r)–11(b)(2) for the definition of *substantial-service employee.* If the transaction described in paragraph (d)(1)(i) of this section occurs after the first testing day in a testing year, the determinations required by paragraphs (d)(1)(iii) (B) and (C) of this section with respect to that testing year must be made on the date of the transaction.

(2) *Employees taken into account.* For purposes of this paragraph (d), the employees taken into account are the same employees who are taken into account for purposes of applying section 410(b) with respect to the first testing day. For this purpose, employees described in section 410(b)(3) and (b)(4) are excluded. However, section 410(b)(4) is applied with reference to the lowest minimum age requirement, and with reference to the lowest service requirement applicable under any plan of the employer that benefits employees of the separate line of business, as if all the plans were a single plan under § 1.410(b)–6(b)(2). The employees of the separate line of business are determined by applying § 1.414(r)–7 to the employees taken into account under this paragraph (d)(2).

(3) *Transition period.* The transition period for purposes of this safe harbor is the period that begins with the first testing year beginning after the date that the transaction described in paragraph (d)(1) of this section occurs. The employer is permitted, but not required, to extend the transition period to include one, two, or three of the testing

years immediately succeeding that first testing year.

(4) *Examples.* The following examples illustrate the application of the safe harbor in this paragraph (d).

Example 1. Employer E is treated as operating three qualified separate lines of business pursuant to § 1.414(r)–1(b). In 1996, Employer E acquires a company that employs 4,000 employees who manufacture and sell pharmaceutical supplies, and designates that portion as a line of business under § 1.414(r)–2. Under § 1.414(r)–1(d)(4), the pharmaceutical supplies line of business is deemed to satisfy the requirements to be a qualified separate line of business (other than the 50-employee and notice requirements) for testing year 1996. In addition, the determination of whether Employer E's remaining three lines of business constitute qualified separate lines of business for testing year 1996 is made without taking into account the acquired employees and by disregarding the property and services provided to customers of Employer E by the pharmaceutical supplies line of business.

Example 2. The facts are the same as in *Example 1*, except that by the first testing day in 1997 ("Transition Year 1"), Employer E employs an additional 300 employees who provide services solely for the pharmaceutical supplies line of business and no terminations of employment have occurred, increasing the line's number of employees who are substantial-service employees with respect to the pharmaceutical supplies line of business from 4,000 to 4,300. Assume that, on that first testing day in Transition Year 1, the pharmaceutical supplies line of business satisfies the requirements of § 1.414(r)–3, and therefore constitutes a separate line of business. Because 4,000 is 93 percent of 4,300, at least 90 percent of the employees who are substantial-service employees with respect to the pharmaceutical supplies line of business for Transition Year 1 were also substantial-service employees with respect to the pharmaceutical supplies line of business for testing year 1996 (the immediately preceding testing year). Under these facts, the pharmaceutical supplies separate line of business satisfies the safe habor in this paragraph (d) for Transition Year 1.

Example 3. The facts are the same as in *Example 2*, except that, before the first day of the next testing year ("Transition Year 2"), Employer E permanently transfers 200 of the 4,300 employees who were substantial-service employees with respect to the pharmaceutical line of business on the first testing day in Transition Year 1 to a different line of business and does not hire any additional employees for the pharmaceutical supplies line of business. Therefore, by the first testing day in Transition Year 2, the number of employees who are substantial-service employees with respect to the pharmaceutical line of business of Employer E has decreased from 4,300 to 4,100. Assume that, on that first testing day in Transition Year 2, the pharmaceutical supplies line of business constitutes a separate line of business within the meaning of § 1.414(r)–3. Because 200 is approximately 5 percent of 4,300, no more than 10 percent of the employees who were substantial-service employees of the pharmaceutical line of business for Transition Year 1 are not substantial-service employees of the pharmaceutical line of business in Transition Year 2. Under these facts, the pharmaceutical supplies separate line of business continues to satisfy the safe harbor in this paragraph (d) for Transition Year 2.

(e) *Safe harbor for separate lines of business reported as industry segments*—(1) *In general.* A separate line of business satisfies the safe harbor in this paragraph (e) for the testing year if, for the employer's fiscal year ending latest in the testing year, the separate line of business is reported as one or more industry segments on its annual report required to be filed in conformity with either—

(i) Form 10–K, annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 ("Form 10–K"); or

(ii) Form 20–F, Annual Report Pursuant to Section 13(a) or 15(d) of the Securities Exchange Act of 1934 with Item 18 financials ("Form 20–F"), and the employer timely files either the Form 10–K or Form 20–F with the Securities and Exchange Commission ("SEC").

(2) *Reported as an industry segment in conformity with Form 10–K or Form 20–F.* For purposes of this paragraph (e), a separate line of business is reported as one or more industry segments in conformity with either Form 10–K or Form 20–F only if—

(i) The separate line of business consists of one or more industry segments within the meaning of paragraphs 10(a), 11(b), and 12 through 14 of the Statement of Financial Accounting Standards No. 14, Financial Reporting for Segments of a Business Enterprise ("FAS 14"); and

(ii) The property or services provided to customers of the employer by the separate line of business (as designated by the employer for the testing year under § 1.414(r)–2) is identical to the property or services provided to customers of the employer by the industry segment or segments (as determined under paragraphs 10(a), 11(b), and 12 through 14 of FAS 14).

(3) *Timely filing of Form 10–K or Form 20–F.* For purposes of this paragraph (e), a Form 10–K of Form 20–F is timely filed with the SEC if it is filed within the required period as provided under 17 CFR 240.12b–25(b)(2)(ii). Therefore, the required period for timely filing of the Form 10–K is the 90-day period after the end of the fiscal year covered by the annual report (including the 15-day extension), and the required period for timely filing of the Form 20–F is the 6-month period after the end of the fiscal year covered by the annual report (including the 15-day extension).

(4) *Examples.* The following examples illustrate the application of the safe harbor in this paragraph (e).

Example 1. Among its other business activities, Employer F operates a bearing manufacturing firm that constitutes a separate line of business under § 1.414(r)–3. Employer F is required to file an annual Form 10–K with the SEC. On its timely filed Form 10–K, Employer F reports its bearing manufacturing operations as an industry segment in accordance of FAS 14 (as determined under paragraphs 10(a), 11(b), and 12 through 14 of FAS 14). The group of bearing products provided by the separate line of business (as designated by Employer F under § 1.414(r)–2) is identical to the group of bearing products provided by the industry segment (as determined under paragraphs 10(a), 11(b), and 12 through 14 of FAS 14). Under these facts, the separate line of business described in this example satisfies the safe harbor in this paragraph (e).

Example 2. The facts are the same as in *Example 1*, except that Employer F has apportioned its bearing manufacturing operations between two separate lines of business as determined under § 1.414(r)–3, one engaged in the manufacture of bearings for use in the automotive industry, and a second engaged in the manufacture of bearings for use in the aerospace industry. Because neither separate line of business provides a group of property or services to customers of Employer F that is identical to the group of bearing products provided by the industry segment reported on Employer F's annual Form 10–K, neither separate line of business described in this example satisfies the safe harbor in this paragraph (e).

(f) *Safe harbor for separate lines of business that provide the same average benefits as other separate lines of business*—(1) *General rule.* A separate line of business satisfies the safe harbor in this paragraph (f) for the testing year only if the level of benefits provided to employees of the separate line of business satisfies paragraph (f)(2) or (f)(3) of this section, whichever is applicable.

(2) *Separate lines of business with a disproportionate number of nonhighly compensated employees*—(i) *Applicability of safe harbor.* This paragraph (f)(2) applies to a separate line of business that for the testing year has a highly compensated employee percentage ratio of less than 50 percent (as determined under paragraph (b)(2) of this section).

(ii) *Requirement.* A separate line of business satisfies this paragraph (f)(2) only if the actual benefit percentage of the group of nonhighly compensated employees of the separate line of business for the testing period that ends with or within the testing year is at least as great as the actual benefit percentage

of the group of all other nonhighly compensated employees of the employer for the same testing period. See § 1.410 (b)–5(c) and (d)(3)(ii) for the definitions of actual benefit percentage and testing period, respectively. In determining actual benefit percentages for purposes of this paragraph (f)(2)(ii), the special rule in § 1.410(b)–5(e)(3) (permitting an employer to determine employee benefit percentages separately for defined contribution and defined benefit plans) may not be used.

(3) *Separate lines of business with a disproportionate number of highly compensated employees*—(i) *Applicability of safe harbor.* This paragraph (f)(3) applies to a separate line of business that for the testing year has a highly compensated employee percentage ratio of more than 200 percent (as determined under paragraph (b)(2) of this section).

(ii) *Requirement.* A separate line of business satisfies this paragraph (f)(3) only if the actual benefit percentage of the group of highly compensated employees of the separate line of business for the testing period that ends with or within the testing year is no greater than the actual benefit percentage of the group of all other highly compensated employees of the employer for the same testing period. See § 1.410 (b)–5(c) and (d)(3)(ii) for the definitions of actual benefit percentage and testing period, respectively. In determining actual benefit percentages for purposes of this paragraph (f)(3)(ii), the special rule in § 1.410(b)–5(e)(3) (permitting an employer to determine employee benefit percentages separately for defined contribution and defined benefit plans) may not be used.

(4) *Employees taken into account.* An employee of a separate line of business (as determined under § 1.414(r)–7 is taken into account for a testing period for purposes of this paragraph (f) only if the employee is an employee of the separate line of business on the first testing day, and would not be an excludable employee for purposes of applying the average benefit percentage test of § 1.410(b)–5 to a plan for a plan year included in that testing period. In determining whether an employee is an excludable employee for purposes of the average benefit percentage test, the employer is assumed not to be operating qualified separate lines of business under § 1.414(r)–1(b). An employee is treated as a highly compensated employee for purposes of this paragraph (f) if the employee is treated as a highly compensated employee for purposes of applying section 410(b) on the first testing day. See § 1.414(r)–11(b)(7) for the definition of "first testing day".

(5) *Example.* The rules of this paragraph (f) are illustrated by the following example.

Example. (i) Employer G is treated as operating two separate lines of business, Line 1 and Line 2, in accordance with § 1.414(r)–1(b). Employer G maintains three qualified plans. Plan A is a calendar-year profit-sharing plan that benefits all employees of Employer G. Plan B is a defined benefit plan with a plan year ending March 31 that benefits all employees of Line 1. Plan C is a defined benefit plan with a plan year ending November 30 that benefits all employees of Line 2.

(ii) In 1995, Line 1 has a highly compensated employee percentage ratio of 25 percent. Employer G's first testing day is March 31. After applying the rules of § 1.414(r)–7, the nonhighly compensated employees of Line 1 and Line 2 on March 31, 1995, are N1–N80 and N81–N100, respectively. N1 is an excludable employee under § 1.410(b)–6 for purposes of the average benefit percentage test during the testing period that includes the plan years of Plans A, B, and C that end in 1995 (the "1995 testing period"), and would therefore not be taken into account in determining whether any of those plans satisfied the average benefit percentage test of § 1.410(b)–5 for plan years included in that testing period, because N1 does not satisfy the minimum age and service conditions under any plan of the employer. All other employees of Line 1 and Line 2 on March 31, 1995 are nonexcludable employees for purposes of the average benefit percentage test during the 1995 testing period.

(iii) In order for Line 1 to satisfy the requirements of this paragraph (f) for 1995, the actual benefit percentage of N2–N80 for the 1995 testing period under Plans A, B and C must be at least as great as the actual benefit percentage of N81–N100 for the same testing period under the same plans. N1 is not taken into account because N1 is an excludable employees for purposes of the average benefit percentage test for the 1995 testing period. Any other employees who were taken into account for purposes of the average benefit percentage test for the 1995 testing period are excluded because they are not employees of Line 1 or Line 2 on March 31, 1995.

(g) *Safe harbor for separate lines of business that provide minimum or maximum benefits.* —(1) *In general.* A separate line of business satisfied the safe harbor in this paragraph (g) for the testing only if the level of benefits provided to employees of the separate line of business satisfies paragraph (g)(2) or (g)(3) of this section, whichever is applicable. For this purpose, the level of benefits is determined with respect to all qualified plans of the employer that benefit employees of the separate line of business for plan years that begin in the testing year.

(2) *Minimum benefit required*—.(i) *Applicability.* This paragraph (g)(2) applies to a separate line of business that for the test year has a highly compensated employee percentage ratio of less than 50 percent (as determined under paragraph (b)(2) of this section).

(ii) *Requirement.* A separate line of business satisfies this paragraph (g)(2) only if one of the following requirements is satisfied—

(A) At least 80 percent of all nonhighly compensated employees of the separate line of business either accrue a benefit for the plan year that equals or exceeds the defined benefit minimum in paragraph (g)(2)(iii) of this section, receive all allocation for the plan year that equal or exceeds the defined contribution minimum in paragraph (g)(2)(iv) of this section, or accrue a benefit and receive an allocation that together equal or exceed the combined plan minimum in paragraph (g)(4) of this section. The defined benefit minimum must be provided in a defined plan, and the defined contribution minimum must be provided in a defined contribution plan.

(B) The separate line of business would satisfy the requirements of paragraph (g)(2)(ii)(A) of this section if the 80 percent threshold were reduced to 60 percent, and the average of the accrual rates or allocation rates of all nonhighly compensated employees in the separate line of business equals or exceeds the minimum amount described for each individual employee in paragraph (g)(2)(ii)(A) of this section.

(iii) *Defined benefit minimum*—(A) *In general.* The defined benefit minimum for a plan year is the employer-derived accrual that would result in a normal accrual rate for the plan year equal to 0.75 percent of compensation. For purposes of this paragraph (g)(2)(iii), the normal accrual rate is the percentage (not less than 0) determining by subtracting the employee's normalized accrued benefit as of the end of the plan year (expressed as a percentage of average annual compensation as of the end of the plan year) from the employee's normalized accrued benefit as of the end of the prior plan year (expressed as a percentage of average annual compensation as of the end of the prior plan year).

(B) *Normal form and equivalent benefits.* The benefit that is tested for purposes of this paragraph (g)(2)(iii) is the accrued retirement benefit commencing at normal retirement age. If the normal form of benefit for a plan being tested is other than a straight life annuity beginning at a normal retirement age of 65, the benefit must be normalized (within the meaning of § 1.401(a)(4)–12) to a straight life annuity

commencing at age 65. No adjustment is permitted for early retirement benefits or for any ancillary benefit, including disability benefits.

(C) *Compensation definition.* The underlying definition of compensation used for purposes of determining accrual rates under this paragraph (g)(2)(iii) must be a definition of compensation that automatically satisfies section 414(s) without a test for nondiscrimination (see § 1.414(s)–1(c)).

(D) *Average compensation requirement.* For purposes of determining accrual rates, compensation must be average annual compensation within the meaning of § 1.401(a)(4)–3(e)(2) determined using a five-year averaging period. The compensation history to be taken into account are all years beginning with the first year in which the employee benefits under the plan, and ending with the last plan year in which the employee participates in the plan. However, a plan may disregard in a reasonable and consistent manner: years before 1992, years more than 10 years preceding the current plan year, years in which an employee has less than 1,000 hours of service (see § 1.401(a)(4)–3(b)(8)(x)(A)(*2*) and years for which the employer does not use this paragraph (g)(2) to satisfy this safe harbor with respect to the separate line of business. If a plan provides a defined benefit minimum that uses three consecutive years (in lieu of five) for calculating average annual compensation, the 0.75 percent annual accrual in paragraph (g)(2)(iii)(A) of this section is multiplied by 93.3 percent, resulting in a normal accrual rate equal to 0.70 percent.

(E) *Special rules.* The special rules of § 1.401(a)(4)–3(f) apply for purposes of determining whether a benefit accrual satisfies the minimum benefit requirement. For example, benefits may be determined on other than a plan year basis as permitted by § 1.401(a)(4)–3(f)(6). A plan described in section 412(i) may be used to provide the defined benefit minimum described in this paragraph (g)(2). In such case, the rules in § 1.416–1, M–17, apply to such a plan. For purposes of this paragraph (g)(2)(iii) an employee is treated as accruing a benefit equal to the minimum benefit in paragraph (g)(2)(iii)(A) of this section if the reason that the employee does not accrue such a benefit is either—

(*1*) The application of a plan provision that applies uniformly to all employees in the plan and limits the service used for purposes of benefit accrual to a specified maximum no less than 25 years, or

(*2*) The employee has attained normal retirement age and fails to accrue a benefit solely because of the provisions of section 411(b)(1)(H)(iii) regarding adjustments for delayed retirement.

(iv) *Defined contribution minimum*—(A) *In general.* The defined contribution minimum for a plan year is an allocation that results in an allocation rate for the plan year (within the meaning of § 1.401(a)(4)–2(c)) equal to three percent of an employee's plan year compensation. Plan year compensation must be based on a definition of compensation that automatically satisfies section 414(s) without a test for nondiscrimination (see § 1.414(s)–1(c)). For this purpose, allocations that are taken into account to do not include matching contributions described in § 1.401(m)–1(f)(12), elective contributions described in § 1.401(k)–1(g)(3), any adjustment in allocation rates permitted under section 401(*l*) or imputed disparity under § 1.401(a)(4)–7.

(B) *Modified allocation definition for averaging.* For purposes of determining whether the average allocation rates for all nonhighly compensated employees of the separate line of business satisfy the minimum benefit requirement in paragraph (g)(2)(ii)(B) of this section, matching contributions described in § 1.401(m)–1(f)(12) are treated as employer allocations.

(3) *Maximum benefit permitted—(i) Applicability.* This paragraph (g)(3) applies to a separate line of business that for the testing year has a highly compensated employee percentage ratio that exceeds 200 percent (as determined under paragraph (b)(2) of this section).

(ii) *Requirement.* A separate line of business satisfies this paragraph (g)(3) only if one of the following requirements is satisfied—

(A) No highly compensated employee of the separate line of business accrues a benefit for the plan year that results in an accrual rate that exceeds the defined benefit maximum in paragraph (g)(3)(iii) of this section, receives an allocation that exceeds the defined contribution maximum in paragraph (g)(3)(iv) of this section, or accrues a benefit and receives an allocation that together exceed the combined plan maximum in paragraph (g)(4) of this section. All benefits provided by qualified defined benefit plans are subject to the defined benefit maximum, and all benefits provided by qualified defined contribution plans are subject to the defined contribution maximum.

(B) The average of the accrual rates or allocation rates of all highly compensated employees of the separate line of business is no more than 80 percent of the maximum amount for any individual employee described in paragraph (g)(3)(ii)(A) of this section.

(iii) *Defined benefit maximum*—(A) *In general.* The defined benefit maximum is the employer-derived accrued benefit that would result from calculating a normal accrual rate equal to 2.5 percent of compensation.

(B) *Determination of defined benefit maximum.* The accrual rate used for the defined benefit maximum is determined in the same manner as the normal accrual rate used for the defined benefit minimum is determined under paragraph (g)(2)(iii) of this section, except as provided below. Thus, a defined benefit plan may provide, in addition to the defined benefit maximum, any benefit the value of which is not taken into account under paragraph (g)(2)(iii) of this section. For example, a plan may provide disability benefits described in § 1.401(a)(4)–3(d)(6)(vi) or ancillary benefits described in § 1.401(a)(4)–4(e)(2).

(C) *Adjustment for different compensation definitions.* If a plan subject to the defined benefit maximum determines accrual rates by using three consecutive years (in lieu of five) for purposes of determining average annual compensation, the 2.5 percent annual accrual rate in paragraph (g)(3)(iii)(B) of this section is multiplied by 93.3 percent, resulting in a maximum accrual rate equal to 2.33 percent. Compensation may be less inclusive than the compensation described in paragraph (g)(2)(iii)(C) of this section. However, no adjustment is made to the maximum normal accrual rate because of the use of a definition of compensation that is less inclusive than the compensation described in paragraph (g)(2)(iii)(C) of this section.

(D) *Adjustment for certain subsidies.* If the plan provides subsidized optional forms of benefit, the accrual rate for purposes of this paragraph (g)(3) must be determined by taking those subsidies into account. An optional form of benefit is considered subsidized if the normalized optional form of benefit is larger than the normalized normal retirement benefit under the plan. In the case of a plan with subsidized optional forms, the determination of accrual rate for the plan year under paragraph (g)(2)(iii)(A) of this section is modified by substituting the largest of the sums of the normalized QJSAs and QSUPPs determined for each age in § 1.401(a)(4)–3(d)(2)(ii)(C) for the normalized accrued benefit as of the end of the current plan year, and the largest of the sums of the normalized QSSAs and QSUPPs determined for each age in § 1.401(a)(4)–3(d)(2)(ii)(D) for the normalized accrued benefit as of the end of the prior plan year.

(iv) *Defined contribution maximum.* The defined contribution maximum is an allocation that results in an allocation rate for the plan year (within the meaning of § 1.401(a)(4)–2(c)) equal to 10 percent of an employee's plan year compensation. Compensation may be less inclusive than the compensation described in paragraph (g)(2)(iv)(A) of this section. However, no adjustment is made to the defined contribution maximum because of the use of a definition of compensation that is less inclusive than the compensation described in paragraph (g)(2)(iv)(A) of this section. For this purpose, allocations that are taken into account do not include elective contributions described in § 1.401(K)–1(g)(3), any adjustment in allocation rates permitted under section 401(*l*) or imputed disparity under § 1.401(a)(4)–7 but do include employer matching contributions under § 1.401(m)–1(f)(12).

(4) *Duplication of benefits or contributions*—(i) *Plans of the same type.* In the case of an employee who benefits under more than one defined benefit plan, the defined benefit minimum required or the defined benefit maximum permitted under this paragraph (g) is determined by reference to the employee's aggregate employer-provided benefit under all qualified defined benefit plans of the employer. In the case of an employee who benefits under more than one defined contribution plan, the defined contribution minimum required or the defined contribution maximum permitted under this paragraph (g) is determined by reference to the employee's aggregate employer-provided allocations under all qualified defined contribution plans of the employer.

(ii) *Plans of different types.* In the case of an employee who benefits under both a defined benefit plan and a defined contribution plan, a percentage of the minimum benefit required or the maximum benefit permitted under this paragraph (g) may be provided in each type of plan as long as the combined percentage equals at least 100 percent in the case of the minimum benefit required and does not exceed 100 percent in the case of the maximum benefit permitted. Thus, for example, if a highly compensated employee benefits under both types of plans and accrues an aggregate adjusted normal accrual rate equal to 1.25 percent of average annual compensation under all defined benefit plans of the employer (i.e, 50 percent of the defined benefit maximum described in paragraph (g)(3)(iii) of this section), in order to comply with the maximum benefit safe harbor, the employee may not receive an aggregate allocation under all defined contribution plans of the employer in excess of five percent of plan year compensation (i.e., 50 percent of the defined contribution maximum described in paragraph (g)(3)(iv) of this section).

(iii) *Special rule for floor-offset arrangements.* In the case of a floor-offset arrangement (as described in § 1.401(a)(4)–8(d)), the minimum or maximum benefit rules are applied to each plan as if the other plan did not exist. Thus, the defined benefit plan must provide at least 100 percent of the defined benefit minimum (or no more than 100 percent of the defined benefit maximum) based on the gross benefit prior to offset, and the defined contribution plan must provide at least 100 percent of the defined contribution minimum (or no more than 100 percent of the defined contribution maximum).

(5) *Certain contingency provisions ignored.* For purposes of this paragraph (g), an employee's accrual or allocation rate under a plan is determined without regard to any plan provision the effect of which is to make the operation of the minimum or maximum benefit formula contingent on the failure of the separate line of business otherwise to satisfy the requirement of administrative scrutiny.

(6) *Employees taken into account.* For purposes of this paragraph (g), an employee is taken into account if the employee is taken into account for purposes of applying section 410(b) with respect to any testing day for the testing year. For this purpose, employees described in section 410 (b)(3) and (b)(4) are excluded. However, section 410(b)(4) is applied with reference to the lowest minimum age requirement applicable, and with reference to the lowest service requirement applicable under any plan of the employer that benefits employees of the separate line of business, as if all the plans were a single plan under § 1.410(b)–6(b)(2). The employees of the separate line of business are determined by applying § 1.414(r)–7 to the employees taken into account under this paragraph (g)(6). An employee is treated as a highly compensated employee for purposes of this paragraph (g) if the employee is treated as a highly compensated employee for purposes of applying section 410(b) on any testing day for the testing year. For the definition of "testing day," see § 1.414(r)–11(b)(6).

§ 1.414(r)–6 Qualified separate line of business—administrative scrutiny requirement—individual determinations.

(a) *In general.* A separate line of business (as determined under § 1.414(r)–3) that does not satisfy any of the safe harbors in § 1.414(r)–5 for a testing year nonetheless satisfies the administrative scrutiny requirement of § 1.414(r)–1(b)(2)(iv)(D) if the employer requests and receives from the Commissioner an individual determination under this section that the separate line of business satisfies the requirement of administrative scrutiny for the testing year. This section implements the individual determinations provided for under section 414(r)(2)(C). Paragraph (b) of this section prescribes the conditions under which an employer is permitted to request an individual determination under this section. Paragraph (c) of this section describes the factors the Commissioner will take into account in determining whether to grant an individual determination under this section.

(b) *Conditions under which an employer is permitted to request an individual determination.* An employer is permitted to request an individual determination under this section with respect to a separate line of business for a testing year only if—

(1) The employer follows the procedures prescribed by the Commissioner in revenue procedures, notices, or other guidance of general applicability for requesting an individual determination under this section; and

(2) The separate line of business satisfies at least one of the following requirements:

(i) The highly compensated employee percentage of the separate line of business for the testing year, as determined under § 1.414(r)–5(b), is at least 40 percent and not more than 250 percent;

(ii) Ninety percent of the gross revenues of the separate line of business result from the provision of property or services that fall exclusively within one or more industry categories established by the Commissioner, as determined under § 1.414(r)-5(c), and no more than ten percent of the gross revenues of any of the employer's other separate lines of business result from property or services provided to customers of the employer that fall within the same industry category or categories;

(iii) The employer is not required to file Form 10–K or 20–F, but there is a certification from an independent certified public accountant that the employer would have been required to report the separate line of business as one or more reportable industry segments on either the Form 10–K or the Form 20–F if the employer had been required to file the applicable SEC

report for the employer's fiscal year ending in the testing year, and the separate line of business therefore would have satisfied the administrative safe harbor in § 1.414(r)–5(e);

(iv) The separate line of business has a highly compensated employee percentage, as determined under § 1.414(r)–5(b), of less than 40 percent, and either—

(A) the separate line of business would satisfy the average benefits safe harbor of § 1.414(r)–5(f)(2)(ii) if the actual benefit percentage of the nonhighly compensated employees of the other separate lines of business were reduced by one-third; or

(B) The separate line of business would satisfy the minimum benefit safe harbor of § 1.414(r)–5(g) if the minimum benefit were reduced by one-thrid;

(v) The separate line of business has a highly compensated employee percentage, as determined under § 1.414(r)–5(b), of more than 250 percent, and either—

(A) The separate line of business would satisfy the average benefits safe harbor of § 1.414(r)–5(f)(3)(ii) if the actual benefit percentage of the highly compensated employees of the other separate lines of business were increased by one-third; or

(B) The separate line of business would satisfy the maximum benefit safe harbor of § 1.414(r)–5(g) if the maximum benefit were increased by one-third; or

(vi) The separate line of business manages a government facility pursuant to a government contract that specifies the benefits to be provided under a qualified plan.

(c) *Factors taken into account in determining whether to grant an individual determination*—(1) *In general.* Paragraphs (c)(2) through (c)(12) of this section list the factors the Commissioner will take into account in determining whether to grant an individual determination under this section. No one factor is necessarily determinative.

(2) *Differences in property or services.* The degree to which the property or services provided by the separate line of business differ from the property or services provided by the employer's other lines of business.

(3) *Separateness of organization and operation.* The degree to which the separate line of business is organized and operated separately from the remainder of the employer, including the degree of vertical integration of the separate line of business with any other line of business of the employer and the degree to which the separate line of business has its own tangible assets.

(4) *Nature of business competition.* The nature of the business competition faced by the separate line of business, the degree to which competitors of the separate line of business are organized as independent stand-alone companies that do not engage in other lines of business, and the type and level of benefits provided by competitors of the separate line of business to their employees.

(5) *Historical factors.* Whether the separate line of business was acquired from another employer, whether it developed separately within the employer, and whether it was operated separately before the enactment of the Tax Reform Act of 1986.

(6) *Geographic factors.* The degree to which the separate line of business is operated in a distinct geographic area from the employer's other lines of business, and the impact geographic factors have on the employer's compensation and benefit policies.

(7) *Safe harbors.* The degree to which the separate line of business fails to satisfy the safe harbors of § 1.414(r)–5, in particular, the average benefits and minimum or maximum benefits safe harbors of § 1.414(r)–5(f) and (g).

(8) *Size.* The size of the separate line of business relative to the remainder of the employer.

(9) *Allocation method.* Which allocation method for residual shared employees the employer applies under § 1.414(r)–7(c), and the impact the allocation method will have on the composition of the groups of employees who are treated as employees of each of the employer's lines of business.

(10) *Other lines of business.* The degree to which the employer's other lines of business satisfy the requirements of a qualified separate line of business for the testing year under § 1.414(r)–1(b)(2).

(11) *Regulated industries.* Whether the separate line of business furnishes or sells electrical energy, water or sewage disposal services; gas or steam through a local distribution system; telephone services or other communication services; or transportation of gas or steam by pipeline, if the rates for such furnishing or sale, as the case may be, have been established or approved by a State or political subdivision thereof, by any agency or instrumentality of the United States, or by a public service or public utility commission or other similar body of any State or political subdivision thereof.

(12) *Other relevant factors.* Any other factor or special circumstance the Commissioner deems relevant in determining whether to grant an individual determination under this section with respect to the separate line of business.

§ 1.414(r)–7 Determination of the employees of an employer's qualified separate lines of business.

(a) *Introduction*—(1) *In general.* This section provides the rules for determining the employees of each qualified separate line of business operated by an employer. Paragraph (a)(2) of this section lists the specific provisions of the regulations for which these rules apply. Paragraph (b) of this section provides the procedure for assigning the employees of the employer among the qualified separate lines of business of the employer and for determining the day or days on which such assignments must be made. Under this procedure, each employee (i.e., a substantial-service employee or a residual shared employee as defined in § 1.414(r)–11(b)(2) and (4)) is assigned to a single qualified separate line of business in a consistent manner for all purposes listed in paragraph (a)(2) of this section with respect to the testing year and plan years beginning within the testing year. Paragraph (c) of this section provides the assignment and allocation methods for assigning residual shared employees among qualified separate lines of business, and paragraph (d) of this section provides an optional rule for assigning employees who are transferred on a temporary basis from a qualified separate line of business to another qualified separate line of business.

(2) *Purposes for which this section applies.* This section applies solely for purposes of determining whether—

(i) A separate line of business satisfies the statutory safe harbor of § 1.414(r)–5(b) for a testing year (see § 1.414(r)–5(b)(3) for the employees taken into account for this purpose);

(ii) A separate line of business satisfies the merger and acquisition safe harbor of § 1.414(r)–5(d) for a testing year (see § 1.414(r)–5(d)(2) for the employees taken into account for this purpose);

(iii) A separate line of business satisfies the average benefits safe harbor of § 414(r)–5(f) for a testing year (see § 414(r)–5(f)(4) for the employees taken into account for this purpose);

(iv) A separate line of business satisfies the minimum or maximum benefits safe harbor of § 414(r)–5(g) for a testing year (see § 1.414(r)–5(g)(6) for the employees taken into account for this purpose);

(v) A plan of the employer satisfies sections 410(b) and 401(a)(4) for a plan year (see § 414(r)–8(d)(3) for the

employees taken into account for this purpose); or

(vi) A plan of the employer satisfies section 401(a)(26) for a plan year (see § 414(r)–9(c)(3) for the employees taken into account for this purpose).

(b) *Assignment procedure*—(1) *In general.* To apply the provisions listed in paragraph (a)(2) of this section with respect to a testing year or plan year, as the case may be, each of the employees taken into account under that provision must be assigned to a qualified separate line of business of the employer on one or more testing days (or section 401(a)(26) testing days) during the year. The first day for which this assignment procedure is required for a testing year is the first testing day. See § 414(r)–11(b)(6), (7) and (8) (definitions of "testing day", "first testing day" and "section 401(a)(26) testing day"). Section § 414(r)–8 may require that the assignment procedure be repeated for testing days that fall after the first testing day (including testing days that fall after the close of the testing year in a plan year that begins in the testing year). Accordingly, new employees may be taken into account for the first time on these later testing days who were not taken into account on the first testing day. Section § 414(r)–9 may have the same effect with respect to section 401(a)(26) testing days that fall after the first testing day.

(2) *Assignment for the first testing day.* The employees taken into account under a provision described in paragraph (a)(2) of this section with respect to the first testing day for a testing year are assigned among the employer's qualified separate lines of business by applying the following procedure to each of those employees—

(i) An employee who is a substantial-service employee with respect to a qualified separate line of business within the meaning of § 414(r)–11(b)(2) must be assigned to that qualified separate line of business;

(ii) An employee who is a residual shared employee within the meaning of § 414(r)–11(b)(4) with respect to a qualified separate line of business must be assigned to a qualified separate line of business under paragraph (c) of this section.

Each employee assigned to a qualified separate line of business under paragraph (b)(2)(i) of this section or this paragraph (b)(2)(ii) remains assigned to the same qualified separate line of business for all purposes with respect to the testing year listed in paragraph (a)(2) of this section and for all plan years beginning in that testing year. Once an employee is assigned to a qualified separate line of business with respect to a particular testing day or section 401(a)(26) testing day, that employee remains assigned to that qualified separate line of business after the employee terminates employment. However, after the employee terminates employment, that employee will in most cases not be taken into account with respect to a subsequent testing day or section 401(a)(26) testing day for purposes of applying one or more of the provisions in paragraph (a)(2) of this section.

(3) *Assignment of new employees for subsequent testing days.* After the first testing day for the testing year, the employees taken into account under a provision described in paragraph (a)(2) of this section with respect to a subsequent testing day (or a section 401(a)(26) testing day) for the testing year may include one or more employees who previously have not been assigned to a qualified separate line of business for any purpose listed in paragraph (a)(2) of this section with respect to the testing year. An employee may not previously have been assigned to a qualified separate line of business for any purpose with respect to the testing year if, for example, the employee has just been hired or has just become a nonexcludable employee. Previously unassigned employees are assigned among the employer's qualified separate lines of business by applying the procedure in paragraph (b)(2) of this section to those employees. In determining whether an employee who is not employed by the employer during the testing year is a substantial-service or a residual shared employee with respect to a qualified separate line of business (including whether the residual shared employee is eligible for assignment under paragraph (c)(2) of this section), § 414(r)–3(c)(5) is applied with reference to services performed by the employee during a period in the immediately succeeding testing year that are reasonably representative of the employee's services for the employer.

(4) *Special rule for employers using annual option under section 410(b).* Notwithstanding the fact that paragraphs (b)(1) through (b)(3) of this section generally only require employees to be assigned on testing days beginning with the first testing day, if a plan is tested under section 410(b) using the annual option of § 410(b)–8(a)(4) (including for purposes of the average benefit percentage test), employees must be assigned on every day of the plan year of that plan for purposes of this paragraph (b). Thus, all employees who provide services at any time during the plan year of a plan that is tested using the annual option of § 1.410(b)–8(a)(4) must be assigned to a line of business even if they terminate employment before the first testing day within the meaning of § 414(r)–11(b)(7) of the testing year in which the plan year begins.

(c) *Assignment and allocation of residual shared employees*—(1) *In general.* All residual shared employees must be assigned among an employer's qualified separate lines of business. An employer is permitted to assign certain residual shared employees under paragraph (c)(2) of this section. All residual shared employees who are not assigned under paragraph (c)(2) of this section must be assigned among an employer's qualified separate lines of business under one of the allocation methods provided in paragraphs (c)(3) through (c)(5) of this section. An employer is permitted to select which method of allocation to apply for the testing year to these other residual shared employees. However, the same allocation method must be used for all these other residual shared employees, and for all purposes listed in paragraph (a)(2) of this section with respect to the testing year.

(2) *Option for assigning certain residual shared employees.* For purposes of this section, if a residual shared employee provides at least 50 percent of the employee's services to a qualified line of business within the meaning of § 414(r)–3(c)(5), the employer is permitted to assign that residual shared employee to that qualified separate line of business. This optional rule may be applied separately with respect to each residual shared employee. Thus, an employer is permitted to determine, on an individual employee basis, whether a residual shared employee is assigned under this optional rule to a qualified separate line of business.

(3) *Dominant line of business method of allocation*—(i) *In general.* Under the method of allocation in this paragraph (c)(3), all residual shared employees who are not assigned under paragraph (c)(2) of this section are allocated to the employer's dominant line of business. This method does not apply unless the employer has a dominant line of business within the meaning of paragraph (c)(3)(ii) or (c)(3)(iv) of this section. If an employer has more than one dominant line of business under this paragraph (c), the employer must select which qualified separate lines of business is its dominant line of business.

(ii) *Dominant line of business.* An employer's dominant line of business is that qualified separate line of business

that has an employee assignment percentage of at least 50 percent.

(iii) *Employee assignment percentage*—(A) *Determination of percentage.* The employee assignment percentage of a qualified separate line of business is the fraction (expressed as a percentage)—

(*1*) The numerator of which is the sum of the number of substantial-service employees with respect to the qualified separate line of business assigned to that line of business under paragraph (b) of this section, and the number of residual shared employees with respect to the qualified separate line of business who are assigned to that qualified separate line of business under paragraph (c)(2) of this section; and

(*2*) The denominator of which is the total number of these employees who are assigned to all qualified separate lines of business of the employer under paragraphs (b) and (c)(2) of this section.

(B) *Employees taken into account.* The employee assignment percentage is calculated solely with respect to employees who are taken into account for purposes of satisfying section 410(b) with respect to the first testing day. Therefore, this percentage is calculated only once for all purposes with respect to a testing year. The employees described in section 410(b)(3) and (4) are excluded. However, section 410(b)(4) is applied with reference to the lowest minimum age requirement applicable under any plan of the employer, and with reference to the lowest service requirement applicable under any plan of the employer, as if all the plans were a single plan under § 1.410(b)–6(b)(2).

(iv) *Option to apply reduced percentage.* An employer is permitted to determine whether it has a dominant line of business by substituting "35 percent" for "50 percent" in paragraph (c)(3)(ii) of this section. This option is available for a testing year only if—

(A) The qualified separate line of business accounts for at least 60 percent of the employer's total gross revenues for the employer's latest fiscal year ending in the testing year;

(B) The employee assignment percentage would be at least 60 percent if collectively bargained employees were taken into account; or

(C) Each qualified separate line of business of the employer satisfies either the statutory safe harbor of § 1.414(r)–5(b), the average benefits safe harbor of § 1.414(r)–5(f), or the minimum or maximum benefits safe harbor of § 1.414(r)–5(g). Whether a qualified separate line of business satisfies either of these safe harbors is determined after the application of this section, including the assignment of all residual shared employees under this paragraph (c)(3).

(v) *Examples.* The following examples illustrate the application of the method of allocation in this paragraph (c)(3).

Example 1. (i) Employer A operates four qualified separate lines of business as determined under § 1.414(r)–1(b) for the testing year, consisting of a software developer, a health food products supplier, a real estate developer, and a ski equipment manufacturer. In applying this section for the first testing day with respect to the testing year, Employer A determines that it has a total of 21,000 employees, of whom 10,000 are substantial-service employees not excludable under section 410(b)(3) or (b)(4). Assume that no residual shared employees is assigned under the optional rule in paragraph (c)(2) of this section. Pursuant to paragraph (b) of this section, these 10,000 employees are assigned among Employer A's qualified separate lines of business as follows:

	Software developer	Health food	Real estate	Ski equipment
Substantial-Service Employees	2,500	1,000	2,500	4,000
Percentage Assigned to QSLOB	25%	10%	25%	40%

(ii) Under these facts, Employer A is not permitted to apply the method of allocation in paragraph (c)(3)(ii) of this section, because none of its qualified separate lines of business satisfies the 50 percent requirement in paragraph (c)(3)(ii) of this section.

Example 2. The facts are the same as in *Example 1*, except that, after allocating all residual shared employees to the ski equipment line of business, the software, ski equipment and health food supplier lines of business each would satisfy the statutory safe harbor of § 1.414(r)–5(b), and that the real estate development line of business would satisfy the minimum or maximum benefits safe harbor of § 1.414(r)–5(g). Under these facts, Employer A is permitted to apply the method of allocation in this paragraph (c)(3) to allocate all its residual shared employees to the ski equipment line of business, because the employee assignment percentage of the ski equipment line of business exceeds 35 percent and each qualified separate line of business satisfies either the statutory safe harbor of § 1.414(r)–5(b) or the minimum or maximum benefits safe harbor of § 1.414(r)–5(g).

Example 3. (i) The facts are the same as in *Example 1*, except that, Employer A chooses not to satisfy the minimum or maximum benefits safe harbor of § 1.414(r)–5(g). Instead, Employer A combines the real estate developer and ski equipment manufacturer into a single line of business. As a result, Employer A has three qualified separate lines of business as determined under § 1.414(r)–1(b). Assume that no residual shared employee becomes a substantial-service employee as a result of the new combination. Employer A's substantial-service employees are assigned among Employer A's qualified separate lines of business as follows:

	Software developer	Health food	Real estate/ ski equipment
Substantial-Service Employees	2,500	1,000	6,500
Percentage Assigned to QSLOB	25%	10%	65%

(ii) Under these facts, Employer A is permitted to apply the method of allocation in this paragraph (c)(3) to allocate all its residual shared employees to the combined real estate development and ski equipment manufacturing line of business, because more than 50 percent of Employer A's substantial-service employees that are taken into account for the first testing day are assigned to that qualified separate line of business.

Example 4. (i) The facts are the same as in *Example 1*, except that, of the remaining 11,000 employees of Employer A, 10,000 employees are substantial-service employees who are collectively bargained employees. Pursuant to paragraph (b) of this section, the 10,000 substantial-service employees and the 10,000 substantial-service employees who are collectively bargained employees are assigned among Employer A's qualified separate lines of business as follows:

	Software developer	Health food	Real estate	Ski equipment
Substantial-Service Employees	2,500	1,000	2,500	4,000
Percentage of total substantial-service employees assigned to QSLOB	25%	10%	25%	40%
Substantial-Service Employees (including collectively bargained employees)	2,500	1,000	2,500	14,000
Percentage of total employees (including collectively bargained employees) assigned to QSLOB	12.5%	5%	12.5%	70%

(ii) Thus, the ski equipment line of business satisfies the 35-percent threshold in paragraph (c)(3)(iii) of this section. In addition, the ski equipment's percentage of substantial-service employees is at least 60 percent when taking into account substantial-service employees who are collectively bargained employees and therefore satisfies the requirement under paragraph (c)(3)(iii)(B) of this section. Under these facts, Employer A is permitted to apply the method of allocation in this paragraph (c)(3) to allocate all its residual shared employees to the ski equipment line of business.

(4) *Pro-rata method of allocation*—(i) *In general.* Under the method of allocation in this paragraph (c)(4), all residual shared employees who are not assigned under paragraph (c)(2) of this section are allocated among an employer's qualified separate lines of business in proportion to the employee assignment percentage of each qualified separate line of business, as determined under paragraph (c)(3)(iii) of this section.

(ii) *Allocation procedure.* The procedure for allocating residual shared employees under the method in this paragraph (c)(4) is as follows—

(A) The number of highly compensated residual shared employees who are allocated to each qualified separate line of business is equal to the product determined by multiplying the total number of highly compensated residual shared employees of the employer by the employee assignment percentage determined with respect to the qualified separate line of business under paragraph (c)(4)(i) of this section;

(B) The number of nonhighly compensated residual shared employees who are allocated to each qualified separate line of business is equal to the product determined by multiplying the total number of nonhighly compensated residual shared employees of the employer by the employee assignment percentage determined with respect to the qualified separate line of business under paragraph (c)(4)(i) of this section;

(C) For purposes of this procedure, the employer is permitted to determine which highly compensated residual shares employees and which nonhighly compensated residual shared employees are allocated to each qualified separate line of business, provided that the required number of highly and nonhighly compensated residual shared employees are allocated to each qualified separate line of business.

(iii) *Examples.* The following example illustrates the application of the method of allocation in this paragraph (c)(4).

Example 1. The facts that are the same as in *Example 1* under paragraph (c)(3)(iv) of this section and that there are no additional residual shared employees after the first testing day. Of Employer A's 1,000 residual shared employees, 800 are highly compensated employees and 200 are nonhighly compensated employees. Employer A applies the pro-rata method of allocation in this paragraph (c)(4). Under these facts, the 1,000 residual shared employees are allocated among Employer A's qualified separate lines of business as follows:

	Software developer	Health food	Real estate	Ski equipment
Substantial-Service Employees	2,500	1,000	2,500	4,000
Percentage Assigned to QSLOB ("employee assignment percentage")	25%	10%	25%	40%
Residual Shared HCEs	200	80	200	320
Allocated to QSLOB	(25%X800)	(10%X800)	(25%X800)	(40%X200)
Residual Shared NHCEs	50	20	50	80
Allocated to QSLOB	(25%X200)	(10%X200)	(25%X200)	(40%X200)

(5) *HCE percentage ratio method of allocation*—(i) *In general.* Under the method of allocation in this paragraph (c)(5), all residual shared employees who are not assigned under paragraph (c)(2) of this section are allocated among an employer's qualified separate lines of business according to the highly compensated employee percentage assignment ratio of each qualified separate line of business.

(ii) *Highly compensated employee percentage assignment ratio.* For purposes of this paragraph (c)(5), the highly compensated employee percentage assignment ratio of a qualified separate line of business is the fraction expressed as a percentage)—

(A) The numerator of which is the percentage of all employees who have previously been assigned to the qualified separate line of business under this section with respect to the testing year who are highly compensated employees; and

(B) The denominator of which is the percentage of all employees who have previously been assigned to any qualified separate line of business under this section with respect to the testing year who are highly compensated employees.

Thus, the highly compensated employee percentage assignment ratio of each of the employer's qualified separate lines of business is recalculated each time a residual shared employee is allocated to a qualified separate line of business under this paragraph (c)(5).

(iii) *Allocation procedure.* The procedure for allocating all residual shared employees under the method in this paragraph (c)(5) is as follows—

(A) If there are any qualified separate lines of business with a highly compensated employee percentage assignment ratio of less than 50 percent (as determined immediately before the employee is allocated to a qualified separate line of business), the highly compensated residual shared employee must be allocated to one of these qualified separate lines of business;

(B) If there are any qualified separate lines of business with a highly compensated employee percentage assignment ratio of greater than 200 percent (as determined immediately before the employee is allocated to a qualified separate line of business), the nonhighly compensated residual shared employee must be allocated to one of

these qualified separate lines of business;

(C) If there are no qualified separate lines of business with a highly compensated employee percentage assignment ratio less than 50 percent, a highly compensated residual shared employee may be allocated to any qualified separate line of business with a highly compensated employee percentage assignment ratio of no more than 200 percent, provided that the employee's allocation to the qualified separate line of business does not cause its highly compensated employee percentage assignment ratio to exceed 200 percent (as determined immediately after the employee is allocated to the qualified separate line of business);

(D) If there are no qualified separate lines of business with a highly compensated employee percentage assignment ratio greater than 200 percent, a nonhighly compensated residual shared employee may be allocated to any qualified separate line of business with a highly compensated employee percentage assignment ratio of no less than 50 percent, provided that the employee's allocation to the qualified separate line of business does not cause its highly compensated employee percentage assignment ratio to fall below 50 percent (as determined immediately after the employee is allocated to the qualified separate line of business);

(E) For purposes of this procedure, the employer is permitted to determine which highly compensated residual shared employees and which nonhighly compensated residual shared employees are allocated to each qualified separate line of business, provided that the requirements of this paragraph (c)(5)(iii) are satisfied.

(d) *Optional rule for assigning certain transferred employees*—(1) *In general.* If the requirements of this paragraph (d) are satisfied, an employer is permitted to apply the optional rule in this paragraph (d) with respect to an employee. This optional rule applies only for purposes of satisfying the provisions listed in paragraph (a)(2) of this section and therefore does not apply for any other purpose (e.g., the determination under § 1.414(r)–3 of whether a line of business is organized and operated separately from the remainder of the employer).

(2) *Requirements.* An employee satisfies the requirements of this paragraph (d) only if—

(i) During a testing year, the employee is transferred from a qualified separate line of business of the employer (the "prior line of business") to another qualified separate line of business of the employer (the "current line of business");

(ii) The transfer is for a temporary period of time; and

(iii) In the immediately preceding testing year, the employee was a substantial-service employee with respect to the prior line of business within the meaning of § 1.414(r)–11(b)(2).

(3) *Optional rule.* For purposes of this section, an employee may be assigned to the prior line of business for the testing year in which the transfer occurs and, if the transfer extends beyond that testing year, the testing year immediately succeeding that testing year.

§ 1.414(r)–8 Separate application of section 410(b).

(a) *General rule.* If an employer is treated as operating qualified separate lines of business for purposes of section 410(b) in accordance with § 1.414(r)–1(b) for a testing year, the requirements of section 410(b) must be applied in accordance with this section separately with respect to the employees of each qualified separate line of business for purposes of testing all plans of the employer for plan years that begin in the testing year (other than a plan tested under the special rule for employer-wide plans in § 1.414(r)–(c)(2)(ii) for such a plan year). Conversely, if an employer is not treated as operating qualified separate lines of business for purposes of section 410(b) in accordance with § 1.414(r)–1(b) for a testing year, the requirements of section 410(b) must be applied on an employer-wide basis for purposes of testing all plans of the employer for plan years that begin in the testing year. See § 1.414(r)–1(c)(2) and (d)(6). Paragraph (b) of this section explains how the requirements of section 410(b) are applied separately with respect to the employees of a qualified separate line of business for purposes of testing a plan. Paragraph (c) of this section explains the coordination between sections 410(b) and 401(a)(4). Paragraph (d) of this section provides certain supplementary rules necessary for the application of this section.

(b) *Rules of separate application*—(1) *In general.* If the requirements of section 410(b) are applied separately with respect to the employees of each qualified separate line of business operated by the employer for a testing year, a plan (other than a plan that is tested under the special rule for employer-wide plans in § 1.414(r)–1(c)(2)(ii) for a plan year) satisfies the requirements of section 410(b) only if—

(i) The plan satisfies section 410(b)(5)(B) of an employer-wide basis; and

(ii) The plan satisfies section 410(b) on a qualified-separate-line-of-business basis.

(2) *Satisfaction of section 410(b)(5)(B) on an employer-wide basis*—(i) *General rule.* Section 410(b)(5)(B) provides that a plan is not permitted to be tested separately with respect to the employees of a qualified separate line of business unless the plan benefits a classification of employees found by the Secretary to be nondiscriminatory. A plan satisfies this requirement only if the plan satisfies either the ratio percentage test of § 1.410(b)–2(b)(2) or the nondiscriminatory classification test of § 1.410(b)–4 (without regard to the average benefit percentage test of § 1.410(b)–5), taking into account the other applicable provisions of §§ 1.410(b)–1 through 1.410(b)–10. For this purpose, the nonexcludable employees of the employer taken into account in testing the plan under section 410(b) are determined under § 1.410(b)–6, without regard to the exclusion in § 1.410(b)–6(e) for employees of other qualified separate lines of business of the employer. Thus, in testing a plan separately with respect to the employees of one qualified separate line of business under this paragraph (b)(2), the otherwise nonexcludable employees of the employer's other qualified separate lines of business are not treated as excludable employees. However, under the definition of "plan" in paragraph (d)(2) of this section, these employees are not treated as benefiting under the plan for purposes of applying this paragraph (b)(2).

(ii) *Application of facts and circumstances requirements under nondiscriminatory classification test.* The fact that an employer has satisfied the qualified-separate-line-of-business requirements in §§ 1.414(r)–1 through 1.414(r)–7 is taken into account in determining whether a classification of employees benefiting under a plan that falls between the safe and unsafe harbors satisfies § 1.410(b)–4(c)(3) (facts and circumstances requirements). Except in unusual circumstances, this fact will be determinative.

(iii) *Application of unsafe harbor percentage to plans satisfying ratio percentage test at 90 percent level.* If a plan benefits a group of employees for a plan year that would satisfy the ratio percentage test of § 1.410(b)–2(b)(2) on a qualified-separate-line-of-business basis under paragraph (b)(3) of this section if that percentage were increased to 90 percent, the unsafe harbor percentage in § 1.410(b)–4(c)(4)(ii) may be reduced by five percentage points (not five percent) for the plan year. Thus, if the

requirements of this paragraph (b)(2)(ii) are satisfied, the unsafe harbor percentage in § 1.410(b)–4(c)(4)(ii) may be treated as 35 percent, reduced by ¾ of a percentage point for each whole percentage point by which the nonhighly compensated employee concentration percentage exceeds 60 percent (but in no event less than 15 percent).

(3) *Satisfaction of section 410(b) on a qualified-separate-line-of-business basis.* A plan satisfies section 410(b) on a qualified-separate-line-of-business basis only if the plan satisfies either the ratio percentage test of § 1.410(b)–2(b)(2) or the average benefit test of § 1.410(b)–2(b)(3) (including the nondiscriminatory classification test of § 1.410(b)–4 and the average benefit percentage test of § 1.410(b)–5), taking into account the other applicable provisions of §§ 1.410(b)–1 through 1.410(b)–10. For this purpose, the non-excludable employees of the employer taken into account in testing the plan under section 40(b) are determined under § 1.410(b)–6, taking into account the exclusion in § 1.410(b)–6(e) for employees of other qualified separate lines of business of the employer. Thus, in testing a plan separately with respect to the employees of one qualified separate line of business under this paragraph (b)(3), all employees of the employer's other qualified separate lines of business are treated as excludable employees.

(4) *Examples.* The following examples illustrate the application of this paragraph (b).

Example 1. (i) Employer A is treated as operating qualified separate lines of business for purposes of section 410(b) in accordance with § 1.414(r)–1(b) for the 1993 testing year with respect to all of its plans. Employer A operates two qualified separate lines of business as determined under § 1.414(r)–1(b)(2), Line 1 and Line 2. Employer A maintains only two plans, Plan X which benefits solely employees of Line 1, and Plan Y which benefits solely employees of Line 2. In testing Plan X under section 410(b) with respect to the first testing day for the plan year of Plan X beginning in the 1993 testing year, it is determined that Employer A has 2,100 nonexcludable employees, of whom 100 are highly compensated employees and 2,000 are nonhighly compensated employees. After applying § 1.414(r)–7 to these employees, 50 of the highly compensated employees and 100 of the nonhighly compensated employees are treated as employees of Line 2, and the remaining 50 highly compensated employees and the remaining 1,900 nonhighly compensated employees are treated as employees of Line 1.

(ii) All of the highly compensated employees and 1,300 of the nonhighly compensated employees who are treated as employees of Line 1 benefit under Plan X. Thus, on an employer-wide basis, Plan X benefits 50 percent of all Employer A's highly compensated employees (50 out of 100) and 65 percent of all Employer A's nonhighly compensated employees (1,300 out of 2,000). Plan X consequently has a ratio percentage determined on an employer-wide basis of 130 percent (65%÷50%), see § 1.410(b)–9, and could satisfy section 410(b) under the ratio percentage test of § 1.410(b)–2(b)(2) if that section were applied on an employer-wide basis without regard to the provisions of this paragraph (b). Under paragraph (a) of this section, however, the requirements of section 410(b) must be applied separately with respect to the employees of each qualified separate line of business operated by Employer A for all plans of Employer A for plan years that begin in the 1993 testing year. This rule does not apply to plans tested under the special rule for employer-wide plans in § 1.414(r)–1(c)(2)(ii). Plan X benefits only 65 percent of the nonhighly compensated employees of Employer A, however, and therefore cannot satisfy the 70 percent requirement necessary to be tested under that rule. As a result, for the plan year of Plan X beginning in the 1993 testing year, Plan X is not permitted to satisfy section 410(b) on an employer-wide basis and, instead, is only permitted to satisfy section 410(b) separately with respect to the employees of each qualified separate line of business operated by Employer A, in accordance with paragraphs (b)(2) and (b)(3) of this section.

Example 2. The facts are the same as in *Example 1.* All of the employees treated as employees of Line 2 benefit under Plan Y, and none of the employees treated as employees of Line 1 benefit under Plan Y. Thus, Plan Y benefits 50 percent of all Employer A's highly compensated employees (50 out of 100) and only 5 percent of all Employer A's nonhighly compensated employees (100 out of 2,000). Thus, while Plan Y has a ratio percentage of 100 percent (100%÷100%) on a qualified-separate-line-of-business basis, it has a ratio percentage of only 10 percent (5%÷100%) on an employer-wide basis. See § 1.410(b)–9. Because 10 percent is less than 15 percent (the unsafe harbor percentage applicable to Employer A under § 1.410(b)–4(c)(4)(ii), after the reduction provided for in paragraph (b)(2)(ii) of this section), Plan Y does not satisfy the nondiscriminatory classification test of § 1.410(b)–4 on an employer-wide basis. Nor does plan Y satisfy the ratio percentage test of § 1.410(b)(2) on an employer-wide basis, since 10 percent is less than 70 percent. Under these facts, Plan Y does not satisfy section 410(b)(5)(B) on an employer-wide basis in accordance with paragraph (b)(2) of this section for the pan year of Plan Y beginning in the 1993 testing year, and therefore fails to satisfy section 410(b) for that year. This is true even though Plan Y satisfies section 410(b) on a qualified-separate-line-of-business basis in accordance with paragraph (b)(3) of this section.

Example 3. (i) The facts are the same as in *Example 1,* except that Plan X benefits only 950 of the employees of Line 1. Assume Plan X satisfies the reasonable classification requirement of § 1.410(b)–4(b) on an employer-wide basis. Plan X benefits 50 percent of all Employer A's highly compensated employees (50 out 100) and 47.5 percent of all Employer A's nonhighly compensated employees (950 out of 2,000). Plan X consequently has a ratio percentage determined on an employer-wide basis of 95 percent (47.5%÷50%), see § 1.410(b)–9, and thus satisfies section 410(b)(5)(B) on an employer-wide basis.

(ii) Plan X has a ratio percentage determined on a qualified-separate-line-of-business basis of 50 percent (50% ÷ 100%). Because 50 percent is less than 70 percent, Plan X must satisfy the nondiscriminatory classification test of § 1.410(b)–4 and the average benefit percentage test of § 1.410(b)–5 on a qualified-separate-line-of-business basis in order to satisfy the other requirements of section 410(b). Plan X satisfies the nondiscriminatory classification requirement of § 1.410(b)–4(c) on a qualified-separate-line-of-business because its ratio percentage determined on a qualified-separate-line-of-business basis is more than 22.25 percent, the safe harbor percentage applicable to Line 1 under § 1.410(b)–4(c)(4)(i). Because Plan X satisfies the reasonable classification requirement of § 1.410(b)–4(b) on an employer-wide basis, it is also deemed to satisfy this requirement on a qualified-separate-line-of-business basis. See § 1.410(b)–7(c)(4). In determining whether Plan X satisfies the average benefit percentage test of § 1.410(b)–5, only Plan X and only employees of Line 1 are taken into account. See §§ 1.410(b)–6(e) and 1.410(b)–7(e).

Example 4. The facts are the same as in *Example 3,* except that, prior to the 1993 testing year, Employer A merges Plan X and Plan Y so that they form a single plan within the meaning of section 414(*l*). Under the definition of "plan" in paragraph (d)(2) of this section, however, the portion of the newly merged plan that benefits employees of Line 2 (former Plan Y) is still treated as a separate plan from the portion of the newly merged plan that benefits employees of Line 1 (former Plan X). The portion of the newly merged plan that benefits employees of Line 2 (former Plan Y) fails to satisfy section 410(b) for the reasons stated in *Example 3.* Under these facts, because the portion of the newly merged plan that benefits employees of Line 2 fails to satisfy section 410(b), the entire newly merged plan fails to satisfy section 410(b) for the plan year of the newly merged plan that begins in the 1993 testing year. See paragraph (d)(5) of this section.

(c) *Coordination of section 401(a)(4) with section 410(b)*—(1) *General rule.* For purposes of these regulations, the requirements of section 410(b) encompass the requirements of section 401(a)(4) (including, but not limited to, the permitted disparity rules of section 401(*l*), the actual deferral percentage test of section 401(k)(3), and the actual contribution percentage test of section 401(m)(2)). Therefore, if the requirements of section 410(b) are applied separately with respect to the employees of each qualified separate line of business of an employer for purposes of testing one or more plans of the employer for plan years that begin in

a testing year, the requirements of section 401(a)(4) must also be applied separately with respect to the employees of the same qualified separate lines of business for purposes of testing the same plans for the same plan years. Furthermore, if section 401(a)(4) requires that a group of employees under the plan satisfy section 410(b) for purposes of satisfying section 401(a)(4), section 410(b) must be applied for this purpose in the same manner provided in paragraph (b) of this section. See, for example, §§ 1.401(a)(4)–2(c)(1) and 1.401(a)(4)–3(c)(1) (requiring each rate group of employees under a plan to satisfy section 410(b)), § 1.401(a)(4)–4(b) (requiring the group of employees to whom each benefit, right, or feature is currently available under a plan to satisfy section 410(b)), and § 1.401(a)(4)–9(c)(1) (requiring the group of employees included in each component plan into which a plan is restructured to satisfy section 410(b)). Thus, the group of employees must satisfy section 410(b)(5)(B) on an employer-wide basis in accordance with paragraph (b)(2) of this section and also must satisfy section 410(b) on a qualified-separate-line-of-business basis in accordance with paragraph (b)(3) of this section, in both cases as if the group of employees were the only employees benefiting under the plan.

(2) *Examples.* The following examples illustrate the application of the rule in this paragraph (c).

Example 1. Employer B is treated as operating qualified separate lines of business for purposes of section 410(b) in accordance with § 1.414(r)–1(b) for the 1993 testing year. Employer B operates two qualified separate lines of business as determined under § 1.414(r)–1(b)(2), Line 1 and Line 2. Employer B maintains Plan Z, which benefits employees in both Line 1 and Line 2. Under the definition of "plan" in paragraph (d)(2) of this section, the portion of Plan Z that benefits employees of Line 1 is treated as a separate plan from the portion of Plan Z that benefits employees of Line 2. Under this paragraph (c), this result applies for purposes of both section 410(b) and section 401(a)(4).

Example 2. The facts are the same as in *Example 1*, except that Plan Z benefits solely employees of Line 1. In testing Plan Z under section 401(a)(4) for the plan year of Plan Z beginning in the 1993 testing year, Employer B restructures Plan Z into several component plans (within the meaning of § 1.401(a)(4)–9(c)). Under § 1.401(a)(4)–9(c)(1), each of these component plans is required to satisfy section 410(b). This paragraph (c) requires that each of the component plans be tested separately with respect to the employees of each qualified separate line of business operated by Employer B. This testing must be done in accordance with paragraph (b) of this section. Consequently, each component plan must satisfy section 410(b)(5)(B) on an employer-wide basis in accordance with paragraph (b)(2) of this section and must also satisfy section 410(b) on a qualified-separate-line-of-business basis in accordance with paragraph (b)(3) of this section.

Example 3. The facts are the same as in *Example 1*, except that Plan Z is a profit-sharing plan, and contributions to Plan Z are made pursuant to cash or deferred arrangement in which all employees of Employer B are eligible to participate. Assume that, as a result, Plan Z satisfies the requirements to be tested under the special rule for employer-wide plans in § 1.414(r)–1(c)(2)(ii). Under these facts, the requirements of sections 410(b), 401(a)(4) and 401(k), including the actual deferral percentage test of section 401(k)(3) and § 1.401(k)–1(b), would generally be required to be applied separately to the portions of Plan Z that benefit the employees of Line 1 and Line 2, respectively. However, if Plan Z is tested under the special rule in § 1.414(r)–1(c)(2)(ii), these requirements must be applied on an employer-wide basis.

(d) *Supplementary rules*—(1) *In general.* This paragraph (d) provides certain supplementary rules necessary for the application of this section.

(2) *Definition of plan.* For purposes of this section, the term *plan* means a plan within the meaning of § 1.410(b)–7(a) and (b), after application of the mandatory disaggregation rules of § 1.410(b)–7(c) (including the mandatory disaggregation rule for portions of a plan that benefit employees of different qualified separate lines of business) and the permissive aggregation rules of § 1.410(b)–7(d). Thus, for purposes of this section, the portion of a plan that benefits employees of one qualified separate line of business is treated as a separate plan from the other portions of the same plan that benefit employees of other qualified separate lines of business of the employer, unless the plan is tested under the special rule for employer-wide plans in § 1.414(r)–1(c)(2)(ii) for the plan year.

(3) *Employees of a qualified separate line of business.* For purposes of applying paragraph (b) of this section with respect to a testing day, the employees of each qualified separate line of business of the employer are determined by applying § 1.414(r)–7 to the employees of the employer otherwise taken into account under section 410(b) for the testing day. For purposes of applying paragraph (c) of this section with respect to a testing day, the employees of each qualified separate line of business of the employer are determined by applying § 1.414(r)–7 to the employees of the employer otherwise taken into account under section 410(a)(4) for the testing day. For the definition of *testing day*, see § 1.414(r)–11(b)(6).

(4) *Contributions and benefits attributable to a qualified separate line of business.* For purposes of this section, all allocations to an employee's account, all benefits accrued by an employee, and all other benefits, rights, and features applicable to an employee under any plan of the employer are treated as if they had been provided under a plan maintained by the qualified separate line of business to which the employee is assigned under § 1.41(r)–7 for the testing year.

(5) *Consequences of failure.* If a plan fails to satisfy either paragraph (b)(2), (b)(3), or (c)(1) of this section, the plan (and any plan of which it constitutes a portion) fails to satisfy section 401(a). However, this failure alone does not cause the employer to fail to be treated as operating qualified separate lines of business in accordance with § 1.414(r)–1(b), unless the employer is relying on benefits provided under the plan to satisfy the minimum benefit portion of the safe harbor in § 1.414(r)–5(g)(2) with respect to at least one of its qualified separate lines of business.

§ 1.414(r)–9 Separate application of section 401(a)(26).

(a) *General rule.* If an employer is treated as operating qualified separate lines of business for purposes of section 401(a)(26) in accordance with § 1.414(r)–1(b) for a testing year, the requirements of section 401(a)(26) must be applied separately with respect to the employees of each qualified separate line of business for purposes of testing all plans of the employer for plan years that begin in the testing year (other than a plan tested under the special rule for employer-wide plans in § 1.414(r)–1(c)(3)(ii) for such a plan year). Conversely, if an employer is not treated as operating qualified separate lines of business for purposes of section 401(a)(26) in accordance with § 1.414(r)–1(b) for a testing year, the requirements of section 401(a)(26) must be applied on an employer-wide basis for purposes of testing all plans of the employer for plan years that begin in the testing years. See § 1414(r)–1(c)(3) and (d)(6). Paragraph (b) of this section explains how the requirements of section 401(a)(26) are applied separately with respect to the employees of a qualified separate line of business for purposes of testing a plan. Paragraph (c) of this section provides certain supplementary rules necessary for the application of this section.

(b) *Requirements applicable to a plan.* If the requirements of section 401(a)(26) are applied separately with respect to the employees of a qualified separate line of business for a testing year, a plan (other than a plan that is tested under the special rule for employer-wide plans

in § 1.414(r)–1(c)(3)(ii) for a plan year) satisfies section 401(a)(26) only if it satisfies the requirements of §§ 1.401(a)(26)–1 through 1.401(a)(26)–9 on a qualified-separate-line-of-business basis. For this purpose, the nonexcludable employees of the employer taken into account in testing the plan under section 401(a)(26) are determined under § 1.401(a)(26)–6(b), taking into account the exclusion in § 1.401(a)(26)–6(b)(8) for employees of other qualified separate lines of business of the employer. Thus, in testing a plan separately with respect to the employees of one qualified separate line of business under this paragraph (b), all employees of the employer's other qualified separate lines of business are treated as excludable employees.

(c) *Supplementary rules*—(1) *In general.* This paragraph (c) provides certain supplementary rules necessary for the application of this section.

(2) *Definition of plan.* For purposes of this section, the term *plan* mean a plan within the meaning of § 1.401(a)(26)–2(c) and (d), including the mandatory disaggregation rule of § 1.401(a)(26)–2(d)(6) for portions of a plan that benefit employees of different qualified separate lines of business. Thus, for purposes of this section, the portion of a plan that benefits employees of one qualified separate line of business is treated as a separate plan from the other portions of the same plan that benefit employees of other qualified separate lines of business of the employer, unless the plan is tested under the special rule for employer-wide plans in § 1.414(r)–1(c)(3)(ii) for the plan year.

(3) *Employees of a qualified separate line of business.* For purposes of applying paragraph (b)(2) of this section with respect to a section 401(a)(26) testing day, the employees of each qualified separate line of business of the employer are determined by applying § 1.414(r)–7 to the employees of the employer otherwise taken into account under section 401(a)(26) for the section 401(a)(26) testing day. For the definition of *section 401(a)(26) testing day*, see § 1.414(r)–11(b)(8).

(4) *Consequences of failure.* If a plan fails to satisfy paragraph (b)(2) of this section, the plan (and any plan of which it constitutes a portion) fails to satisfy section 401(a). However, this failure alone would not cause the employer to fail to be treated as operating qualified separate lines of business in accordance with § 1.414(r)–1(b), unless the employer is relying on benefits provided under the plan to satisfy the minimum benefit portion of the safe harbor in § 1.414(r)–5(g)(2) with respect to at least one of its qualified separate lines of business.

§ 1.414(r)–10 Separate application of section 129(d)(8). [Reserved]

§ 1.414(r)–11 Definitions and special rules.

(a) *In general.* This section contains certain definitions and special rules applicable under these regulations. Paragraph (b) of this section provides certain definitions that apply for purposes of these regulations. Paragraph (c) of this section provides averaging rules under which certain provisions of these regulations may be applied on the basis of a two-year or a three-year average.

(b) *Definitions*—(1) *In general.* In applying the provisions of this section and of §§ 1.414(r)–1 through 1.414(r)–10, unless otherwise provided, the definitions in this paragraph (b) govern in addition to the definitions in § 1.410(b)–9.

(2) *Substantial-service employee.* An employee is a substantial-service employee with respect to a line of business for a testing year if at least 75 percent of the employee's services are provided to that line of business for that testing year within the meaning of § 1.414(r)–3(c)(5).

(3) *Top-paid employee.* An employee is a top-paid employee with respect to a line of business for a testing year if the employee is among the top 10 percent by compensation of those employees who provide at least 25 percent of their services to that line of business for that testing year within the meaning of § 1.414(r)–3(c)(5). For purposes of this paragraph (b)(3), an employee's compensation is the compensation used to determine the employee's status as a highly or nonhighly compensated employee under section 414(q) for purposes of applying section 410(b) with respect to the first testing day. For this purpose, only compensation received during the determination year (within the meaning of § 1.414(q)–1T, Q&A–13) is taken into account. See § 1.414(r)–3(c)(7) for examples of the determination of top-paid employee.

(4) *Residual shared employee.* An employee is a residual shared employee with respect to a line of business for a testing year if, for that testing year, the employee provides services to that line of business within the meaning of § 1.414(r)–3(c)(5), and the employee is not a substantial-service employee within the meaning of paragraph (b)(2) of this section with respect to that line of business.

(5) *Testing year.* The term *testing year* means the calendar year.

(6) *Testing day.* The term *testing day* means any day on which § 1.410(b)–8(a)(1) requires any plan (within the meaning of § 1.414(r)–8(d)(2)) of the employer actually to satisfy section 410(b) with respect to plan year that begins in the testing year. Thus, if a plan is required to satisfy section 410(b) on one day within each quarter of the plan year under the quarterly testing option of § 1.410(b)–8(a)(3), each of those four days is a testing day. Similarly, if a plan is required to satisfy section 410(b) on every day of the plan year under the daily testing option of § 1.410(b)–8(a)(2), every day of the plan year is a testing day.

(7) *First testing day.* The term *first testing day* means the testing day that occurs earliest in time of all the testing days under all plans of the employer with respect to the testing year. If a plan is tested under the annual testing option of § 1.410(b)–8(a)(4) (other than for purposes of the average benefit percentage test of § 1.410(b)–5) for a plan year that begins in a testing year, then, solely for purposes of determining the first testing day in a testing year, the employer may treat any day in the plan year as a testing day, provided that the coverage of each plan of the employer on the day selected is reasonably representative of the coverage of the plan over the entire plan year. The first testing day with respect to a testing year must fall within that testing year.

(8) *Section 401(a)(26) testing day.* The term *section 401(a)(26) testing day* means any day on which § 1.401(a)(26)–7(a) or (b) requires any plan of the employer actually to satisfy section 401(a)(26) with respect to a plan year that begins in the testing year. In no event may a section 401(a)(26) testing day with respect to a testing year fall before the first testing day for that testing year. For purposes of this paragraph (b)(8), the term *plan* has the same meaning as in § 1.414(r–9(c)(2).

(c) *Averaging rules*—(1) *In general.* The provisions specified in this paragraph (c) are permitted to be applied based on the average of the percentages for the current testing year and the consecutive testing years (not to exceed four consecutive testing years) immediately preceding the current testing year.

(2) *Specified provisions.* The provisions specified in this paragraph (c) are—

(i) The 90-percent separate employee workforce requirement of § 1.414(r)–3(b)(4);

(ii) The 80-percent separate management requirement of § 1.414(r)–3(b)(5);

(iii) The 25-percent provision-to-customers requirement of § 1.414(r)–3(d)(2)(iii);

(iv) The minimum and maximum highly compensated employee percentage ratios under the statutory safe harbor of § 1.414(r)–5(b)(1)(i) and (ii) (50 percent and 200 percent, respectively), but not the 10-percent exception in § 1.414(r)–5(b)(4);

(v) The employee assignment percentage applied for purposes of the dominant line of business method of allocating residual shared employees under § 1.414(r)–7(c)(3) and the pro-rata method for allocating residual shared employees under § 1.414(r)–7(c)(4).

(3) *Averaging of large fluctuations not permitted.* A provision is not permitted to be applied based on an average determined under this paragraph (c) if the percentage for any testing year taken into account in calculating the average falls below a mimimum percentage, or exceeds a maximum percentage, by more than 10 percent (not 10 percentage points) of the respective minimum or maximum percentage. Thus, for example, the statutory safe harbor of § 1.414(r)–5(b) is not permitted to be applied based on an average determined under this paragraph (c) if the percentage for any testing year taken into account in calculating the average falls below 45 percent (which is 10 percent below the 50-percent minimum) or exceeds 220 percent (which is 10 percent above the 200-percent maximum).

(4) *Consistency requirements.* A provision is permitted to be applied on an averaging basis under this paragraph (c) regardless of how any other provision is applied, except in the case of the separate employee workforce and separate management requirements of § 1.414(r)–3(b)(4) and (5), which each must be applied on the same basis as the other. A provision is also permitted to be applied on an averaging basis under this paragraph (c) for a testing year, regardless of how the provision is applied for any other testing year. However, once a provision is applied on an averaging basis under this paragraph (c) for a testing year, it must be applied on the same basis to all the employer's lines of business to which the provision is applied for the testing year. The percentage for a preceding testing year may be taken into account under this paragraph (c) only if—

(i) The employer calculates the percentage for the preceding testing year in the same manner as the employer calculates the percentage for the current testing year;

(ii) The employer is treated as operating qualified separate lines of business in accordance with § 1.414(r)–1(b) for the preceding testing year; and

(iii) The employer designated the same lines of business in the preceding testing year as in the current testing year.

PART 602—OMB CONTROL NUMBER UNDER THE PAPERWORK REDUCTION ACT

Par. 9. The authority citation for part 602 continues to read:

Authority: 26 U.S.C. 7805.

§ 602.101 [Amended]

Par. 10. Section 602.101(c) is amended by inserting in the appropriate place in the table, "§ 1.414(r)–1 . . . 1545–1221".

Fred T. Goldberg, Jr.,

Commissioner of Internal Revenue.

Approved November 18, 1991.

Kenneth W. Gideon,

Assistant Secretary of the Treasury.

[FR Doc. 91–28858 Filed 12–2–91; 8:45 am]

BILLING CODE 4830–01–M

DEPARTMENT OF AGRICULTURE

Forest Service

36 CFR Part 241

RIN 0596–AA41

Conservation of Fish and Wildlife and Their Habitat

AGENCY: Forest Service, USDA.

ACTION: Final rule.

SUMMARY: This final rule adopts management direction for the conservation of fish and wildlife and their habitat within the Copper River-Rude River, and Copper River-Bering River areas of the Chugach National Forest in Alaska. The intended effect is to establish a standard by which multiple-use activities can be evaluated for consistency with the conservation of fish and wildlife and their habitat.

EFFECTIVE DATE: This rule is effective December 4, 1991.

FOR FURTHER INFORMATION CONTACT: John C. Capp, Director, Wildlife and Fisheries Management, Alaska Region (907) 586–8752 or Philip J. Janik, Assistant Director, Wildlife and Fisheries Management, Forest Service, Washington, DC 20090 (202) 453–8207.

SUPPLEMENTARY INFORMATION: Section 501(a)(1) of the Alaska National Interest Lands Conservation Act (ANILCA) (16 U.S.C. 539) added four areas totaling 1,900,000 acres of public lands to the Cugach National Forest in Alaska. Section 501(b) of the Act provides that, subject to valid existing rights, the lands added to the National Forest in section 501(a)(1) are to be administered by the Secretary of Agriculture in accordance with the Act and the laws, rules, and regulations applicable to the National Forest System.

Section 501(b) further specifies that the primary purpose for the management of the Copper River-Rude River addition and the Copper River-Bering River portion of the existing Chugach National Forest "* * * shall be * * * the conservation of fish and wildlife and their habitat." The Act permits the taking of fish and wildlife pursuant to the Act and other applicable State and Federal law, and specifies that multiple-use activities shall be permitted only in a manner consistent with the conservation of fish and wildlife and their habitat. Finally, section 501(b) requires the Secretary of Agriculture to issue rules and regulations to implement the provisions of this section.

National Forest System lands are managed for multiple uses and the sustained-yield of products and services. As provided by the National Forest Management Act (16 U.S.C. 1600 *et seq.*) and implementing rules at 36 CFR part 219, the mix of uses and outputs from National Forest System lands is determined through the execution of a land management plan. The Copper River-Rude River and Copper River-Bering River areas remain subject to multiple-use, sustained-yield management and the land management planning process, but section 501(b) of ANILCA requires that in these two areas conservation of fish and wildlife resources be given primacy in determining the management direction.

Analysis of Public Comment

On March 31, 1989, at 54 FR 13199, the Forest Service published a proposed rule to provide management direction for the conservation of fish and wildlife and their habitat within the Copper River-Rude River and Copper River-Bering River areas of the Chugach National Forest. A total of 10 responses were received; four were from individual citizens, one was from a private corporation, and five were from governmental agencies.

The majority of the comments were broad in nature and concerned protection of wildlife and fish and their habitats. Two responses contained substantive recommendations for inclusion of appeal rights in the final rule. One respondent wanted more specific recognition of valid existing rights in the final rule.

All suggestions and comments have been reviewed, analyzed, and considered in preparation of the final rule. Responses are available for review at the U.S. Department of Agriculture, Forest Service, Alaska Region, Wildlife and Fisheries Management Staff, 709 W. 9th, P.O. Box 21628, Juneau, Alaska 99802.

The following summarizes the major comments and suggestions received on the proposed rule and the Department's response to these comments in the final rule. Comments are keyed to the section numbers and headings of the proposed rule document.

Section 240.20 Scope and Applicability

This section of the proposed rule established that the rules of this proposed new subpart are supplemental to the general regulations governing occupancy and use of National Forest lands and apply only to the two geographic areas within the Chugach National Forest specified in section 501(b). This section also stated that the primary purpose for management of the Copper River-Rude River, Copper River-Bering River areas is the conservation of fish and wildlife and their habitat. Finally, this section stated that the rule would have no effect on the long established responsibility and authority of the State of Alaska for management of fish and wildlife.

Comments: The State of Alaska expressed concerns that the rule could be interpreted as affecting their responsibilities and authorization for managing fish and wildlife. In particular, the State sought clarification that the consistency determination requirement of § 241.22 was intended to apply to activities other than routine fish and wildlife management, research, and harvest methods and means.

In addition, one reviewer felt that specific identification of valid existing rights of Alaska Natives in the rule was necessary to protect those rights.

Response: With regard to the State's concerns, nothing in the rule is intended to enlarge or diminish the responsibility and authority of the State of Alaska for management of fish and wildlife on the lands to which the rule applies, and the proposed rule explicitly stated this in paragraph (c) of § 241.20. It is not the intent of the rule to change, in any way, the relationship between the State and the Department with respect to the management of fish and wildlife, including, but not limited to, the specific areas of concern expressed by the State's comment. Therefore, the Department is retaining the language of paragraph (c) as proposed.

With regard to concerns over valid existing rights, the Department believes valid existing rights, including those identified and guaranteed under the 1982 Settlement Agreement between the USDA Forest Service, Alaska Region, and the Chugach Natives, Incorporated, to be fully protected by the proposed rule. The consistency determinations required by § 241.22 are described in the proposed rule as being "* * * subject to valid existing rights." Rights identified and guaranteed under the 1982 Settlement Agreement would clearly fall into this category. The Department believes the valid existing rights of the Chugach Natives, Incorporated (now Chugach Alaska Corporation), as well as the valid existing rights of other entities, if any, to be fully protected by the proposed rule. Moreover, it would be impracticable to try to list all valid existing rights that might exist within the two areas. Therefore, it is unnecessary to change this provision.

Section 241.22 Consistency Determinations

This section was the core of the proposed rule. It included the standards by which multiple-use activities would be evaluated for their impacts on conservation of fish and wildlife and their habitats, as well as administrative and procedural mechanisms to implement the consistency determination process.

Comments: One reviewer stated that failure to address specific appeal rights was a significant omission in the proposed rule. Another reviewer perceived the consistency requirements as potential sources of delay in the granting of valid existing rights. This reviewer also suggested that the rule provide for a generic consistency determination process for certain categories of permitted activities. Several reviewers also suggested that the proposed rule was so restrictive as to preclude any surface disturbing activity while, in contrast, several commented that the proposed rule should be strengthened to only allow for the needs of fish and wildlife and not other uses.

Response: The Department agrees that the rule should address appeal rights. A new paragraph (f) has been added to make clear that consistency determination decisions documented in a Decision Memorandum, Decision Notice or Record of Decision, are subject to appeal under 36 CFR part 217. The statement included in paragraph (f) also addresses termination, suspension, restriction, or modification of existing permitted uses and activities to achieve consistency, which may be subject to appeal under 36 CFR part 251, subpart C.

The Department disagrees with the comment that consistency determinations will necessarily add significantly to the time required for obtaining permits in connection with the exercise of valid existing rights or otherwise. The effect of § 241.22(b) is to make the consistency determination process part of the existing permitting process. The intent of incorporating the consistency determination process into the existing permitting process, including compliance with National Environmental Policy Act procedures, is to minimize duplications of effort and delay. Accordingly, the Department finds no basis for further change in the procedures in the proposed rule.

With respect to issuing generic consistency determinations for certain classes of activities, flexibility in the rule as proposed is sufficient to establish certain categories of activities that are inherently consistent with the conservation of fish, wildlife, and their habitat should experience show that this is feasible and in the public interest. However, to adopt such an approach at this time would be premature. The rule allows for combining consistency determinations along with other findings that Forest Service officers must make in decision documents; for example, as part of a finding that an activity is consistent with the management direction in the Chugach Forest Plan.

The Department also does not agree that the proposed rule is overly restrictive. The purpose of the rule is limited to implementing the requirements of section 501(b) of ANILCA which requires that "* * * the conservation of fish and wildlife and their habitat shall be the primary purpose for the management of the Copper/Rude River addition and the Copper River-Bering River portion of the existing Chugach National Forest."

Consistent with the Act, the rule permits multiple-use activities as long as they are conducted in a manner consistent with the conservation of fish and wildlife and their habitat. Restrictions would be necessary only to achieve consistency. Finally, the Department does not agree that the rule should be revised to restrict all multiple-use activities other than fish and wildlife habitat management. The Copper River-Rude River and Copper River-Bering River areas are units of the National Forest System which, by law, are to be managed for multiple uses on a sustained yield basis. In providing management direction for these two areas in section 501(b) of ANILCA, the

Congress did not repeal the multiple-use management for these areas. The Act specifically recognizes the continuation of multiple-use activities. Rather than prohibit them, section 501(b) requires that they be permitted in a manner consistent with the primary management goal on these two areas of conserving fish, wildlife, and their habitat. The Department believes that the rule as proposed provides for an effective and reasonable means of implementing the intent of Congress as expressed in the language of section 501(b). Therefore, these suggestions regarding the degree of restriction that should be in the rule are not adopted in the final rule.

Conclusion

In addition to citing the appeal opportunities which apply to this Subpart, a number of technical errors were discovered in the proposed rule which have been corrected in the final rule. The term "federally-owned lands" and its definition in § 241.21 has been revised to exactly conform to the definition of "federal lands" in section 102(2) of ANILCA. Consistent with agency practice and terminology, paragraph (b) of § 241.22 has been revised to make clear that consistency determinations are to be made, not in environmental assessments or environmental impact statements, but in the decision documents that accompany these environmental analysis documents. Similarly, the reference in paragraph (d) of this section to authorizations granted under the new subpart should have referred to "other" regulations in this Chapter. Finally, paragraph (e) of § 241.22 has been revised to add a specific reference to the two areas of the Chugach National Forest that are subject to the rule to avoid any misimpression that this provision applies to other areas. Also, at the end of this paragraph the text has been revised from "consistency with this section" to read: "Consistency with the conservation of fish, wildlife, and their habitat as provided by this Subpart." With the exception of these changes, the Department is adopting the final rule essentially as it was proposed.

The effect and intent of the final rule is to integrate the management direction of section 501 of ANILCA with the other statutory requirements governing the management of National Forest lands. Because there are extensive regulations governing land management planning, authorization of special uses, and environmental analysis documentation, the proposed rule is limited to the mechanisms necessary to integrate management of the Copper River-Rude River and Copper River-Bering River areas with those existing processes and to give adequate notice to affected parties of how uses will be evaluated.

Environmental Impact

Based on both experience and environmental analysis, this final rule will have no significant effect on the human environment, individually or cumulatively. Therefore, it is categorically excluded from documentation in an environmental assessment or an environmental impact statement (40 CFR 1508.4).

Controlling Paperwork Burdens on the Public

This rule does not contain any recordkeeping or reporting requirements or other information collection requirements as defined in 5 CFR part 1320 and therefore imposes no paperwork burden on the public.

Regulatory Impact

This final rule has been reviewed under USDA procedures and Executive Order 12291 on Federal Regulations. It has been determined that this is not a major rule. The rule will not have an effect of $100 million or more on the economy, substantially increase prices or costs for consumers, industry, or State or local governments, nor adversely affect competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete in foreign markets. In short, little or no effect on the National economy will result from this rule, since it does not increase costs to the government or to users of the National Forest System.

Moreover, this rule has been considered in light of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), and it has been determined that this action will not have a significant economic impact on a substantial number of small entities as defined in the Act.

Effect on Private Property

Executive Order 12630 requires agency decisionmakers to consider the effect of proposed agency actions on private property rights. Pursuant to section 501(a)(1) of ANILCA, this final rule provides for a consistency determination of multiple use management activities with the conservation of fish and wildlife and their habitat on National Forest System lands in the Copper River-Rude River and the Copper River-Bering River areas of the Chugach National Forest in Alaska. Since consistency determinations are subject to valid existing rights, including those of Alaska Natives, no private property will be taken as a result of this proposed final rule.

Therefore, this rule presents no risk of takings liability.

List of Subjects in 36 CFR Part 241

Intergovernmental relations, National forest, wildlife, and wildlife refuges.

Therefore, for the reasons set forth above, part 241 of chapter II of title 36 of the Code of Federal Regulations is amended as follows:

PART 241—FISH AND WILDLIFE

1. Revise the authority citation for part 241 to read as follows:

Authority: 16 U.S.C. 472, 539, 551, 683.

2. Revise the heading for part 241 to read as set forth above.

3. Designate 241.1, 241.2, and 241.3 as subpart A—General Provisions.

4. Add a new subpart B to read as follows:

Subpart B—Conservation of Fish, Wildlife, and Their Habitat, Chugach National Forest, Alaska

Sec.

241.20 Scope and applicability
241.21 Definitions
241.22 Consistency determinations
241.23 Taking of fish and wildlife.

Subpart B—Conservation of Fish, Wildlife, and Their Habitat, Chugach National Forest, Alaska

§ 241.20 Scope and applicability.

(a) The regulations in this subpart apply to management of the Copper River-Rude River addition and Copper River-Bering River portion of the Chugach National Forest, for the conservation of fish, wildlife and their habitat as required by the Alaska National Interest Lands Conservation Act (16 U.S.C. 539). These regulations supplement the general regulations governing use and occupancy of National Forest System lands nationwide in 36 CFR part 251—Land Uses.

(b) The rules of this subpart are applicable only on Federally-owned lands within the boundaries of the Copper River-Rude River addition and the Copper River-Bering River portion of the Chugach National Forest, Alaska, known as the Copper River Management Area and as described and displayed in the Chugach National Forest Land and Resource Management Plan, July 1984.

(c) Nothing in these regulations is intended to enlarge or diminish the responsibility and authority of the State of Alaska for management of fish and wildlife.

(d) The primary purpose for the management of the Copper River-Rude River addition and the Copper River-Bering River portion of the Chugach National Forest, Alaska, is the conservation of fish and wildlife and their habitat. Consistent with the regulations at part 219 of this chapter, direction for managing the fish and wildlife resources of these units shall be documented in the land management plan for the Chugach National Forest.

§ 241.21 Definitions.

For the purpose of this subpart, the terms listed in this section shall be defined as follows:

ANILCA refers to the Alaska National Interest Lands Conservation Act (16 U.S.C. 3101 *et seq.*)

Federal lands mean lands the title to which is in the United States, but does not include those lands: (1) Tentatively approved, legislatively conveyed, or patented to the State of Alaska, or (2) interim-conveyed or patented to a Native corporation or person.

Fish and Wildlife means any member of the animal kingdom, including without limitation any mammal, fish, bird, amphibian, reptile, mollusk, crustacean, arthropod, or other invertebrate, and includes any part, product, egg, or offspring thereof, or dead body or part thereof. For the purposes of this subpart, birds also include any migratory or endangered bird for which protection is afforded by treaty or other international agreement.

Land means lands, waters, and interests therein.

Multiple-use activity is a specific management or permitted activity, use, measure, course of action, or treatment of National Forest System lands carried out under the statutory charter of the Multiple-Use Sustained-Yield Act of 1960 (16 U.S.C. 528 *et seq.*) and the National Forest Management Act (16 U.S.C. 1600 *et seq.*).

Responsible Forest Officer is the Forest Service employee who has the authority to select, authorize, permit and/or carry out a specific multiple-use activity.

§ 241.22 Consistency determinations.

(a) Subject to valid existing rights, a multiple-use activity may be permitted or authorized within the areas of the Chugach National Forest subject to this subpart only after a determination by the responsible Forest Officer that such activity is consistent with the conservation of fish, wildlife, and their habitat. A use or activity may be determined to be consistent if it will not materially interfere with or detract from the conservation of fish, wildlife and their habitat.

(b) Where an evaluation is made pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4321) for a proposed multiple-use activity, and the responsible Forest Officer prepares an environmental impact statement (EIS) or environmental assessment (EA) or categorically excludes an activity from documentation in an EA or EIS, the consistency determination required by this section for the use or activity shall be included as a part of the decision document.

(c) Guidelines that are consistent with this section may be developed for specific multiple-use activities as a part of the planning and implementation process required by the National Forest Management Act and the implementing regulations at 36 CFR part 219, National Forest System Land and Resource Management Planning.

(d) Subject to valid existing rights, the responsible Forest Officer may incorporate into any permit or other authorization issued pursuant to 36 CFR part 251 or other regulations of this chapter any reasonably practicable measures that are determined to be necessary to maintain consistency with the conservation of fish, wildlife, and their habitat as provided by this subpart.

(e) Subject to valid existing rights, the responsible Forest Officer may terminate, suspend, restrict, or require modification of any activity if it is determined that such measures are required to conserve wildlife, fish, or their habitat within the areas of the Chugach National Forest subject to this subpart. Prior to taking action to terminate, suspend, restrict, or require modification of an activity under this section, the responsible Forest Officer shall give affected parties reasonable prior notice and an opportunity to comment, unless it is determined that doing so would likely result in irreparable harm to conservation of fish, wildlife, and their habitat.

(f) Decisions made pursuant to this section are subject to appeal only as provided in 36 CFR parts 217 and 251, subpart C.

(g) Nothing in this section affects subsistence activities carried out in accordance with § 241.23 of this subpart or other applicable law.

§ 241.23 Taking of fish and wildlife.

(a) The taking of fish and wildlife by hunting, trapping, or fishing from lands subject to the rules of this subpart is authorized in accordance with applicable State and Federal law.

(b) To the extent consistent with the conservation of fish and wildlife and their habitat in accordance with recognized scientific management principles, local rural residents who depend upon the Chugach National Forest for subsistence needs shall continue to have the opportunity to engage in a subsistence way of life on the lands to which this subpart applies pursuant to applicable State and Federal law.

(c) To the extent consistent with the conservation of fish and wildlife and their habitat, the continuation of existing uses and the future establishment and use of temporary campsites, tent, platforms, shelters, and other temporary facilities and equipment directly and necessarily related to the taking of fish and wildlife may be authorized in accordance with applicable law and regulations. However, the Forest Supervisor may restrict or prohibit facilities or uses in the Copper River-Rude River addition or Copper River-Bering River area if it is determined, after adequate notice to the affected parties, that the continuation of such facilities or uses would materially interfere with or adversely affect the conservation of fish and wildlife and their habitat.

Dated: November 22, 1991.

James R. Moseley,

Assistant Secretary, Natural Resources and Environment.

[FR Doc. 91–29050 Filed 12–3–91; 8:45 am]

BILLING CODE 3410–11–M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 81

[A–1–FRL–4033–7]

Designation of Areas for Air Quality Planning Purposes; Massachusetts; Designation of the Commonwealth of Massachusetts With Respect to the Nitrogen Dioxide NAAQS

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is approving a redesignation request submitted by the Commonwealth of Massachusetts. This action will designate each of the 351 towns and cities in the Commonwealth of Massachusetts as a separate attainment area with respect to the National Ambient Air Quality Standard (NAAQS) for nitrogen dioxide (NO_2). This action will minimize the analysis of

changes in ambient air levels of NO_2 resulting from construction of new sources required by the Prevention of Significant Deterioration Rule for nitrogen dioxide (53 FR 40656–40672). This action is being taken in accordance with section 107(d) of the Clean Air Act.

EFFECTIVE DATE: This action will become effective February 3, 1992, unless notice is received within 30 days that adverse or critical comments will be submitted. If the effective date is delayed, timely notice will be published in the **Federal Register**.

ADDRESSES: Comments may be mailed to Linda M. Murphy, Director, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region I, JFK Federal Building, Boston, MA 02203. Copies of the documents relevant to this action are available for public inspection during normal business hours, by appointment at the Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region I, One Congress Street, 10th floor, Boston, MA; Public Information Reference Unit, U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460; and the Division of Air Quality Control, Department of Environmental Protection, One Winter Street, 8th Floor, Boston, MA 02108.

FOR FURTHER INFORMATION CONTACT: Ian D. Cohen, (617) 565–3229; FTS 835–3229.

SUPPLEMENTARY INFORMATION: On October 31, 1990, the Commonwealth of Massachusetts submitted a formal request to designate each of the 351 towns and cities in the State as a separate area for attainment of the NAAQS for NO_2. The state is currently designated as a single area which is in attainment for NO_2 in 40 CFR 81.322.

Section 107(d)(5) of the Clean Air Act Amendments of 1977 allows states to revise and resubmit the list of designated attainment areas for their state subject to EPA approval. Section 107(d)(3)(D) of the Clean Air Act Amendments of 1990 also allow states to submit revised designations to EPA of any area which is currently in attainment for a given pollutant. After the publication of the Prevention of Significant Deterioration (PSD) regulations (45 FR 52676), the Commonwealth of Massachusetts requested and EPA approved (46 FR 40190) a redesignation request for sulfur dioxide (SO_2), designating most cities and towns as separate attainment areas. On October 17, 1988, EPA promulgated NO_2 increments as part of the PSD program (53 FR 40656–40672). The present action will serve the same purpose for NO_2 that 46 FR 40190 served for SO_2.

EPA's PSD regulations limit the increase in ambient pollution concentrations over an established baseline concentration. While the baseline concentration for major sources of NO_2 was established on February 8, 1988, a separate minor source baseline concentration may be established for each separate attainment area. Currently, the entire Commonwealth of Massachusetts is treated as a single attainment area for NO_2. The first complete application from a source which would have a significant impact on the concentration of NO_2 (an increase in concentration of at least 1 microgram per cubic meter, $\mu g/m^3$) would trigger the minor source baseline for the entire state. If each city and town is designated a separate attainment area, the minor source baseline would only have been triggered in those cities and towns in which an application for a new source with a significant emission of NO_2 has been filed. The entire Commonwealth of Massachusetts is currently considered a Class II area for PSD, so the permissible increase in the annual average concentration for NO_2 is an annual concentration of 25 $\mu g/m^3$. This is referred to as the increment. After the baseline concentration has been set, each new source or modification to an existing source will consume some of this increment. While redefining the boundaries of an existing attainment area will not affect the air quality at a given location, it will eliminate the need for a new source to consider the effects of a distant source simply because that source triggered the baseline for the entire state.

If a source emits enough NO_2 to increase the concentration of NO_2 in the ambient air by 1 $\mu g/m^3$, it is considered significant. If a significant source has been issued a permit since February 8, 1988, any area in which that source has a significant impact must be part of the same attainment area. Therefore, if any source permitted since February 8, 1988 has a significant impact in 2 or more towns, those towns would have had to be part of the same attainment area. When Massachusetts redefined the boundaries for its attainment area for SO_2, several towns had sources which affected neighboring towns, and therefore some attainment areas for SO_2 were defined to include more than one town. In the case of NO_2, four sources have submitted applications, but in each case, the impact of the source is confined to one town. This will permit Massachusetts to define each city and town as a separate attainment area, but the minor source baseline date in four towns has already been set. The sources and towns involved are:

1. Bellingham Cogeneration, Bellingham (December 16, 1988)
2. Lawrence Thermal Conversion facility, Lawrence (December 12, 1989)
3. Seamass Waste-to-Energy Unit #3, Rochester (December 16, 1988)
4. MASSPOWER Cogeneration facility, Springfield (September 5, 1990)

The baseline date for each of these four towns are given in parentheses.

The baseline dates for the remaining 347 towns have not been set. All are currently in attainment for NO_2.

The proposed action will redefine the boundaries of an attainment area. It does not affect the attainment status of any area, nor does it increase the increment available in any area. This proposed action will give the Commonwealth of Massachusetts the flexibility it desires in administering its PSD program.

EPA is approving this redesignation request without prior proposal because the Agency views this as a noncontroversial amendment and anticipates no adverse comments. This action will be effective 60 days from the date of this **Federal Register** notice unless, within 30 days of its publication, notice is received that adverse or critical comments will be submitted. If such notice is received, this action will be withdrawn before the effective date by simultaneously publishing two subsequent notices. One notice will withdraw the final action and another will begin a new rulemaking by announcing a proposal of the action and establishing a comment period. If no such comments are received, the public is advised that this action will be effective on February 3, 1992.

Final Action

EPA is approving the redesignation of NO_2 areas in the Commonwealth of Massachusetts, designating each city and town as a separate attainment area for NO_2.

Under 5 U.S.C. 605(b), I certify that this redesignation will not have a significant economic impact on a substantial number of small entities. (See 46 FR 8709.)

This action has been classified as a Table 3 action by the Regional Administrator under the procedures published in the **Federal Register** on January 19, 1989 (54 FR 2214–2225).

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

The Agency has reviewed this request for revision of the federally-approved redesignation for conformance with the provisions of the 1990 Amendments enacted on November 15, 1990. The Agency has determined that this action conforms with those requirements irrespective of the fact that the submittal preceded the date of enactment.

Nothing in this action should be construed as permitting or allowing or establishing a precedent for any future redesignation request. Each redesignation request shall be considered separately in light of specific technical, economic, and environmental factors and in relation to relevant statutory and regulatory requirements.

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by February 3, 1992. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 81

Air pollution control, Nitrogen dioxide, Reporting and recordkeeping requirements.

Dated: November 7, 1991.

Julie Belaga,

Regional Administrator Region I.

Part 81 of chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 81—[AMENDED]

1. The authority citation for part 81 continues to read as follows:

Authority: 42 U.S.C. 7401–7642, unless otherwise noted.

Subpart C—Section 107 Attainment Status Designations

2. In § 81.322, the table entitled "Massachusetts-NO_2" is revised to read as follows:

§ 81.322 Massachusetts.

MASSACHUSETTS-NO_2

Designated area	Does not meet primary standards	Does not meet secondary standards	Cannot be classified	Better than national standard
Each Individual City and Town [1]				X

[1] Each city and town is a separate Section 107 desginated Attainment Area.

* * * * *

[FR Doc. 91–28959 Filed 12–3–91; 8:45 am]

BILLING CODE 6560–50–M

40 CFR Part 180

[PP 0E3901 and 1E3924/R1129; FRL–3945–1]

RIN 2070–AB78

Pesticide Tolerances for Norflurazon

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This document removes tolerances for regionally restricted registration of the herbicide norflurazon in or on the raw agricultural commodities asparagus and avocados and adds them for nonregionally restricted registration. This amendment was requested in petitions submitted by the Interregional Research Project No. 4 (IR-4).

EFFECTIVE DATE: This regulation becomes effective December 4, 1991.

ADDRESSES: Written objections, identified by the document control number, [PP 0E3901 and 1E3924/R1129], may be submitted to: Hearing Clerk (A-110), Environmental Protection Agency, Rm. M3708, 401 M St., SW., Washington, DC 20460.

FOR FURTHER INFORMATION CONTACT: By mail: Hoyt Jamerson, Emergency Response and Minor Use Section (H7505C), Registration Division, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location and telephone number: Rm. 716C, CM #2, 1921 Jefferson Davis Highway, Arlington, VA 22202, (703)-557-2310.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of August 14, 1991 (56 FR 40291), EPA issued a proposed rule under section 408(e) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 346a(e)), that gave notice that the Interregional Research Project No. 4 (IR-4), New Jersey Agricultural Experiment Station, P.O. Box 231, Rutgers University, New Brunswick, NJ 08903, had submitted additional field residue data for asparagus from New Jersey, California, and Arizona and for avocados from California. These data show that use of norflurazon in other production areas is not likely to result in residues in excess of the established tolerances for asparagus (0.05 part per million (ppm)) and avocados (0.2 ppm). It is, therefore, no longer necessary for the Agency to regionally restrict registration for use of norflurazon on these commodities. To allow geographical expansion of the registration of norflurazon on asparagus and avocados, the Agency proposed amending 40 CFR 180.356 by deleting the tolerances in paragraph (c) for regional registration of asparagus and avocados and adding them in paragraph (a), which contains tolerances for norflurazon without regionally restricted registration.

There were no comments or requests for referral to an advisory committee received in response to the proposed rule.

The data submitted in the petitions and other relevant material have been evaluated and discussed in the proposed rule. Based on the data and information considered, the Agency concludes that the tolerances will protect the public health. Therefore, the tolerances are established as set forth below.

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. The objections submitted must specify the provisions of the regulation deemed objectionable and the grounds for the objections. If a hearing is requested, the objections must include a statement of the factual issue(s) on which a hearing is requested and the requestor's contentions on each such issue. A request for a hearing will be granted if the Administrator determines that the material submitted shows the following: There is a genuine and substantial issue of fact; there is a reasonable possibility that available

evidence identified by the requestor would, if established, resolve one or more of such issues in favor of the requestor, taking into account uncontested claims or facts to the contrary; and resolution of the factual issue(s) in the manner sought by the requestor would be adequate to justify the action requested.

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

Pursuant to the requirements 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).

List of Subjects in 40 CFR Part 180

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

Dated: October 24, 1991.

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. Section 180.356 is amended by removing paragraph (c) and by amending paragraph (a) in the table therein by alphabetically inserting the tolerance listings for asparagus and avocados, to read as follows:

§ 180.356 Norflurazon; tolerances for residues.

(a) * * *

Commodity	Parts per million
* * * * *	
Asparagus	0.05
Avocados	0.20
* * * * *	

* * * * *

[FR Doc. 91-29059 Filed 12-3-91; 8:45 am]

BILLING CODE 6560-50-F

40 CFR Part 180

[PP 9E3719 and PP 9E3748/R1128; FRL-3944-6]

RIN 2070-AB78

Pesticide Tolerances for Zinc Phosphide

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This document establishes tolerances for residues of phosphine resulting from the use of the rodenticide zinc phosphide in or on the raw agricultural commodities artichoke and sugar beet (roots and tops). The regulations to establish maximum permissible levels for residues of the rodenticide in or on the commodities were requested in petitions submitted by the Interregional Research Project No. 4 (IR-4).

EFFECTIVE DATE: This regulation becomes effective December 4, 1991.

ADDRESSES: Written objections, identified by the document control number, [PP 9E3719 and 9E3748/R1128], may be submitted to: Hearing Clerk (A-110), Environmental Protection Agency, Rm. M3708, 401 M St., SW., Washington, DC 20460.

FOR FURTHER INFORMATION CONTACT: By mail: Hoyt L. Jamerson, Emergency Response and Minor Use Section (H-7505C), Registration Division, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location and telephone number: Rm. 716C, CM #2, 1921 Jefferson Davis Highway, Arlington, VA 22202, (703)-557-2310.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of July 31, 1991 (56 FR 36125), EPA issued a proposed rule under section 408(e) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 346a(e)) that gave notice that the Interregional Research Project No. 4 (IR-4), New Jersey Agricultural Experiment Station, P.O. Box 231, Rutgers University, New Brunswick, NJ 08903, had submitted pesticide petitions 9E3719 and 9E3748 to EPA on behalf of the Agricultural Experiment Station of California.

1. *PP 9E3719:* In or on the raw agricultural commodity globe artichoke at 0.01 part per million (ppm).

2. *PP 9E3748:* In or on the raw agricultural commodities sugarbeet roots at 0.04 ppm and sugar beet tops at 0.02 ppm.

The petitioner proposed that these uses of zinc phosphide be limited to California based on the geographical representation of the residue data submitted. Additional residue data will be required to expand the area of usage. Persons seeking geographically broader registration should contact the Agency's Registration Division at the address provided above.

There were no comments or requests for referral to an advisory committee received in response to the proposed rule.

The data submitted in the petition and other relevant material have been evaluated and discussed in the proposed rule. Based on the data and information considered, the Agency concludes that the tolerances will protect the public health. Therefore, the tolerances are established as set forth below.

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. The objections submitted must specify the provisions of the regulation deemed objectionable and the grounds for the objections. If a hearing is requested, the objections must include a statement of the factual issue(s) on which a hearing is requested and the requestor's contentions on each such issue. A request for a hearing will be granted if the Administrator determines that the material submitted shows the following: There is a genuine and substantial issue of fact; there is a reasonable possibility that available evidence identified by the requestor would, if established, resolve one or more of such issues in favor of the requestor, taking into account uncontested claims or facts to the contrary; and resolution of the factual issue(s) in the manner sought by the requestor would be adequate to justify the action requested.

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

Pursuant to the requirements 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).

List of Subjects in 40 CFR Part 180

Administrative practice and procedure, Agricultural commodities,

Pesticides and pests, Reporting and recordkeeping requirements.

Dated: October 24, 1991.

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. Section 180.284 is revised to read as follows:

§ 180.284 Zinc phosphide; tolerances for residues.

(a) Tolerances are established for residues of the phosphine resulting from the use of the rodenticide zinc phosphide in or on the raw agricultural commodities as follows:

Commodity	Parts per million
Grapes	0.01
Grasses (rangeland)	0.1
Sugarcane	0.01

(b) Tolerances with regional registration, as defined in § 180.1(n), are established for residues of phosphine resulting from the use of the rodenticide zinc phosphide in or on the following raw agricultural commodities as follows:

Commodity	Parts per million
Artichoke (globe)	0.01
Sugar beet (roots)	0.04
Sugar beet (tops)	0.02

[FR Doc. 91-29060 Filed 12-3-91; 8:45 am]
BILLING CODE 6560-50-F

Proposed Rules

Federal Register
Vol. 56, No. 233
Wednesday, December 4, 1991

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 989

[FV-91-437 PR]

1991-92 Expenses and Assessment Rate Under Marketing Order No. 989 Raisins Produced From Grapes Grown In California

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This proposed rule would authorize expenditures and establish an assessment rate under Marketing Order No. 989 for the 1991-92 fiscal year established under the Federal marketing order for raisins produced from grapes grown in California. Authorization of this budget would allow the Raisin Administrative Committee (Committee) to incur reasonable and necessary expenses to administer the marketing order program. Funds for the program would be derived from assessments on handlers of California raisins.

DATES: Comments must be received by December 16, 1991.

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, room 2525-S, 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: Richard Lower, Marketing Specialist, Marketing Order Administration Branch, room 2525-S, F&V, AMS, USDA, P.O. Box 96456, Washington, DC 20090-6456; telephone: (202) 475-3861.

SUPPLEMENTARY INFORMATION: This proposed rule is issued under Marketing Agreement and Order No. 989 [7 CFR part 989], both as amended, regulating the handling of raisins produced from grapes grown in California. The 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 by the U.S. Department of Agriculture (Department) in accordance with Departmental Regulation 1512-1 and the criteria contained in Executive Order 12291 and has been determined to be a "non-major" rule.

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 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 an estimated 23 handlers of California raisins subject to regulation under this marketing order and approximately 5,000 producers of California raisins. Small agricultural producers have been defined by the Small Business Administration [13 CFR 121.601] as those having annual receipts of less than $500,000, and small agricultural service firms are defined as those whose annual receipts are less than $3,500,000. A minority of the handlers and majority of the producers of raisins may be classified as small entities.

The Federal marketing order for California raisins requires that the assessment rate for a particular marketing year shall apply to all assessable raisins handled from the beginning of such year. An annual budget of expenses is prepared by the Committee and submitted to the Department for approval. The members of the Committee are handlers and producers of raisins. 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 public meetings, so that all directly affected persons 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 assessable raisins. That rate is applied to actual shipments to produce sufficient income to pay the Committee's expected expenses. The budget of expenses and rate of assessment are usually recommended by the Committee shortly after the season starts. Expenses are incurred on a continuous basis; therefore, the budget of annual expenses and assessment rate approval must be expedited so that the Committee will have funds to meet its obligations.

The Raisin Administrative Committee (Committee) met on October 10, 1991, and unanimously recommended 1991-92 expenditures in the amount of $516,735, together with a reserve for contingencies of $77,965 for a total of $594,700 and a rate of assessment of $1.90 per ton of free tonnage raisins shipped under the marketing order. In comparison, 1990-91 budgeted expenditures were $540,550, which included a reserve for contingencies of $37,770 and the assessment rate was $1.90. Total income for 1990-91 was $649,687, and actual expenditures were $420,874. Unexpended funds from the 1990-91 season shall be credited or refunded to the handler from whom collected. Major expenditure categories, by comparison, in the 1991-92 and actual 1990-91 expenses (in parentheses) are as follows: $212,000, ($203,808) for executive salaries, $95,000, ($75,924) for office personnel salaries, $50,000, ($27,924) for Committee travel, $40,000, ($37,892) for compliance staff salaries, and $40,000, ($32,014) for insurance bonds. The estimated assessable tonnage of 313,000 tons would provide adequate funds to meet the budgeted expenses for the 1991-92 crop year.

While this action would impose some additional costs on handlers of California raisins, including small entities, the costs are in the form of uniform assessments on all handlers. Any costs to handlers are expected to be more than offset by 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 10 days is appropriate because the budget and assessment rate approval for this program needs to be expedited. The Committee must have sufficient funds to pay its expenses, which are incurred on a continuous basis.

List of Subjects in 7 CFR Part 989

Grapes, Marketing agreements, Raisins, and Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, it is proposed that 7 CFR part 989 be amended as follows:

PART 989—RAISINS PRODUCED FROM GRAPES GROWN IN CALIFORNIA

1. The authority citation for 7 CFR part 989 continues to read as follows:

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

§ 989.342 Expenses and assessment rate.

2. Section 989.342 is added to read as follows:

Expenses of $594,700 by the Raisin Administrative Committee are authorized and an assessment rate payable by each handler in accordance with § 989.80 of $1.90 per ton of assessable raisins is established for the crop year ending July 31, 1992. Any unexpended funds from that crop year shall be credited or refunded to the handler from whom collected.

Dated: November 27, 1991.

William J. Doyle,

Associate Deputy Director, Fruit and Vegetable Division.

[FR Doc. 91–29076 Filed 12–3–91; 8:45 am]

BILLING CODE 3410–02–M

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7 CFR Part 1030

[DA–91–020]

Milk in the Chicago Regional Marketing Area; Notice of Proposed Revision of Supply Plant Shipping Percentages

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed revision of rule.

SUMMARY: This notice invites written comments on a proposal to revise certain provisions of the Chicago Regional milk order for the month of December 1991. The proposal would reduce the shipping percentages for pooling individual supply plants by 4 percentage points from (5 to 1 percent of receipts) and units of supply plants by 6 percentage points (from 10 to 4 percent of receipts) during December 1991. The reductions were requested by Central Milk Producers Cooperative, a federation of cooperatives that represents producers who supply the market. The organization contends that the action is necessary to prevent uneconomic shipment of milk from supply plants to distributing plants.

DATES: Comments are due on or before December 11, 1991.

ADDRESSES: Comments (two copies) should be filed with the USDA/AMS/Dairy Division, Order Formulation Branch, room 2968, South Building, P.O. Box 96456, Washington, DC 20090–6456.

FOR FURTHER INFORMATION CONTACT: John F. Borovies, Marketing Specialist, USDA/AMS/Dairy Division, Order Formulation Branch, room 2968, South Building, P.O. Box 96456, Washington, DC 20090–6456, (202) 690–1366.

SUPPLEMENTARY INFORMATION: The Regulatory Flexibility Act (5.U.S.C. 601–612) requires the Agency to examine the impact of a proposed rule on small entities. Pursuant to 5 U.S.C. 605(b), the Administrator of the Agricultural Marketing Service has certified that this proposed action will not have a significant economic impact on a substantial number of small entities. The action would reduce the regulatory impact on milk handlers and tend to insure that the market would be adequately supplied with milk for fluid use with a smaller proportion of milk shipments from pool supply plants.

This proposed rule has been reviewed by the Department in accordance with Departmental Regulation 1512–1 and the criteria contained in Executive Order 12291 and has been determined to be a "non-major" rule.

Notice is hereby given that, pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), and the provisions of § 1030.7(b)(5) of the order, the revision of certain provisions of the order regulating the handling of milk in the Chicago Regional marketing area is being considered for the month of December 1991.

All persons who want to send written data, views or arguments about the proposed revision should send two copies of their views to the USDA/AMS/Dairy Division, Order Formulation Branch, room 2968, South Building, P.O. Box 96456, Washington, DC 20090–6456, by the 7th day after publication of this notice in the **Federal Register**. The period for filing comments is limited to seven days because a longer period would not provide the time needed to complete the required procedures and implement the suspension for December.

All written submissions made pursuant to this notice will be made available for public inspection in the Dairy Division during normal business hours (7 CFR 1.27(b)).

Statement of Consideration

The provisions proposed to be revised are the supply plant shipping percentages for the month of December 1991. The proposed action would reduce the shipping percentage for individual supply plants by 4 percentage points (from 5 to 1 percent of receipts) and for supply plant units by 6 percentage points (from 10 to 4 percent of receipts) during December 1991.

Currently, the order provides that individual supply plants must ship at least 5 percent of milk receipts to other plants to qualify as pool plants while a unit of supply plants must ship at least 10 percent of total receipts for pooling purposes during the months of September through December. During other months the shipping standards are 3 percent for individual plants and 6 percent for a unit of plants.

The Chicago order provides that the market administrator may adjust the shipping standards for individual plants and units of plants by up to 2 percentage points for up to 3 months. The order also provides that the the Director of the Dairy Division may increase the shipping standards by up to 5 percentage points or decrease the shipping standards by up to 10 percentage points. The adjustments can be make to encourage additional milk shipments or to prevent uneconomic shipments.

The revision was requested by Central Milk Producers Cooperative (CMPC), a federation of cooperative associations that represent a substantial number of the producers who supply the market. CMPC contends that a reduction of shipping percentages is necessary to prevent uneconomic shipments of milk from distant supply plants solely for pooling purposes.

Based on supply and sales estimates, CMPC has requested that the market administrator reduce the shipping percentages by 2 percentage points during the months of November and December. A reduction of the shipping percentages for November has been issued by the market administrator.

Based on the most recent supply and demand projections, CMPC contends a further reduction of shipping percentages, beyond the request to the market administrator, will be necessary.

CMPC contends that in order to make the most efficient use of available milk supplies, as much as possible of nearby milk supplies will have to be utilized with reliance on distant supplies only on days when nearer milk supplies have been exhausted. For the month of December, CMPC contends that such efficiencies can only be realized if the shipping standards for individual plants and units of supply plants are reduced to 1 and 4 percent of receipts, respectively.

In view of the supply/demand relationship, it may be necessary to reduce the supply plant shipping percentages as proposed to provide for the efficient and economic marketing of milk during the month of December 1991.

List of Subjects in 7 CFR Part 1030

Milk marketing orders.

The authority citation for 7 CFR part 1030 continues to read as follows:

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

Signed at Washington, DC, on: November 27, 1991.

W.H. Blanchard,

Director, Dairy Division.

[FR Doc. 91–29077 Filed 12–3–91; 8:45 am]

BILLING CODE 3410–02–M

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[INTL–965–86]

RIN 1545–AM12

Calculation of Currency Gain or Loss on Transfers From Qualified Business Unit Branches Using the Profit and Loss Method of Accounting; Hearing Cancellation

AGENCY: Internal Revenue Service, Treasury.

ACTION: Cancellation of notice of public hearing on proposed regulations.

SUMMARY: This document provides notice of cancellation of a public hearing on proposed Income Tax Regulations relating to the calculation of income (including currency gain or loss on remittances) attributable to a qualified business unit of a taxpayer that uses the profit and loss method of accounting.

DATES: The public hearing originally scheduled for Monday, December 9, 1991, beginning at 10 a.m. is cancelled.

FOR FURTHER INFORMATION CONTACT: Bob Boyer of the Regulations Unit, Assistant Chief Counsel (Corporate), 202–377–9231, (not a toll-free number).

SUPPLEMENTARY INFORMATION: The subject of the public hearing is proposed regulations under section 987 of the Internal Revenue Code of 1986 relating to the calculation of income (including gain or loss on remittances and terminations) attributable to a QBU branch of a taxpayer that uses the profit and loss method of accounting. A notice in the **Federal Register** for Wednesday, September 25, 1991, (56 FR 48464), announced that the public hearing on the proposed regulations would be held on Monday, December 9, 1991, beginning at 10 a.m. in the IRS Commissioner's Conference Room, room 3313, Internal Revenue Building, 1111 Constitution Avenue, NW, Washington, DC.

The public hearing scheduled for Monday, December 9, 1991, has been cancelled.

By direction of the Commissioner of Internal Revenue.

Cynthia E. Grigsby,

Alternate Federal Register Liaison Offier, Assistant Chief Counsel (Corporate).

[FR Doc. 91–29005 Filed 12–3–91; 8:45 am]

BILLING CODE 4830–01–M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 131

[WH–FRL–4036–6]

Amendments to the Water Quality Standards Regulation To Establish the Numeric Criteria for Priority Toxic Pollutants Necessary to Bring All States Into Compliance With Section 303(c)(2)(B)

AGENCY: Environmental Protection Agency.

ACTION: Proposed rule; correction.

SUMMARY: EPA is correcting typographical errors in the proposed rule for water quality standards for priority toxic pollutants which appeared in the **Federal Register** on November 19, 1991 (56 FR 58420).

FOR FURTHER INFORMATION CONTACT: David K. Sabock or R. Kent Ballentine, Telephone 202–260–1315.

SUPPLEMENTARY INFORMATION: EPA proposed regulations to establish water quality criteria for certain States in order to bring those States into compliance with section 303(c)(2)(B) of the Clean Water Act (Pub. L. 92–500 as amended, 33 U.S.C. 1251, *et seq.*). The proposed rule contained typographical errors which are identified briefly below and are corrected by this notice.

Description of Errors and Correction

1. Proposed 40 CFR 131.36(b) beginning on 56 FR 58442 has an error on page 58443, on the last line of the matrix. The total number of criteria for saltwater criterion maximum concentrations (column C1) is 23.

2. In § 131.36 for a number of States, the reference to particular columns in the criterion matrix in 40 CFR 131.36(b) varies between arabic numbers and Roman Numerals. The correct citation is the arabic numbers. Thus, the correct citations are B1, B2, C1, C2, D1, and D2. The States and paragraph in § 131.36 affected by this change are: Connecticut (d)(1)(ii)), New Hampshire (d)(2)(ii)), Rhode Island (d)(3)(ii)), Vermont (d)(4)(ii)), Virginia (d)(7)(ii)), District of Columbia (d)(8)(ii)), Michigan (d)(10)(ii)), Louisiana (d)(12)(ii)), Kansas (d)(13)(ii)), Colorado (d)(14)(ii), Alaska (d)(20)(ii), Idaho (d)(21)(ii)), Washington (d)(22)(ii)).

3. Proposed 40 CFR 131.36(d)(1)(ii) beginning on page 58445 contains a matrix for the State of Connecticut in the middle column. In that matrix for the use classification of Class B waters where water supply is not designated; the applicable criteria from Column D(2) should read "all."

4. Proposed 40 CFR 131.36(d)(3)(ii) beginning on page 58445 contains a matrix for the State of Rhode Island in the third column. In that matrix, the description of the second use classification, a semicolon should be added so that the description reads: "Class B waters where water supply use in not designated; Class C; Class SA; Class SB; Class SC."

5. Proposed 40 CFR 131.36(d)(5)(ii) beginning on page 58445 contains a matrix for the State of New Jersey in the first column on page 58446. In that matrix, the first use classification should be "FW2" and the second use classification should read "SE1, SE2, SE3, SC."

6. Proposed 40 CFR 131.36(d)(13)(ii) beginning on page 58447 contains a matrix for the State of Kansas in the middle column. In the Applicable criteria column on the matrix, each column citation should have the word "all" inserted before the word "except." That is, column B(1), all except #9, etc.; column B2, all except #19, etc.; column D2, all except #9, etc.; column D(1), all except #9, etc.

7. Proposed 40 CFR 131.36(d)(20)(ii) beginning on page 58449 contains a matrix for the State of Alaska in the first column on page 58450. For the last use classification shown (i.e. (1)(C)), the applicable criterion, "Same as for

(1)(B)(ii)," should appear in the applicable criteria column.

Dated: November 22, 1991.

Martha G. Prothro,

Acting Assistant Administrator for Water.

[FR Doc. 91-28681 Filed 12-3-91; 8:45 am]

BILLING CODE 6560-50-M

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 90

[PR Docket No. 91-322; FCC 91-332]

Private Land Mobile Radio Services; Secondary Fixed Operations

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Commission has proposed rule changes that, if adopted, would relax existing restrictions on secondary fixed tone signaling and alarm operations by all types of private land mobile radio systems that are licensed for exclusive use. This action was taken because no valid regulatory or public interest objective is achieved by continuing to apply rules intended for a shared-spectrum environment to an exclusive-use environment. The proposed rule changes would relieve licensees of these systems, including small businesses, of an unnecessary regulatory burden entailing various technical restrictions.

DATES: Comments must be filed on or before January 13, 1992, and reply comments on or before January 28, 1992.

ADDRESSES: Federal Communications Commission, 1919 M Street NW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Freda Lippert Thyden, Rules Branch, Private Radio Bureau, (202) 634-2443.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Notice of Proposed Rule Making, PR Docket No. 91-322, FCC 91-332, adopted October 22, 1991, and released November 21, 1991. The full text of this Notice of Proposed Rule Making 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 may be purchased from the Commission's copy contractor, Downtown Copy Center, 1114 21st Street, Washington, DC 20036, telephone (202) 452-1422.

Summary of Notice of Proposed Rule Making

1. 47 CFR 90.235 provides that private radio land mobile licensees authorized under part 90 of the Commission's Rules may conduct secondary fixed tone signaling and alarm operations above 25 MHz provided certain terms and conditions are met. These provisions, essentially technical, relate primarily to protection of co-channel users from interference on shared channels. The Commission recently amended 47 CFR 90.637(c) to allow trunked Specialized Mobile Radio (SMR) systems and their end users to conduct such operations on a less restricted basis without complying with 47 CFR 90.235. This action was taken because the restrictions had been intended to reduce interference potential to mobile operations in a shared spectrum environment and thus were unnecessary for trunked SMR systems with exclusive frequency assignments.

2. Trunked SMR systems above 800 MHz are not the only private land mobile radio systems that operate in an exclusive-use environment. The American Petroleum Institute (API), in its Petition for Rule Making in this proceeding, requested relaxing the restrictions for non-SMR trunked systems above 800 MHz when conducting secondary fixed operations because these operations also are licensed for exclusive use. Based on this rationale, we propose to consider relaxing the existing restrictions on secondary fixed tone signaling and alarm operations by all types of private land mobile radio systems operating in an exclusive-use environment, including non-SMR trunked systems above 800 MHz. We also note that a conventional system in the 470-512 MHz frequency band or above 800 MHz can achieve "exclusive-use" single-user status for its assigned frequencies in a geographic area by reason of its mobile loading. This category also is included in our proposal.

Initial Regulatory Flexibility Analysis

3. Pursuant to the Regulatory Flexibility Act of 1980, an initial regulatory flexibility analysis has been prepared. It is available for public viewing as part of the full text of this decision which may be viewed at the Commission's offices or obtained from its copy contractor.

List of Subjects in 47 CFR Part 90

Private land mobile radio services, Secondary fixed tone signaling and alarm operations, Exclusive-use land mobile systems, Radio.

Amendatory Text

PART 90—[AMENDED]

It is proposed to amend 47 CFR part 90, as follows:

1. The authority citation for part 90 continues to read as follows:

Authority: Sections 4, 303, 331, 48 Stat., as amended, 1066, 1082; 47 U.S.C. 154, 303, and 332, unless otherwise noted.

2. Section 90.235 would be amended by adding a new paragraph (l) to read as follows:

§ 90.235 Secondary fixed signaling operations.

* * * * *

(l) Secondary-fixed tone signaling operations conducted in accordance with the provisions of Section 90.317(a) or 90.637(c) of this Part are exempt from the foregoing provisions of this Section.

3. A new § 90.317 would be added to read as follows:

§ 90.317 Fixed ancillary signaling and data transmissions.

(a) Licensees of systems that have exclusive-use status in their respective geographic areas may engage in fixed ancillary signaling and data transmissions, subject to the following requirements:

(1) All such ancillary operations must be on a secondary, noninterference basis to the primary mobile operation of any other licensee.

(2) The output power at the remote site shall not exceed 30 watts.

(3) Any fixed transmitters will not count toward meeting the mobile loading requirements nor be considered in whole or in part as a justification for authorizing additional frequencies in the licensee's mobile system.

(4) Automatic means must be provided to deactivate the remote transmitter in the event the carrier remains on for a period in excess of three minutes.

(5) Operational fixed stations authorized pursuant to the provisions of this paragraph are exempt from the requirements of §§ 90.425 and 90.429 of this part.

(b) Licensees of systems that do not have exclusive-status in their respective geographic areas may conduct fixed ancillary signaling and data transmissions only in accordance with the provisions of § 90.235 of this part.

4. Section 90.637 would be amended by revising paragraph (c) and adding new paragraph (d) to read as follows:

§ 90.637 Restrictions on operational fixed stations.

* * * * *

(c) Trunked and conventional systems that have exclusive-use status in their respective geographic areas may conduct fixed ancillary signaling and

data transmissions subject to the following requirements:

(1) All operations must be on a secondary, non-interference basis to the primary mobile operation of any other licensee.

(2) The output power at the remote site shall not exceed 30 watts.

(3) Any fixed transmitters will not count toward meeting the mobile loading requirements nor be considered in whole or in part as a justification for authorizing additional frequencies in the licensee's mobile system.

(4) Automatic means must be provided to deactivate the remote transmitter in the event the carrier remains on for a period in excess of three minutes.

(5) Operational fixed stations authorized pursuant to the provisions of paragraphs (c) and (d) of this section are exempt from the requirements of §§ 90.425 and 90.429 of this part.

(d) Conventional systems that do not have exclusive-use status in their respective geographic areas may conduct fixed ancillary signaling and data transmissions only in accordance with the provisions of § 90.235 of this part.

Federal Communications Commission.

William F. Caton,

Acting Secretary.

[FR Doc. 91-28987 Filed 12-3-91; 8:45 am]

BILLING CODE 6712-01-M

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 571

[Docket No. 87-02; Notice 5]

RIN 2127-AE22

Federal Motor Vehicle Safety Standards; Seat Belt Assembly Anchorages

AGENCY: National Highway Traffic Safety Administration (NHTSA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: This notice solicits comments on a proposal to amend the performance requirements of Standard No. 210, *Seat Belt Assembly Anchorages* to provide that the lap belt angle would be measured for rear adjustable seats with the seats in the rearmost adjustment position. This proposal is intended to resolve ambiguities regarding the seat adjustment position for the current requirement.

DATES: Comments must be received by February 3, 1992. If adopted, the proposed amendment would become effective 18 months following the publication of the final rule.

ADDRESSES: Comments should refer to the docket and notice number of this notice and be submitted to: Docket Section, room 5109, National Highway Traffic Safety Administration, 400 Seventh Street, SW., Washington, DC 20590. (Docket Room hours are 9:30 a.m.-4 p.m., Monday through Friday).

FOR FURTHER INFORMATION CONTACT: Mr. Clark Harper NRM-12, Office of Vehicle Safety Standards, National Highway Traffic Safety Administration, 400 Seventh Street, SW., Washington, DC, 20590, Telephone (202) 366-2264.

SUPPLEMENTARY INFORMATION:

Background

On April 30, 1990 (55 FR 17970), NHTSA pulished a final rule amending Standard No. 210, *Seat Belt Assembly Anchorages* (49 CFR 571.210). The rule made several amendments, specifically:

1. Increasing the minimum lap belt angle to reduce the likelihood of occupant submarining (sliding under the lap belt) in a crash;

2. Excluding front outboard designated seating positions (driver's seats and right front passenger's seats) equipped with automatic safety belts from the requirement that those positions also be equipped with anchorages for manual shoulder belts;

3. Permitting the optional use of some new test equipment for compliance testing to make the compliance tests simpler and less costly to perform; and

4. Removing some ambiguities in the current compliance testing procedures so that all parties would know precisely how compliance testing will be conducted by the agency.

The agency received 7 petitions for reconsideration of this rule. Elsewhere in today's edition of the **Federal Register**, the agency has published a notice responding to these petitions. In response to one of the petitions, this notice proposes to amend the anchorage location requirements of Standard No. 210, to measure the lap belt angle for rear adjustable seats from the rearmost adjustment position.

Lap Belt Angle for Rear Adjustable Seats

Standard No. 210 sets performance requirements for safety belt anchorages to ensure their proper location for effective occupant protection and to reduce the likelihood of the anchorages' failure in a crash. The requirements of the standard, which apply to passenger cars, trucks, buses, and multipurpose passenger vehicles (MPVs), set zones within the vehicle where an anchorage must be located. The anchorage for a lap belt, or the lap portion of a lap/shoulder belt, is required to meet minimum and maximum mounting angle requirements. Prior to the April 30, 1990 final rule, the lap belt mounting angle for an adjustable seat is the intersection of a line between a point 2.5 inches forward and 0.375 inch above the seating reference point (SgRP) and the anchorage or the nearest point where the belt contacts the seat and a horizontal line, with the seat in its rearmost adjustment position.

In the April 30, 1990 final rule, the agency revised the seat location requirement specified in S4.3.2 to determine if the upper anchorage for a lap/shoulder belt complies with the anchorage location requirements of Standard No. 210. This amendment specified that the seat was to be adjusted to its most rearward position, rather than the SgRP, to determine if the vehicle complies with the upper anchorage location zones. In the NPRM for this rule, the agency stated that it would continue to use the existing SgRP, even though the seating adjustment position "may not be the rearmost position." to determine if a lap belt or the lap belt portion of a lap/shoulder belt meets the minimum and maximum mounting angle requirements in Standard No. 210. Therefore, the reference to the seat being in its rearmost adjustment position were removed from the Standard.

In its petition, Volkswagen requested an amendment to Standard No. 210 "to provide that the seating reference point for determining the minimum and maximum lap belt angles be based on the seating reference point located with the 95th percentile male dummy leg length." Because the agency has recently published a final rule amending the definition of SgRP, this petition was not granted, see, 56 FR 38084; August 12, 1991.

In reviewing this petition, however, the agency has tentatively determined that use of the SgRP may not be appropriate means of determining lap belt angle for free-standing adjustable seats located behind the front seats. The SgRP is determined by positioning a two dimensional template. For adjustable seats, the forward or rearward location of the seat cannot be determined unless there is a fiducial mark that can be used to position the template. For example, for front seats, the front of the template is positioned at the point where the floor pan of the vehicle begins to curve upward and the seat is then adjusted either forward or rearward so the

template can be positioned correctly in it. Because adjustable seats located behind the front seats have no fiducial mark to locate the template, there is no way to determine an appropriate position for the seat. The agency is therefore proposing that, for adjustable seats located behind the front seats, the lap belt angle be measured when the seat is in its rearmost adjustment position. The agency is therefore proposing to rescind the amendment made in the April 30, 1990 final rule for rear adjustable seats.

Note: Elsewhere in today's edition of the **Federal Register** the agency has published a final rule amending the definition of "seat belt anchorage" in Standard No. 210. As part of the final rule, the agency has made a technical amendment to S4.3.1.1(b) deleting the words "the hardware attaching to it." This change is reflected in the language of the proposed amendment in this notice. Persons interested in the reasons for this change are referred to the preamble for that final rule notice.

Rulemaking Analyses and Notices

Executive Order 12291 (Federal Regulation) and DOT Regulatory Policies and Procedures

NHTSA has examined the impact of this rulemaking action and determined that it is not major within the meaning of E.O. 12291 or significant within the meaning of the Department of Transportation's regulatory policies and procedures. The agency has also determined that the economic and other impacts of this rulemaking action are so minimal that a full regulatory evaluation is not required. The effect of the amendment being proposed is to rescind one aspect of the April 30 final rule prior to its effective date. For this reason, the agency estimates that there will be no change in compliance costs as a result of this proposal.

Regulatory Flexibility Act

NHTSA has also considered the impacts of this rulemaking action under the Regulatory Flexibility Act. I hereby certify that it would not have a significant economic impact on a substantial number of small entities. As stated above, the agency expects no change in compliance costs associated with this proposal.

National Environmental Policy Act

NHTSA has also analyzed this rulemaking action for the purposes of the National Environmental Policy Act. The agency has determined that implementation of this action would not have any significant impact on the quality of the human environment.

Executive Order 12612 (Federalism)

Finally, NHTSA has analyzed this proposal in accordance with the principles and criteria contained in Executive Order 12612, and the agency has determined that this proposal does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Submission of Comments

Interested persons are invited to submit comments on the proposal. It is requested but not required that 10 copies be submitted.

All comments must not exceed 15 pages in length. (49 CFR 553.21). Necessary attachments may be appended to these submissions without regard to the 15-page limit. This limitation is intended to encourage commenters to detail their primary arguments in a concise fashion.

If a commenter wishes to submit certain information under a claim of confidentiality, three copies of the complete submission, including purportedly confidential business information, should be submitted to the Chief Counsel, NHTSA, at the street address given above, and seven copies from which the purportedly confidential information has been deleted should be submitted to the Docket Section. A request for confidentiality should be accompanied by a cover letter setting forth the information specified in the agency's confidential business information regulation. 49 CFR part 512.

All comments received before the close of business on the comment closing date indicated above for the proposal will be considered, and will be available for examination in the docket at the above address both before and after that date. To the extent possible, comments filed after the closing date will also be considered. Comments received too late for consideration in regard to the final rule will be considered as suggestions for further rulemaking action. Comments on the proposal will be available for inspection in the docket. The NHTSA will continue to file relevent information as it becomes available in the docket after the closing date, and it is recommended that interested persons continue to examine the docket for new material.

Those persons desiring to be notified upon receipt of their comments in the rules docket should enclose a self-addressed, stamped postcard in the envelope with their comments. Upon receiving the comments, the docket supervisor will return the postcard by mail.

List of Subjects in 49 CFR Part 571

Imports, Motor vehicle safety, Motor vehicles.

In consideration of the foregoing, it is proposed that 49 CFR 571.210 be amended as follows:

PART 571—FEDERAL MOTOR VEHICLE SAFETY STANDARDS

1. The authority citation for part 571 would continue to read as follows:

Authority: 15 U.S.C. 1392, 1401, 1403, 1407; delegation of authority at 49 CFR 1.50.

2. S4.3.1.1 as published on April 30, 1990 (55 FR 17970) effective September 1, 1992, is proposed to be amended by revising S 4.3.1.1(b) to read as follows:

§ 571.210 Standard No. 210; Seat belt assembly anchorages.

S 4.3.1.1 * * *

(b) If the seat is an adjustable seat, then a lime from the seating reference point to the nearest contact point of the belt with the anchorage shall extend forward from the anchorage at an angle with the horizontal of not less than 30 degrees and not more than 75 degrees. In a seating position where the seating reference point cannot be established by positioning the template on the toe-board or the rear of another seat, the seat shall be in its rearmost position and the angle shall be measured to the hip-point of the template used to locate the seating reference point.

* * * * *

Issued on November 27, 1991.

Barry Felrice,

Associate Administrator for Rulemaking.

[FR Doc. 91-28996 Filed 12-3-91; 8:45 am]

BILLING CODE 4910-59-M

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49 CFR Part 571

[Docket No. 80-9; Notice 4]

RIN 2127-AA12

Federal Motor Vehicle Safety Standards; Lamps, Reflective Devices, and Associated Equipment

AGENCY: National Highway Traffic Safety Administration (NHTSA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: This notice proposes that trailers which have an overall width of 80 inches or more and a GVWR of more than 10,000 pounds be equipped on the sides and rear with means for increasing their conspicuty and thereby enhance the likelihood of their detection at night and under other conditions of reduced visibility. Trailer manufacturers would be given a choice of installing either

retroreflective sheeting or reflex reflectors. Under the proposal, manufacturers of retroreflective sheeting or reflectors would certify compliance of their product with Standard No. 108, whether for use as original or as replacement equipment. NHTSA estimates that the incidence of accidents involving trailers impacted from the side or rear by other vehicles could be reduced 15 percent by enhancing conspicuity as proposed in this notice.

DATES: The comment closing date for the proposal is February 3, 1992. The proposed effective date for the final rule is 12 months after its publication in the **Federal Register**. Any request for an extension of time in which to comment must be received not later than 10 days before the published expiration date of the comment period.

ADDRESSES: Comments should refer to the docket number and the notice number, and be submitted to: Docket Section, room 5109, Nassif Building, 400 Seventh Street, SW., Washington DC 20590 (Docket hours are from 9:30 a.m. to 4 p.m.)

FOR FURTHER INFORMATION CONTACT: Patrick Boyd, Office of Rulemaking (202–366–6346).

SUPPLEMENTARY INFORMATION: On February 13, 1991, NHTSA announced the forthcoming publication of a notice of proposed rulemaking addressed to making large trailers more visible on the road (56 FR 5792). This notice contains that proposal, and represents a tentative and partial solution to a safety problem that has concerned NHTSA for some years: The need to reduce the incidence and severity of collisions with large trailers during conditions of darkness or reduced visibility.

On May 27, 1980, the agency issued an ANPRM (45 FR 35405) requesting comments on methods to reduce such collisions by improving the conspicuity of large commercial vehicles that could lead to the issuance of a proposal. Forty-two comments were received, most of which favored the concept.

NHTSA Fleet Study

Between 1980 and 1985, the agency conducted a fleet study in which retroreflective material was placed on truck-van trailer combinations in a manner designed to increase their conspicuity. The treatment of trailers consisted of rear perimeter outlining, and delineating the lower side. No reflectorized mud flaps were used. The contractor concluded that truck-trailer combinations equipped with this material were involved in 15 percent fewer crashes in which a trailer was struck in the side or rear by another vehicle than combinations lacking the material.

1987 Request for Comments

The agency published a Notice of Request for Comments on September 18, 1987 (52 FR 35345) concerning the use of reflective material to increase the conspicuity of large trucks and trailers. The Notice recited the results of the fleet study and sought comments on the test results as well as the experiences others may have had with the use of reflective material to enhance conspicuity. Thirty-seven comments were received, most agreeing that an effectiveness of 15 percent could be expected when all large vehicles were so equipped with reflective material.

The Motor Carrier Safety Act of 1990

In response to the NHTSA fleet study, Congress included in the Motor Carrier Safety Act of 1990 (sec. 15, Pub. L. 101–500) a provision directing the Secretary of Transportation "to initiate a rulemaking proceeding on the need to adopt methods for making trucks or any category of trucks more visible to motorists * * *" not later than February 3, 1991, and to complete the rulemaking proceeding not later than November 3, 1992.

Current Proposal

NHTSA regards this proposal, which is part of a rulemaking proceeding begun before the enactment of the Motor Carrier Safety Act of 1990, as responsive to the directive in that Act and to data regarding heavy vehicle crashes. Under the proposal, heavy trailers would be required to be equipped with means for increasing their conspicuity because the agency has tentatively concluded that this would be an effective method to reduce the incidence and severity of these crashes. This proposal does not apply to large trucks without trailers, as NHTSA's FARS (Fatal Accident Reporting System) accident data for 1989 indicate a much lower rate of conspicuity-related accidents for large trucks alone than for large truck-trailer combinations. These data indicate there were 585 fatalities occurring when the sides or rears of heavy trucks or truck-trailer combinations were struck at night. Only 29 of the fatalities occurred when the vehicle struck was a truck without a trailer, the remaining 556 fatalities occurring in truck-trailer combination accidents (approximately 62 percent from striking the rear, and 38 percent from striking the side). The reason for the lower rate appears to be that trucks without trailers are used with lesser frequency at night than truck-trailer combinations. NHTSA seeks comment on these tentative conclusions.

Types of Trailers

Since the various types of trailers differ from one another in their configuration, NHTSA believes that the method of compliance that may be appropriate for one type may not be for another. For examples, van-type trailers have distinct rectangular side and rear perimeters to which conspicuity enhancing materials could be easily applied, while tank-type, platform trailers, or others do not. In order to ensure that the requirements would be practicable for each type of trailer to which they apply, the agency has developed definitions for four types of trailers. These types are "Dump trailer", "Flatbed trailer," "Tank trailer," and "Van trailer." Definitions for these types are proposed under paragraph S4 of the regulatory text of this notice. The proposed requirements for these types differ somewhat based on configurational differences between the vehicles in those groups. Because these trailer types account for 95 percent of the miles travelled by heavy commercial trailers, NHTSA seeks comment on whether, for the sake of practicability, the remaining 5 percent of trailers (those not fitting any of the four proposed definitions) should be excluded from compliance with the conspicuity treatment requirements. Additionally, NHTSA seeks comment on the practicability of applying conspicuity treatment to car carriers, heavy haulers, and intermodal trailers.

Manufacturer Choice of Type of Retroreflective Materials

NHTSA has tentatively decided that manufacturers of heavy trailers should be required to equip them with one of two proposed types of retroreflective materials. Compliance would be achieved using either retroreflective sheeting, or an array of reflex reflectors which reflects the same amount of light as the retroreflective sheeting.

Alternative Proposals re Pattern, Color and Location of Retroreflective Materials

NHTSA is proposing as alternatives two sets of requirements regarding pattern, color and location for placing retroreflective sheeting on the side and rear of trailers. One alternative is the pattern tested in the fleet study, and the other is a modification of it that is expected to increase visibility of the trailer side. Each alternative uses about the same amount of retroreflective sheeting, so that cost is not an issue, but

the second alternative distributes it in a way that is more generally applicable to all trailers, avoids setting higher standards for van standards for van trailers, and promotes uniformity of appearance. Under either alternative, the material would not be required to be affixed to discontinuous surfaces on the trailer body, and on items such as door hinges, and lamp bodies. While the agency is proposing two specific configurations of conspicuity treatment, it specifically seeks comment on whether variations of these alternatives would be more appropriate for a final rule, or whether there are other patterns more appropriate for conspicuity that should be proposed before a final rule is adopted NHTSA asks that commenters discuss the cost-effectiveness of each pattern, and provide support for their comments. The agency anticipates that the final rule would specify only one pattern, and not allow alternative treatments. Associated issues on which NHTSA requests comment are the appropriate level of retroreflective performance of the sheeting, the appropriate amount of sheeting used, whether the sheeting should be patterned, and the appropriate location of the sheeting, with respect to each of the alternatives.

Retroreflective Sheeting

For its first proposed alternative for applying retroreflective sheeting, Alternative 1 (Figure 31A), the agency has chosen a variation of the scheme used in the NHTSA fleet study. That scheme consisted of a 2-inch wide strip of retroreflective tape alternating red and white, or blue and white, rectangles delineating the lower side rails and outlining the rear perimeter of the trailer. Alternative 1 consists of a strip of alternating rectangles of red and white material, not less than 2 inches high (3 inches for platform trailers), or wide, when installed vertically. The white rectangles would be 7 to 9 inches long, and the adjacent red rectangles would be 2 to 4 inches longer than the white rectangles. The material would be installed on the perimeter of the rear of van trailers, and on as much of the rear perimeter of other trailers as practicable. The material would also be installed horizontally on each side to indicate the length of the trailer. The length of the material mounted on the side inclusive of interruptions for discontinuous surfaces must be within 3 feet of the full length of the trailer. Allowing for interruptions, the total length of the individual horizontal strips provided must not be less than 85 per cent of the length of the material were there no interruptions. The mounting height of the horizontal side strips would be restricted to the same height as other retroreflective devices currently required by Standard No. 108; the center would be not less than 15 inches above the road surface, and the upper edge not more than 60 inches above it. As a matter of practicability, only van trailers can fully benefit by this type of treatment. The large, flat surfaces of van trailers give the observer a better judgment of size, shape, and distance compared with a flat bed trailer having only a thin side or rear frame.

Because of this and the resultant higher performance proposed for van trailers as compared with others in alternative 1, proposed Alternative 2 (as illustrated in Figure 31B) reflects an attempt to optimize conspicuity. Alternative 2 redistributes the conspicuity materials by placing more on the sides of the trailers and using only a partial outline on the rear. This approach would provide better depth perception to the drivers of vehicles approaching the trailer from the sides and create a more standardized treatment across trailer categories without requiring the use of more conspicuity materials. In addition, this approach would avoid "penalizing" van trailers which because of their large and flat surfaces, would require, under Alternative 1, a greater use of reflective materials than other trailer types. Alternative 2 provides slightly better side recognition distance than Alternative 1, and identical rear recognition distance, as demonstrated by laboratory and field results from an ongoing University of Michigan Transportation Research institute (UMTRI) research for NHTSA (Contract No. DTNH22–90–07017). Under both Alternative 1 and Alternative 2, red and white material would be required to be installed horizontally on each side to indicate the length of the trailer. However, on the rear, the only red and white material required by Alternative 2 would be at the base of the perimeter, rather than the entire perimeter as required by Alternative 1. In addition, Alternative 2 would require two vertical white strips (Rear Element (3)) in Figure 31B), 12 inches high and 2 inches wide, to indicate the width of the trailer, located within 12 inches of its full width. Similarly, two vertical white strips (Side Element (3)) would be located on the side, as close to the front and rear as practicable, to indicate the full length of the trailer. In addition, the upper corners of the rear and both sides would be required to be marked with (Rear and Side Element (4)) two intersecting pieces of white reflective sheeting, each 12 inches by 2 inches. On the rectangular sides and rear or a van trailer, the white strips, along with the red and white based strips, would mark the bottom and four corners of the sides and rear as shown in Figure 31B. However, under Alternative 2, the white strips could also be applied to trailers of irregular shape because they would not be required to form a continuous perimeter. White strips of sheeting (Rear Element (2)) would also be added to the vertical members of the rear underride protection equipment. Finally, white sheeting 36 inches in length and not less than 2 inches high (Side Element (2)) would be installed horizontally at the top center of the trailer sides.

The ongoing UMTRI study referenced above might yield additional insight into the effectiveness of various conspicuity treatment patterns. The research is expected to be completed shortly and a report on its findings will be placed in the docket at that time. NHTSA will consider extending or reopening the comment period if the findings warrant it.

Performance of Retroreflective Sheeting

The notice proposes a set of tests to evaluate retroreflective sheeting. These tests would be conducted in accordance with ASTM D 4956–90, Standard Specification for Retroreflective Sheeting for Traffic Control. The ASTM Specification has been chosen because NHTSA understands it to be the Specification that manufacturers of retroreflective sheeting are following as their current manufacturing practice. The tests that NHTSA proposes address retroreflective photometric performance, flexibility, adhesion, impact resistance, accelerated weathering, shrinkage, resistance to fungus, and specular gloss. The notice proposes that material meeting the performance requirements for Type V, defined as a super-high-intensity retroreflective sheeting, be used to enhance the conspicuity of trailers. It also proposes minimum requirements for coefficient of retroreflective intensity from research in progress by the University of Michigan Transportation Research Institute (UMTRI) that are lower than those specified by ASTM for Type V material.

Comments on Performance and Dimensions of Retroreflective Sheeting

With respect to retroreflective materials, NHTSA requests the views of interested persons on the proposed dimensions and performance capabilities of the colored segments as compared with alternative dimensions and performance capabilities. For

example, commenters should discuss the use of 2 or 3-inch wide white material of a minimum 250 candela lux/square meter (for entrance angles of light up to 30 degrees) as compared with wider, but lower performance material or narrower, higher performance material. As a further example, comments are sought on the appropriateness of the length of the white and red segments.

In addition, NHTSA research has indicated that in a real world environment the effective SIA of retroreflective materials may be reduced by more than 50 percent because of the accumulated road dirt and grime. The minimum retroreflective intensity suggested by UMTRI included consideration of the effects of wear, dirt, and vehicle orientation. However, it is less than the ASTM Type V Specification for retroreflective intensity met by some conspicuity products currently in use. NHTSA requests comment on whether the higher retroreflective intensity of the ASTM Specification for Type V material should be required.

NHTSA wishes to note that it is not proposing to allow corporate logos as a substitute for the conspicuity materials that this notice proposes. Typically, logos consist of material of low brightness, and they are not applied to the perimeters of a vehicle but are centered on the sides and rear. Logos may be used to supplement the conspicuity-enhancing materials that would be required, however.

With respect to the requirements of Alternative 1 and Alternative 2 regarding pattern, color and location, the agency seeks comments on the likely relative effectiveness of each on van trailers, and on trailers other than van trailers.

With respect to Alternative 2, NHTSA asks for views on whether it would improve or detract from the side conspicuity of trailers as compared with Alternative 1, and whether the 12-inch long segments of white material contemplated (Elements (2), (3), and (4) in Figure 29B) should be increased to 18 inches (NHTSA estimates this would increase compliance costs about 8 percent).

NHTSA is also interested in comments on how to improve the conspicuity of platform trailers, and on the desirability of standardizing to the maximum extent possible the treatment of all trailers.

Reflex Reflectors

As noted above, the agency is proposing that a manufacturer have the choice of installing a system of reflex reflectors instead of retroreflective sheeting. Reflex reflectors that conform to SAE Standard J594f Reflex Reflectors, January 1977 (the current requirement in Standard No. 108), are rated in terms of the absolute amount of light reflected, as contrasted with the amount of light striking them. The size of the reflector and the brightness of the material may be balanced to achieve the specified amount of reflected light. Retroreflective sheeting, however, is rated in terms of the reflected light per unit area as contrasted with the light striking it. Typically, three reflex reflectors (either white or red, and independent of their size and shape) would provide the same reflected light as one foot of 2-inch side reflective sheeting of the same color. The array of reflectors that the agency believes equivalent to the alternating white/red retroreflective material scheme is a group of two white reflectors alternating with a group of three red reflectors, the center of each reflector in a group being approximately 4 inches from the center of the next one in that group. For the elements of Alternative 2 that are all white, if the reflex reflector performance were as above, three white reflectors per foot would likely suffice. Although these reflectors would be required to conform to SAE J594f, they would also be required to meet the additional performance requirement of providing very high reflectivity over a range of entrance angles of light from 30 degrees left to 30 degrees right. The additional requirement assures that the array of reflex reflectors will deliver the same minimum performance as the retroreflective sheeting. Reflex reflectors molded in bars, resembling the sheeting material, but narrower, is an obvious implementation. For a multiple-reflector bar, each segment conforming to SAE J594f would be labeled in order to indicate the number of reflectors per length of bar. NHTSA requests comment on this option, its likely relative effectiveness as an alternative to the use of retroreflective sheeting, and the likelihood of daytime conspicuity enhancement compared with that of sheeting.

Certification of Compliance of Retroreflective Sheeting or Reflectors

The responsibility for compliance with the performance requirements of the retroreflective sheeting or reflex reflectors used to comply with the conspicuity requirements would rest upon the manufacturers of the sheeting or reflectors. Thus, manufacturers who are providing these materials to the trailer manufacturing industry and to replacement parts outlets would have to certify compliance with Standard No. 108, whether the materials are intended for use as original or replacement equipment. Such manufacturers would also be expected to file information in accordance with 49 CFR part 566 Manufacturer Identification, if they had not done so before.

Certification of the retroreflective materials would be mandatory. It would consist of the characters "DOT–C", to distinguish the materials from those conforming to Federal Specification L–S–300, September 7, 1965, which is presently permitted by paragraph S5.1.1.4 as an allowable alternative for side reflex reflectors. These reflectors may be marked "DOT" as an indication that they meet this earlier version of L–S–300, but this material may not meet ASTM D 4956–90, nor the conspicuity requirements that this notice proposes.

Each reflex reflector installed for purpose of compliance with the conspicuity requirements would be required to be marked with the letters DOT–C as a certification of compliance with the conspicuity requirements (reflectors conforming only to SAE J594f would continue to be marked DOT if their manufacturer chose that method of certification). As for retroreflective materials, with respect to strips of all-white material, the agency is proposing to require the DOT–C symbol to appear not less than every 12 inches. With respect to strips of alternating red and white material, NHTSA is proposing that the DOT–C symbol appear on each red segment and each white segment. However, NHTSA requests comments on an alternative such as one requiring that the DOT–C symbol appear on one color alone, with a paragraph added to Standard No. 108 specifying that such certification shall also be a certification of the materials adjacent to it that are of a different color. NHTSA requests comments on whether individual segment marking would be practicable, or whether other methods may be used that have the desired legal result for certification of materials.

Associated Rulemaking: Rear Underride Protection

The agency is also seeking to reduce the severity of accidents in which vehicles strike the rear ends of trailers through a rulemaking notice regarding rear underride protection. To the extent that the number and severity of rear end crashes would be mitigated by enhancing conspicuity, the benefits of a rear underride rule might be lessened. Interested persons are advised to be aware of the relatedness of these two rulemaking actions in preparing their comments on each.

Related Rulemaking: Federal Highway Administration

The Federal Highway Administration (FHWA) has worked with NHTSA to ensure that its standards are compatible with the Federal motor vehicle safety standards wherever possible. As part of this effort, the FHWA will continue to adopt the appropriate sections of NHTSA's standards into the Federal Motor Carrier Safety Regulations (FMCSRs). If amendments to 49 CFR part 393, Parts and Accessories Necessary for Safe Operation, and 396, Inspection Repair and Maintenance, of the FMCSRs are necessary for conspicuity enhancements for large trailers, the FHWA will address the issue in a separate rulemaking.

Effective Date

Because of the relatively simple efforts that would be necessary to conform to the conspicuity requirements, and the fact that trailers are not modified on a model year basis. the agency proposes an effective date that would be 12 months after publication of the final rule.

Rulemaking Analyses

Executive Order 12291 (Federal Regulation) and DOT Regulatory Policies and Procedures

NHTSA has considered the impacts of this rulemaking action and has determined that although it is not major within the meaning of Executive Order 12291 "Federal Regulation," it is significant under Department of Transportation regulatory policies and procedures because it involves a matter of substantial Congressional and public interest. The rulemaking would not have an effect upon the economy in excess of $100 million a year. NHTSA estimates that the cost to equip all new trailers manufactured in a calendar year would be $21.7 million for Alternative 1, and $24.6 million for Alternative 2, and that the use of sheeting material or reflex reflectors molded in bars would be equivalent in cost. The agency further estimates that the reduction in property damage from preventing 1,850 accidents and mitigating 8,390 others would be $24.5 million. Thus, the cost of the conspicuity system would be compensated by the savings in property damage alone, but the expected prevention of injuries and fatalities is the reason that NHTSA is proposing to improve the visibility of heavy trailers.

NHTSA estimates that the life of the average trailer is 14 years. Agency research indicates that the original application of conspicuity materials can be expected to perform during the entire life of the trailer. Standard No. 108 does not apply to vehicles in use, and the agency cannot require the owner of a trailer to replace retroreflective sheeting after degradation.

NHTSA has no studies allowing it to quantify a reduction in fatalities and injuries that would be expected from use of conspicuity material. However, it is reasonable to expect prevention of some fatalities and injuries, specifically, 82 and 529 respectively if they were reduced in proportion to accidents. There is no cost assigned to preventing those fatalities and injuries because the reduction of property damage alone is expected to equal the cost of conspicuity materials and labor. The costs and benefits are calculated in 1991 dollars, but they represent a situation in which the rule would have been in effect sufficiently long (late 1990s) that most of the national fleet would be equipped with conspicuity-enhancing materials. A Regulatory Evaluation has been prepared and is available for examination by the public in the docket.

Regulatory Flexibility Act

The agency has also considered the effects of this proposed rule in relation to the Regulatory Flexibility Act. I certify that this proposed rule would not have a significant economic effect upon a substantial number of small entities. Although trailer manufacturers are generally small businesses within the meaning of the Regulatory Flexibility Act, the cost impact of complying with the proposed regulation would not be significant. The agency estimates that compliance costs to the trailer buyer will average from $127 to $145 per trailer, depending upon the treatment pattern. As for manufacturers of retroreflective materials and reflex reflectors, NHTSA notes that materials that conform to ASTM D 4956–90 Type V are presently being manufactured, and that the cost to add a DOT certification symbol should be small. Further, small organizations and governmental jurisdictions would not be significantly affected as the price of new trailers equipped with conspicuity treatment should not be more that minimally impacted. Accordingly, no Regulatory Flexibility Analysis has been prepared.

Executive Order 12612 (Federalism)

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 12612 on "Federalism." It has been determined that the proposed rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

National Environmental Policy Act

NHTSA has analyzed this proposed rule for purposes of the National Environmental Policy Act. The proposed rule would not have a significant effect upon the environment. There is no environmental impact associated with the manufacture or use of retroreflective material as it is non-toxic in nature. The rule would not have an effect upon fuel consumption.

Paperwork Reduction Act

The reporting and recordkeeping requirement associated with this proposed rule is being submitted to the Office of Management and Budget for approval in accordance with 44 U.S.C. chapter 35 under DOT No. _____; OMB No. _____; Administration: National Highway Traffic Safety Administration; *Title:* Labeling or reflective material for trailer conspicuity; *Need for Information:* Identification of reflective material as conforming to requirements; *Proposed use of Information:* Routine trailer inspection by Federal Highway Administration; *Frequency:* On occasion; *Burden estimate:* 200 hours; *Respondents:* 2; *Form(s):* None; *Average Burden Hours per Respondent:* .0006 minute; For further information contact: The Information Requirements Division, M–34, Office of the Secretary of Transportation, 400 Seventh Street, SW., Washington, DC 20590, (202) 366–4635. Comments on the proposed information collection requirements should be submitted to Office of Management and Budget, Office of Information and Regulatory Affairs, New Executive Office Building, Washington, DC 20503, Attn: Desk Officer for NHTSA. It is requested that comments sent to OMB also be sent to the NHTSA rulemaking docket for this proposed action.

Request for Comments

Interested persons are invited to submit comments on the proposal. Please submit 10 copies of written comments and 2 copies of films, tapes, and other materials. All comments must be limited not to exceed 15 pages in length (49 CFR 553.21). Necessary attachments may be appended to these submissions without regard to the 15-page limit. This limitation is intended to encourage commenters to detail their primary arguments in a concise fashion.

If a commenter wishes to submit certain information under a claim of confidentiality, three copies of the complete submission, including purportedly confidential information, should be submitted to the Chief Counsel, NHTSA, at the street address given above, and seven copies from

which the purportedly confidential information has been deleted should be submitted to the docket section. A request for confidentiality should be accompanied by a cover letter setting forth the information specified in the agency's confidential business information regulation (49 CFR part 512).

All comments received before the close of business on the closing date indicated above will be considered, and will be available for examination in the docket at the above address both before and after that date. To the extent possible, comments filed after the closing date will also be considered. However, the rulemaking action may proceed at any time after that date, and comments received after the closing date and too late for consideration in regard to the action will be treated as suggestions for future rulemaking. NHTSA will continue to file relevant material as it becomes available in the docket after the closing date, and it is recommended that interested persons continue to examine the docket for new material.

Those persons desiring to be notified upon receipt of their comments in the rules docket should enclose, in the envelope with their comments, a self-addressed stamped postcard. Upon receiving the comments, the docket supervisor will return the postcard by mail.

List of Subject in 49 CFR Part 571

Imports, Motor vehicle safety, Motor vehicles.

PART 571—FEDERAL MOTOR VEHICLE SAFETY STANDARDS

In consideration of the foregoing, it is proposed that 49 CFR part 571 be amended as follows:

1. The authority citation for part 571 would continue to read as follows:

Authority: 15 U.S.C. 1392, 1401, 1403, 1407; delegation of authority at 49 CFR 1.50.

§ 571.108 [Amended]

2. S3 *Application* would be revised to read:

§ 571.108 Standard No. 108; Lamps, reflective devices, and associated equipment.

* * * * *

S3 *Application.* This standard applies to:

(a) Passenger cars, multipurpose passenger vehicles, trucks, buses, trailers (except pole trailers and trailer converter dollies), and motorcycles;

(b) Retroreflective sheeting and reflex reflectors manufactured to conform to paragraph S5.7 of this standard; and

(c) Lamps, reflective devices, and associated equipment for replacement of like equipment on vehicles to which this standard applies.

§ 571.10 [Amended]

3. S4 *Definitions* would be amended by adding the following definitions in alphabetical order:

* * * * *

Dumping trailer means a trailer that has an open top, and which is intended to transport bulk commodities which are discharged by gravity through the sides, bottom, or rear of the cargo body."

* * * * *

Flatbed trailer means a trailer which has a platform that effectively spans the entire length and width of the vehicle and which has no sides, ends, roofs, or other enclosing superstructure higher than the platform.

* * * * *

Tank trailer means a trailer equipped with a liquid-tight vessel for carrying liquids or dry bulk products.

Van trailer means a trailer constructed with a flat or multi-height floor that effectively spans its entire length and width, and has walls or sides and ends, and may have a roof.

* * * * *

§ 571.108 [Amended]

4. S5.7, S5.7.1 and S5.7.2 would be redesignated S5.8, S5.8.1 and S5.8.2, and a new section S5.7 added to read:

S5.7 *Conspicuity Systems.* Each trailer of 80 or more inches overall width, and with a GVWR over 10,000 lbs., manufactured on or after _____ 1, 1992, shall be equipped with either retroeflective sheeting that meets the requirements of section S5.7.1, or reflex reflectors that meet the requirements of section S5.7.2.

S5.7.1 *Retroreflective sheeting.* Each trailer shall be equipped with retroflective sheeting that conforms to the requirements specified in sections S5.7.1.1 through 5.7.1.5.

S5.7.1.1 *Construction.* Retroreflective sheeting shall consist of a smooth, flat, transparent exterior film with retroreflective elements embedded or suspended beneath the film so as to form a non-exposed retroreflective optical system.

S5.7.1.2. *Test requirements.* Retroreflective sheeting shall meet the requirements of ASTM D 4956–90, Standard Specification for Retroreflective Sheeting for Traffic Control, for Type V Sheeting. It shall also meet the minimum requirements for coefficient of retroreflection specified in Figure 29.

S5.7.1.3 Sheeting pattern, relative coefficients of retroreflection, and dimensions.

(a) Retroreflective sheeting shall be applied in alternating colors of white and red (, or in white, [the language in this parenthetical would be adopted if Alternative 2 is adopted]) to each trailer in the pattern shown in Figure 30 of this standard, and in the locations specified in section S5.7.1.4.

(b) The coefficients for retroreflection of alternating segments of white and red sheeting shall be not less than the minimum values specified in Figure 29 of this standard.

(c) The white portion of the sheeting applied in alternating colors shall have a length of 7 to 9 inches, and each adjacent red portion of the sheeting shall be 2 to 4 inches longer than that white portion.

(d) Sheeting material in alternating colors applied horizontally on the rear of platform trailers shall be not less than 3 inches wide.

(e) Sheeting material in alternating colors used for trailers other than platform trailers shall be not less than 2 inches wide.

S5.7.1.4 *Location* Retroreflective sheeting shall be applied to each trailer in the locations specified below. Sheeting need not be applied to discontinous surfaces on a trailer, such as outside ribs, stake post holes on flat bed trailers, and external protruding beams, or to items of equipment such as door hinges and lamp bodies.

Alternative 1 (Fig. 31A)

S5.7.1.4.1 *Rear.* Retroreflective sheeting of the pattern and color specified in S5.7.1.3 shall be applied to the rear of trailers as specified below, and as shown in Figure 31A:

(a) For van trailers:

(1) A horizontal strip of sheeting applied in alternating colors to the full width of the trailer, as low as practicable, the lower edge of which is not less than 15 inches above the road surface and the upper edge of which is not more than 60 inches from the road surface.

(2) Vertical and horizontal strips applied in alternating colors to the remaining perimeter of the rear of the body as close to the edges as practicable;

(b) For platform trailers: A strip of sheeting applied in alternating colors to the full width of the vehicle, as low as practicable, with each end located as near to the extreme edges of the vehicle as practicable; and

(c) For other trailers: A strip of sheeting applied in alternating colors to

as much of the perimeter outline as practicable, and a single horizontal strip applied in alternating colors with the dimensions and location specified in paragraph (b) of this section, for those trailers whose strip applied to its perimeter outline does not include such a horizontal strip.

S5.7.1.4.2 *Side.* A horizontal strip of sheeting applied in alternating colors to each side of the trailer so as to run the full length of the side as close to the front and rear ends of the side as practicable, and as low as practicable. If the strip is not interrupted for discontinuous surfaces, as provided by section S5.7.1.4, its length shall be not less than the length of the trailer minus 36 inches. If the strip is interrupted for discontinuous surfaces, the total length of the strips applied shall be not less than 85 percent of the length of the trailer minus 36 inches. The sheeting shall be installed as low as practicable, except that the bottom edge shall be not less than 15 inches above the road surface, and the top edge shall not be more than 60 inches above the road surface.

Alternative 2 (Figs. 31B, 31C)

S5.7.1.4.1 *Rear.* Retroreflective sheeting shall be applied to the rear of trailers as specified below, and as shown in Figure 31B.

(a) Element 1: A horizontal strip of sheeting applied in alternating colors across the full width of the trailer body, as near to the extreme edges and as low as practicable, except that the bottom edge shall not be less than 15 inches above the road surface, and the top edge shall not be more than 60 inches above the road surface.

(b) Element 2: Two white strips of sheeting, each 18 inches long and not less than 2 inches wide, installed vertically on the rear underride protection members;

(c) Element 3: Two white strips of sheeting, each 12 inches long and not less than 2 inches wide, installed vertically on the rear, as low as practicable but within 6 inches of the extreme edges of the trailer body; and

(d) Element 4: Two pairs of white strips of sheeting, each pair consisting of strips 12 inches long and not less than 2 inches wide, with the strips of one pair intersecting in the upper left hand corner and the other pair in the upper right hand corner of the rear of the trailer, if the rear of the trailer is rectangular. If the rear of the trailer is other than rectangular, the strips shall be applied to follow the contours of the rear in the uppermost and outermost areas of the rear of the trailer body on the left and right sides.

S5.7.1.4.2 *Side.* Sheeting shall be applied to each side of a trailer as follows:

(a) Element 1: A horizontal strip of sheeting applied in alternating colors along the full length of the side so that the ends of the strip are as close to the front and rear ends of the side as practicable. If the strip is not interrupted for discontinuous surfaces as provided by section S5.7.1.4, its length shall be not less than the length of the trailer minus 36 inches. If the strip is interrupted for discontinous surfaces, the total length of the strips applied shall be not less than 85 percent of the length of the trailer minus 36 inches. The sheeting shall be applied as low as practicable, but the bottom edge shall be not less than 15 inches above the road surface, and the top edge shall be not more than 60 inches above the road surface. The sheeting shall be not less than 2 inches wide.

(b) Element 2: A horizontal white strip of sheeting that is not less than 36 inches long and 2 inches wide installed in the center of each side, and as close to the top as practicable;

(c) Element 3: Two white strips of sheeting, each 12 inches long and not less than 2 inches wide, installed as low as practicable, and whose distance from each other is not less than the length of the trailer minus 36 inches; and

(d) Element 4: Two pairs of white strips of sheeting, each pair consisting of one horizontal strip 12 inches long and not less than 2 inches wide and one vertical strip of the same dimensions, with the strips of one pair intersecting in the upper forward corner and the other pair in the upper rear corner of the side of the trailer.

S5.7.1.5 *Certification.* The letters DOT–C, constituting a certification that the retroreflective sheeting conforms to the requirements of section S5.7.1.2, shall appear at least once on the exposed surface of each shite rectangle and of each red rectangle of retroreflective material installed on the trailer (and at least once every 12 inches for the white retroflective sheeting used to conform to Alernative 2). The letters DOT–C shall be not less than 3 mm high, and shall be permanently stamped, etched, molded, or printed in indelible ink.

S5.7.2 *Reflex Reflectors.* Each trailer shall be equipped with reflex reflectors in accordance with this section.

S5.7.2.1(a) Each reflex reflector shall be designed to conform to SAE Standard J594f, Reflex Reflectors, January 1977.

(b) Each red reflex reflector shall also be designed to provide at an observation angle of 0.2 degree not less than 310 millicandelas/lux at any light entrance angle between 30 degrees left and 30 degrees right, including an entrance angle of 0 degree.

(c) Each white reflex reflector shall also be designed to provide, at an observation angle of 0.2 degree, not less than 1290 millicandelas/lux at any light entrance angle between 30 degrees left and 30 degrees right, including an entrance of 0 degree.

S5.7.2.2 Reflex reflectors shall be installed and located as specified below:

(a) In the same locations and in the same length in which retroreflective sheeting is required by S5.7.1.4 to be applied in alternative colors, reflex reflectors shall be installed in a repetitive pattern of two white reflex reflectors alternating with three red reflex reflectors, with the center of each reflector not less than 3½ inches or more than 4½ inches from the center of each adjacent reflector.

(The following paragraph would be adopted if Alternative 2 above is adopted).

(b) In the same locations and in the same length in which white retroreflective sheeting is required by S5.7.1.4 to be installed, white reflex reflectors shall be installed, with the center of each white reflex reflector 4 inches from the center of each adjacent white reflector.

S5.7.2.3 *Certification.* The exposed surface of each reflex reflector shall be marked with the letters DOT–C, which constitutes a certification that the reflector conforms to all applicable requirements of § 571.108 of this part. The letters DOT–C shall be not less than 3 mm high, and permanently stamped, etched, molded or printed in indelible ink.

Table I [Amended]

5. Table I would be amended by adding the following at the end thereof:

Item	Multipurpose passenger vehicles, trucks, and buses	Trailers	Applicable SAE standard or recommended practice (see S5 for subreferenced SAE materials)
* * * * *	*	*	
Conspicuity	See S5.7	See S5.7	See S5.7

Table II [Amended]

6. Table II would be amended by adding the following after the requirements for "Intermediate side reflex reflectors":

Item	Location on—		Height above road surface measured from center of item on vehicle at curb weight
	Multipurpose passenger vehicles, trucks, and buses	Trailers	
* * * * *	*	*	
Conspicuity	See S5.7	See S5.7	See S5.7

* * * * *

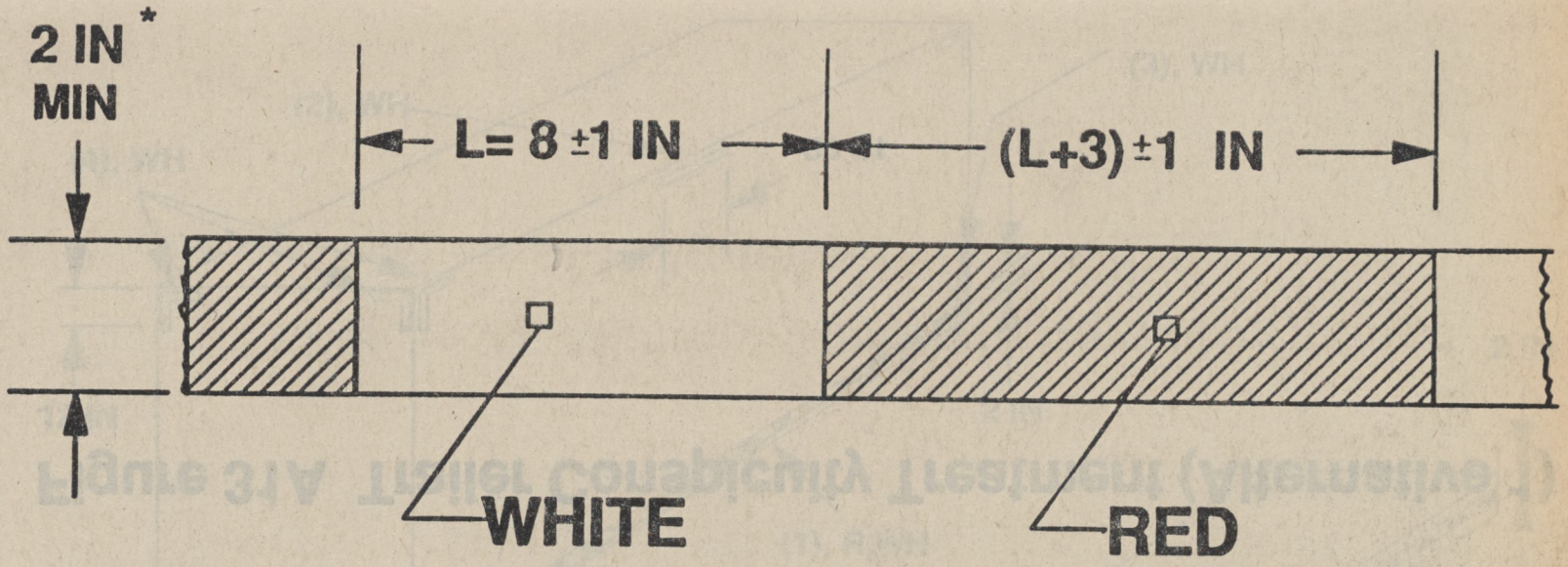
7. Figures 29, 30, 31A, and 31B or 31C would be added as follows:

BILLING CODE 4910-59-M

	Observation Angle			
	0.2 Degree		0.5 Degree	
Entrance Angle	WHITE Min	RED Min	WHITE Min	RED Min
-4 Degree	250	60	65	10
30 Degree	250	60	65	10

Candela/Lux/m^2 is the unit of the coefficient of retroreflection.

Figure 29 Minimum Photometric Performance of Retrofeflective Sheeting



* 3 INCH MINIMUM FOR REAR OF PLATFORM TRAILERS

Figure 30 Color Pattern of Retroreflective Sheeting

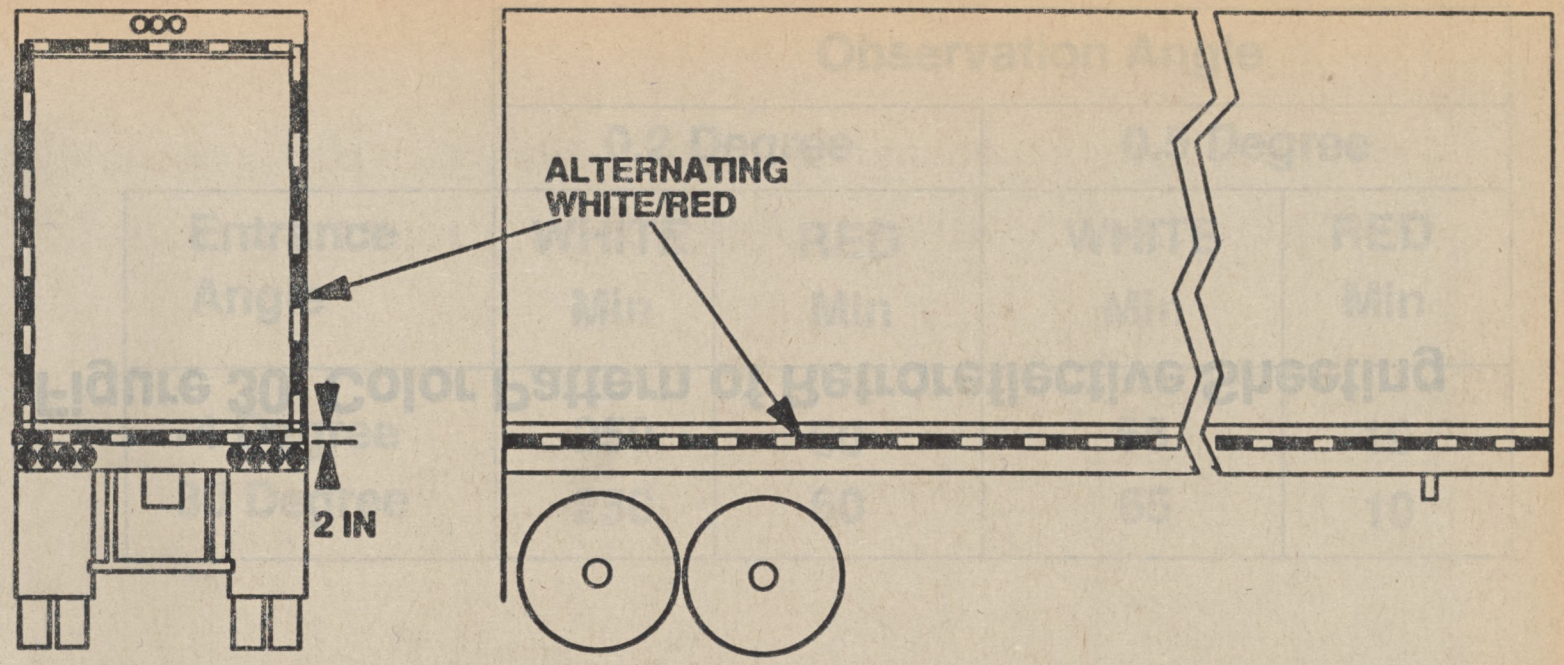


Figure 31A Trailer Conspicuity Treatment (Alternative 1)

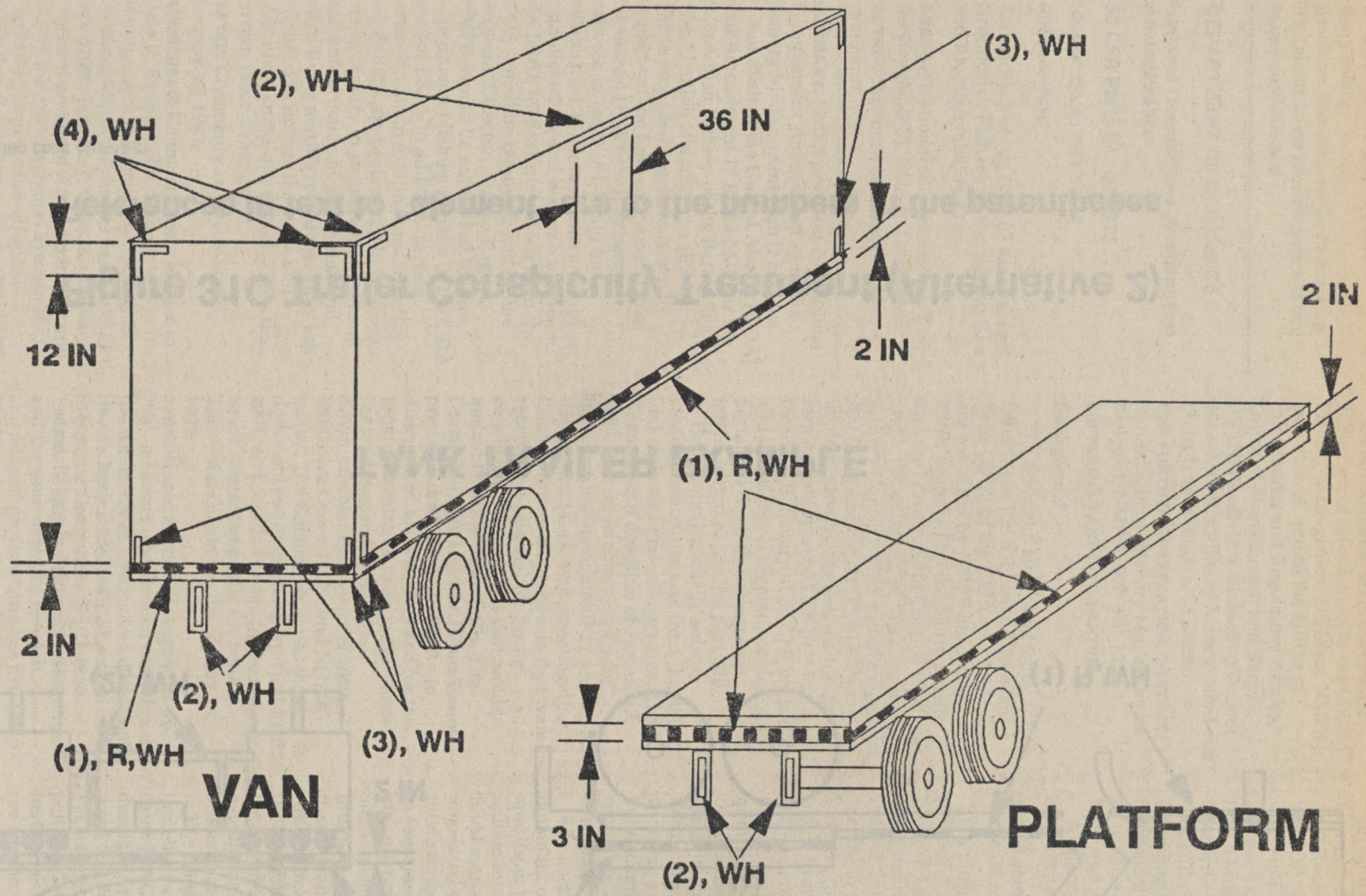
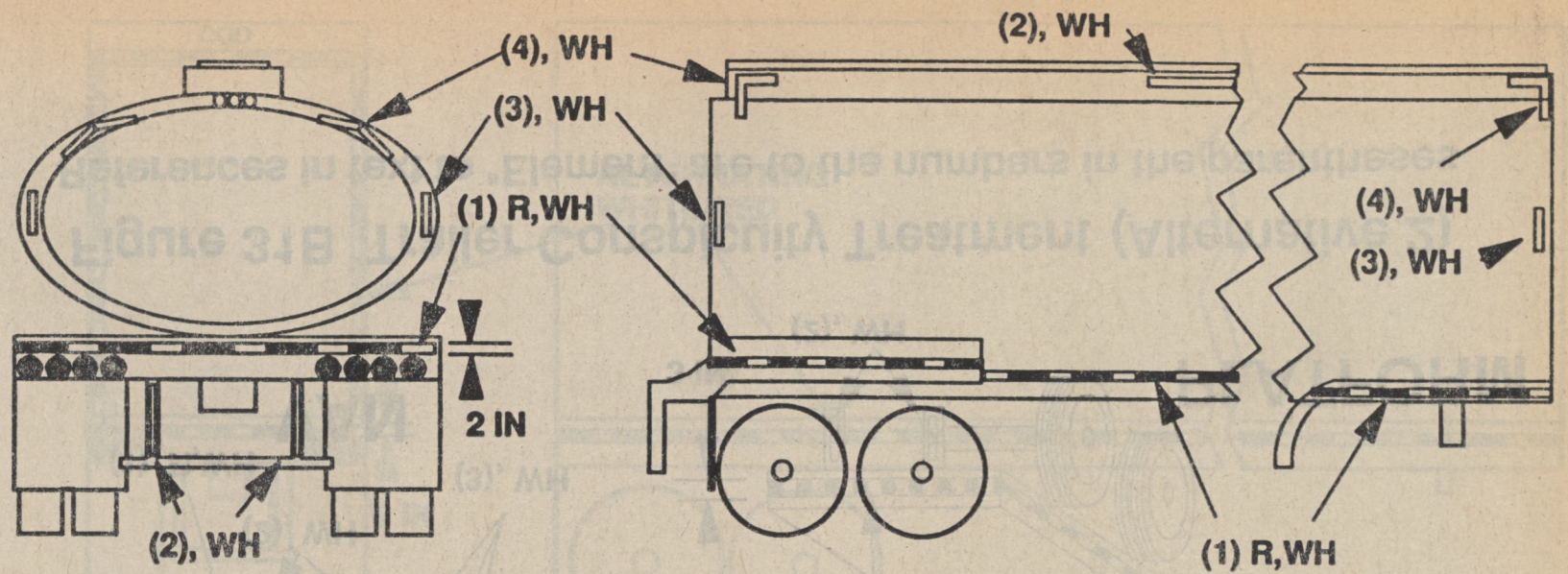


Figure 31B Trailer Conspicuity Treatment (Alternative 2)

References in text to "Element" are to the numbers in the parentheses



TANK TRAILER EXAMPLE

Figure 31C Trailer Conspicuity Treatment (Alternative 2)

References in text to "element" are to the numbers in the parentheses

BILLING CODE 4910-59-C

Issued on: November 27, 1991.

Barry Felrice,

Associate Administrator for Rulemaking.

[FR Doc. 91-28999 Filed 12-3-91; 8:45 am]

BILLING CODE 4910-59-M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 672 and 675

[Docket No. 911182-1282]

RIN 0648-AD47

Groundfish of the Gulf of Alaska, and Groundfish Fishery of the Bering Sea and Aleutian Islands Area

AGENCY: National Marine Fisheries Service (NMFS), NOAA, Commerce.

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS proposes regulations to implement Amendment 22 to the Fishery Management Plan (FMP) for Groundfish of the Gulf of Alaska (GOA) and Amendment 17 to the FMP for the Groundfish Fishery of the Bering Sea and Aleutian Islands Area (BSAI). These proposed regulations would implement the following amendment measures: (1) A new management subarea in the BSAI would be established; (2) area closures would be established around walrus haulouts in the BSAI; (3) Statistical Area 68 in the GOA would be removed; and (4) the Regional Director, Alaska Region, NMFS, would be authorized to issue experimental fishing permits in the GOA and/or BSAI. In addition, certain amendments to existing implementing regulations are proposed. These actions are necessary to promote management and conservation of groundfish and other living marine resources. They are intended to further the goals and objectives contained in both FMPs that govern these fisheries.

DATES: Comments are invited until January 13, 1992.

ADDRESSES: Comments may be sent to Dale R. Evans, Chief, Fishery Management Division, Alaska Region, National Marine Fisheries Service, P.O. Box 21668, Juneau, AK 99802. Individual copies of proposed Amendments 17 and 22 and the environmental assessment/regulatory impact review/initial regulatory flexibility analysis (EA/RIR/IRFA) may be obtained from the North Pacific Fishery Management Council, P.O. Box 103136, Anchorage, AK 99510. Comments on the environmental assessment are particularly requested.

Send comments on the proposed collection of information to the Chief, Fishery Management Division, NMFS (see above), and to the Office of Information and Regulatory Affairs, Office of Management and Budget, ATTN: Paperwork Reduction Project 0648-XXXX, Office of Management and Budget, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Ronald J. Berg (Fishery Management Biologist, NMFS), 907-586-7228.

SUPPLEMENTARY INFORMATION:

Background

The domestic and foreign groundfish fisheries in the Exclusive Economic Zone (EEZ) of the GOA and BSAI areas are managed by NMFS according to FMPs prepared by the North Pacific Fishery Management Council (Council) under the authority of the Magnuson Fishery Conservation and Management Act (Magnuson Act). The FMPs are implemented by regulations for the foreign fishery at 50 CFR part 611 and for the U.S. fishery at 50 CFR parts 672 and 675. General regulations that also pertain to the U.S. fishery are implemented at 50 CFR part 620.

The Council annually solicits management proposals from the public and state and Federal agencies. The Council set a deadline of August 17, 1990, for receiving proposals for inclusion in Amendments 17 and 22. At its January 14-18, 1991, meeting, the Council reviewed proposals that were received. It selected for further consideration measures that would amend either or both FMPs. The Council's GOA and BSAI Plan Teams prepared draft EA/RIR/IRFAs to discuss and analyze the need for the proposals relating to each FMP under the guidance of the National Environmental Policy Act of 1969, Executive Order 12291, and NOAA policy. The Council reviewed these documents at its meeting on April 23-26, 1991, and decided to send the analyses to the interested public for review. These documents are dated May 14, 1991.

At its June 24-29 and August 13-16, 1991, meetings, the Council considered the testimony and recommendations of its Advisory Panel (AP), Scientific and Statistical Committee (SSC), Plan Teams, fishing industry representatives, and the general public on each amendment proposal and the EA/RIR/IRFA analysis. It then approved the following measures for inclusion into Amendments 17 and 22 for review under section 304(b) of the Magnuson Act:

(1) Establishment of the Bogoslof subarea in the BSAI;

(2) Groundfish fishing closures around walrus haulout sites in the BSAI;

(3) Recision of Statistical Area 68 in the GOA; and

(4) Authority for the Regional Director to issue experimental fishing permits for the GOA and/or BSAI groundfish fisheries.

In addition to the above FMP amendments, amendments to current implementing regulations are proposed as discussed below (see Additional Proposed Regulatory Changes).

A description of, and the reasons for, each measure follow:

Establishment of the Bogoslof Subarea in the BSAI

For purposes of managing pollock (*Theragra chalcogramma*), a measure is proposed that would establish a new management subarea in the BSAI. Pollock is the most abundant groundfish species in the BSAI. The exploitable biomass (pollock aged 3 years and older) over the contintental shelf area of the Eastern Bering Sea was estimated at 6.7 million metric tons (mt) for 1991. An additional 405,000 mt was estimated for the Aleutian Islands subarea. Generally, the abundance of pollock in the Eastern Bering Sea is considered to be high due to strong year classes in 1982 and 1984, but declining due to weaker year classes recruiting to the exploitable population since 1984.

The commercial harvest of pollock is dominant over all other groundfish species in the BSAI. In 1990, about 1.4 million mt of pollock were caught in the BSAI management area, which amounted to about 77 percent of the total groundfish catch by U.S. fishermen in this area. This harvest was almost entirely processed by U.S. at-sea or shore-based processors. Common products made from pollock include frozen blocks, fillets, surimi, meal, and roe. Pollock roe has the highest value per mt of pollock products. It is harvested from pre-spawning aggregations of pollock during the roe season from January through mid-April.

The BSAI FMP provides authority to limit the amount of the total allowable catch (TAC) of pollock that is taken during the roe season (January 1 through April 15). For the 1991 fishing year, 441,500 mt, or 34 percent of the 1991 pollock TAC of 1.3 million mt for the Bering Sea subarea, was allocated to the roe season.

Separate TACs for pollock fisheries are specified for the Bering Sea and Aleutian Islands subareas of the BSAI management area. The Aleutian Islands subarea includes the EEZ that is north and south of the Aleutian Islands, west

of 170° W. longitude, and south of 55° N. latitude. The Bering Sea subarea includes all remaining areas of the EEZ in the Bering Sea. For management purposes, the Aleutian Islands subarea is reporting area 540 and the Bering Sea subarea includes all other reporting areas. Hence, the pollock TAC for the Bering Sea subarea applies to all fisheries in reporting areas beginning with 51, 52, and 53. The pollock TAC for the Aleutian Islands subarea applies to fisheries in reporting area 540.

The Bering Sea pollock stock is not distinguishable along these reporting area boundaries. Recent biological data suggest that the pollock population on the Eastern Bering Sea continental shelf is different from that in the deep water area known as the Aleutian Basin. The international waters outside the fishery management jurisdiction of either the United States or the Union of Soviet Socialist Republics (commonly referred to as the "Donut Hole") approximates the center of the Aleutian Basin. Age composition data indicate that Aleutian Basin pollock are generally older and, at any specific age, generally smaller that those found on the continental shelf. Data also indicate that pollock in the Aleutian Islands subarea are generally different from either those in the Aleutian Basin or those on the continental shelf. Genetic studies and other biological assessments are continuing to determine the stock structure of Bering Sea pollock.

The deep water of the Aleutian Basin is closest to the Alaska Peninsula in Statistical Area 515. The relatively flat plain of the continental shelf descends steeply down the continental slope and into the Aleutian Basin along the shelf break that extends generally in a northwest-southeast direction (roughly, the diagonal boundary of Statistical Areas 517 and 521). In reporting area 515, the shelf break curves sharply to the southwest toward the western Aleutian Islands. This area is a principal spawning area for Aleutian Basin pollock.

Pollock harvests in existing Statistical Area 515 currently are not managed under a separate acceptable biological catch (ABC) because such harvests are considered part of the ABC specified for the larger Bering Sea subarea. For 1991, the Bogoslof pollock ABC was calculated to be 286,000 mt, but for the continental shelf portion of the Bering Sea subarea, the 1991 ABC was 1.7 million mt. The TAC for the entire Bering Sea subarea was established at 1.3 million mt.

Biological surveys of the pollock biomass in the Bering Sea subarea have been limited to the Eastern Bering Sea continental shelf and have not included Bogoslof pollock because these pollock appear to be of a separate stock. Although the biomass and ABC estimates for pollock in the Bering Sea subarea are based on biological data pertinent only to the Eastern Bering Sea continental shelf, they are applied for fishery management purposes also to area 515.

Aleutian Basin pollock aggregate in the Bogoslof area from January through March prior to spawning and are vulnerable to intensive fishing by fishermen seeking the highly valued roe and other pollock products. In the absence of regulatory action, the TAC for roe-season pollock (441,500 mt in 1991) could be taken almost exclusively in area 515. Such concentrated pollock harvests in the Bogoslof area could substantially exceed the ABC for this area. Such harvests could result in the Aleutian Basin Stock being overfished, given the large international fishing fleet that also exploits these fish without limit in the international waters of the Bering Sea.

To prevent overharvesting of pollock in the Bogoslof area during the 1991 roe season, the Council recommended and the Secretary of Commerce implemented an emergency interim rule (56 FR 5659; February 12, 1991). This action temporarily established a Bogoslof District and prescribed a catch limit in the district of 200,000 mt of pollock. This emergency rule expired on April 15, 1991. Expiration of the rule in April did not present a problem for the remainder of the 1991 fishing year because Aleutian Basin pollock leave the Bogoslof area after spawning. The same management measures cannot be used in 1992 and future years unless the FMP and its implementing regulations are amended through the normal rule-making process.

Information applicable to the 1992 fishing year is still preliminary. To obtain a preliminary biomass estimate of Aleutian Basin pollock for 1992, the 1991 biomass estimate of 600,000 mt, which was determined from the 1991 hydroacoustic survey, was adjusted to account for natural mortality, resulting in 445,000 mt. The Council, at its September 23–29, 1991, meeting, adopted an ABC estimate of 0–102,000 mt. This wide range expresses uncertainty in the status of pollock stocks. The upper end of the range may be too high for a number of reasons. The decline in catch per unit of effort in the Donut Hole and a three- to five-fold decrease in catch levels from 1989 to 1991 are indicative of substantial reductions in biomass. Over the same period, survey biomass in the proposed Bogoslof Subarea has declined from 2.1 million mt in 1989 to 600,000 mt in 1991. This decline supports justification for a conservative management regime.

The Council recommended that the Bogoslof District be established as a separate subarea in the BSAI for purposes of specifying and managing allowable levels of pollock harvest. Therefore, regulations are proposed that would create two new statistical areas, Statistical Areas 518 and 519, from existing Statistical Area 515. Statistical Area 518 would encompass the Bogoslof subarea.

Groundfish Fishing Closures Around Walrus Haulout Sites

The BSAI FMP and implementing regulations at 50 CFR 675.22(f) close directed fishing for groundfish in the EEZ from April 1 through September 30 within 12 miles of islands named Round Island and The Twins, and around Cape Peirce. The purpose of these closures is to reduce disturbance to walrus during the time of the year that they use these areas for haulout sites. Authority for these closures currently is based on regulations implementing Amendment 13 to the BSAI FMP (54 FR 50386; December 6, 1989). This authority expires on December 31, 1991. The measure contained in Amendment 17 would reestablish these closures in the EEZ between 3 and 12 miles seaward of the baseline used to measure the territorial sea. It would address potential disturbance problems by prohibiting all vessels that are Federally permitted to fish for groundfish from entering the closed areas. The prohibition would apply regardless of the activity in which the vessels might be engaged and would include support vessels as well as fishing vessels within the closed areas. It also would prohibit the transit of Federally permitted vessels through the areas.

Significant biological or economic information is not available at this time beyond that upon which Amendment 13 is based. The environmental assessment prepared for that measure summarizes the available information. The peak number of walrus counted on Round Island has fluctuated over time. Numbers declined from about 15,000 in 1978 to about 6,000 in 1984. The decline was attributed to disturbance resulting from the developing Togiak herring fishery and from arriving and departing visitors to Round Island. State regulations were made more restrictive in 1984 by increasing the controlled access area around Round Island from 0.5 to 2.0 miles. The number of walrus counted at the haulout sites increased to

12,500 in 1986. The size of the controlled access zone was further increased to 3.0 miles in 1989. The Federal Aviation Administration, at the request of the State of Alaska, issued a notice of airspace restriction prohibiting overflights of an altitude of less than 2,000 feet within one-half mile of Round Island. One reason for the restriction was to reduce disturbance associated with the State-managed herring fishery.

In 1987, daily counts and peak haulout counts on Round Island declined dramatically, and peak numbers never exceeded 5,300 walrus. Counts were even lower in 1988 with a minimum of 4,424 walrus. The only obvious change in human activity in the area was a large fleet of vessels associated with the yellowfin sole fishery that appeared in the vicinity of Round Island for the first time in 1987, and returned again in 1988. In 1989, the yellowfin sole fleet did not fish in the vicinity of Round Island and the peak count of walrus rebounded to 7,792. The peak count for 1990 when fishing was closed under existing regulations was 6,891, which is lower than that for 1989, but the difference is considered to be statistically insignificant.

At Cape Peirce, the peak number of walrus hauling out increased to 12,548 animals in 1985. The peak count declined to 6,249 in 1987, increased to 6,938 in 1988, and dropped considerably to 2,436 in 1989 and to 1,474 in 1990. The decline between 1986 and 1987 is believed to be disturbance-related. Some disturbance occurs at the Cape Peirce haulout site due to subsistence hunting and traffic from aircraft and boats. The frequency of disturbance is believed to have been relatively constant from year to year. Vessels associated with the yellowfin sole fishery during the period 1989–1991 have not been observed in the area. Walrus numbers at Cape Peirce and Round Island remain substantially below numbers observed prior to 1987.

To reduce disturbance that fisheries may impose on walrus during haulout periods, the Council adopted Amendment 17 to the BSAI FMP. In order to implement Amendment 17, the Council recommended that the April 1-September 30 closure around the haulout sites be implemented on a permanent basis. Based on industry testimony, the Council also recommended that a transit corridor be established around Right Hand Point that will extend 3 miles from the shore. The purpose of this corridor is to allow vessels to move through a particular area to other fishing grounds while at the same time remaining as far as possible from Round Island, which is one of the haulout sites. Establishing the transit corridor would reduce travel distance by 80 miles.

NMFS proposes the closures with two exceptions. First, because these closures would be implemented under authority of the BSAI FMP, they would affect only those vessels fishing for groundfish. Authority for implementing broader closures will be reviewed. Second, because the Magnuson Act does not apply to State waters, the transit area around Right Hand Point is not proposed. The State of Alaska will be requested to close state waters shoreward of the EEZ around the Walrus Islands consistent with the intent of Federal regulations. The Council may then request the State of Alaska to implement the intent of the Council by allowing a transit area around Right Hand Point.

Therefore, to implement the intent of this amendment, a regulation is proposed that prohibits entry into the closed area 9 miles seaward of the State boundary by Federally permitted fishing vessels during April 1-September 30. This prohibition would apply to vessels that are permitted under 50 CFR 675.4, as well as vessels fishing for groundfish without such permits.

Removal of Statistical Area 68 in the GOA

The present East Yakutat District (Statistical Area 68) is proposed to be removed by combining it with the Southeast Outside District (Statistical Area 65). The present Statistical Area 68 no longer serves a useful purpose for fishery conservation and management. In 1980, the Eastern Regulatory Area in the Gulf of Alaska was divided into the Yakutat District and the Southeast Outside District for purposes of sablefish management (45 FR 73486; November 5, 1980). In 1983, the Yakutat District was further divided into the West Yakutat District and the East Yakutat District, again for purposes of sablefish management (48 FR 43044; September 21, 1983).

Initial management experience during the 1984 sablefish fishery indicated that the newly created East Yakutat District was not functioning as intended. Because the boundary (137° W. longitude) between the East Yakutat and the Southeast Outside Districts lies across a major fishing ground, catch reports could not be relied upon to separate catches between the two districts.

As a practical matter, NMFS has been managing the two districts as a single, combined district since 1984, even though two harvest quotas were established. The combined districts have been referred to as the Southeast Outside/East Yakutat District. Since 1987, a single harvest quota has been specified for these combined districts (52 FR 785; January 9, 1987).

Fishermen are required to maintain records by Federal Reporting Area, which is the same as a statistical area, except that the reporting area also includes adjacent State waters. Regulations at 50 CFR 672.2 identify Statistical Area 68 as the East Yakutat District. Fishermen are required to complete each day a separate sheet in the Daily Fishing Logbook (DFL) for each reporting area in which they fish. If they fish in Statistical Area 68 (East Yakutat District) and then fish in Statistical Area 65 (Southeast Outside District), they must complete separate sheets in the DFL. Likewise, operators of processor vessels and managers of shoreside processing facilities who receive or process groundfish from both reporting areas on the same day must complete an additional sheet in the Daily Cumulative Production Log. Such reporting is necessary when harvest quotas are specified for each area. Because only one harvest quota is specified for the combined Southeast Outside/East Yakutat District, no useful information is obtained from the additional reports. Therefore, Statistical Area 68 is proposed to be removed by combining it with Statistical Area 65.

Authority to Issue Experimental Fishing Permits for the GOA and BSAI Groundfish Fisheries

Amendments to both the GOA and BSAI FMPs are proposed that would authorize the Regional Director to issue experimental fishing permits on a case-by-case basis after consulting with the Council.

Experimental fishing could provide information not otherwise available through research or commercial fishing operations. Results may be used to supplement information obtained through research. Fishing mortality resulting from experimental fishing would be outside of any TAC specification. Such additional mortality would be authorized only if overfishing as defined in the GOA and BSAI FMPs would not occur. Experimental fishing permits would expire at the end of a calendar year.

To implement this measure, procedures regarding preliminary screening of permit applications, Council consultation, notification of the applicant, and provisions for permit terms and conditions are proposed.

These elements are discussed as follows:

Preliminary Screening

Under regulations proposed to implement this measure, the Regional Director, in consultation with the Alaska Fishery Science Center (AFSC), would screen any application for an experimental fishing permit to determine whether its experimental design as described in the application could reasonably be expected to provide information as intended should the experimental fishing permit be issued. If the Regional Director determines that the experimental design is inadequate for obtaining intended information, the application would be returned to the submitter stating the reasons why the experimental design was determined to be inadequate. The Council would be notified of the Regional Director's determination. If the Regional Director determines that the experimental design is adequate, the Regional Director would commence consultation with the Council.

Council Consultation

If the Regional Director finds the application is complete and warrants further consideration, he will initiate consultation with the Council concerning the permit application by forwarding the application to the Council. The Council's Executive Director shall notify the applicant of a meeting at which the Council will consider the application and invite the applicant to appear in support of the application if the applicant desires. If the Regional Director initiates consultation with the Council, a notice of receipt of the application will be published in the **Federal Register** with a brief description of the proposal.

Application Contents

An application for an experimental fishing permit must include the following written information when it is submitted to the Regional Director:

1. A statement of the purpose and goal of the experiment, including justification explaining why issuance of an experimental fishing permit is warranted;

2. Technical details about the experiment, including the area and timing of the experiment, vessel and gear to be used, experimental design, staffing, sampling procedures, the data and samples to be collected, analysis of the data and samples, provision for public release of all obtained information by means of interim and/or final reports;

3. A description of the species to be harvested, amount of such harvest necessary to conduct the experiment, and arrangement for disposition of all species taken;

4. The willingness of the applicant to carry observers, if required by the Regional Director, and a description of accommodations and work space for the observer(s); and

5. Details for all coordinating parties engaged in the experiment and signatures of all representatives of all principal parties.

Notifying the Applicant

The Regional Director shall notify the applicant in writing of the decision to grant or deny the experimental fishing permit as soon as practicable after consulting with the Council, and, if denied, the reasons for the denial. Grounds for denial of an experimental fishing permit include, but are not limited to, the following:

1. The applicant has failed to disclose material information required, or has made false statements as to any material fact, in connection with the application;

2. According to the best scientific information available, the harvest to be conducted under the permit would detrimentally affect living marine resources, including marine mammals and birds, and their habitat in a significant way;

3. Activities to be conducted under the experimental fishing permit would be inconsistent with the intent of 50 CFR 672.6 and 675.6 or the management objectives of the FMP;

4. The applicant has failed to demonstrate a valid justification for the permit;

5. The activity proposed under the experimental fishing permit could create a significant enforcement problem;

6. The applicant failed to make available to the public information that had been obtained under a previously issued experimental fishing permit; or

7. The proposed activity had economic allocation as its sole purpose.

In the event a permit is denied on the basis of incomplete information or design flaws after preliminary screening or after consultation with the Council, the applicant will be provided an opportunity to resubmit the application. If a permit is denied because experimental fishing would (1) detrimentally affect living marine resources, (2) have economic allocation as its sole purpose, (3) be inconsistent with the management objectives of the FMP, or (4) create significant enforcement problems, the decision of the Regional Director will be the final action of the agency.

Terms and Conditions

The Regional Director may attach terms and conditions to the experimental fishing permit consistent with the purpose of the experiment. Unless otherwise specified in the experimental fishing permit or a superseding notice or regulation, an experimental fishing permit is effective for no longer than 1 year but may be revoked, suspended, or modified. Experimental fishing permits may be renewed following the above application procedures.

Predicting what types of information collections might be authorized by experimental fishery permits is not practical. Types of experiments that might be conducted or facilitated under this proposed measure include:

1. Fishing in areas where the total allowable catch (TAC) has been reached (e.g., determine abundance of minor target species components of a complex);

2. Fishing with gear types otherwise prohibited; and

3. Fishing in areas otherwise closed to all fishing.

Each type would be considered on a case-by-case basis when reviewing the application for an experimental fishing permit.

Because neither groundfish FMP currently authorizes fishery experiments or specific harvests of groundfish to support experiments, that authorization is proposed.

Additional Proposed Regulatory Changes

Certain changes to existing regulations are proposed that NMFS has determined are necessary for fishery conservation and management. These changes and the reasons for them are as follows:

1. In § 672.20(f)(1) (i), (ii), (iii), the phrase " * * * the Regional Director will publish a notice in the **Federal Register** prohibiting fishing by JVP and DAP vessels * * * " is changed to read, " * * * the NMFS will publish a notice in the **Federal Register** prohibiting directed fishing for groundfish by JVP and DAP vessels * * * ". This change is necssary to limit the prohibtion to just directed fishing operations. To prohibit all fishing is beyond the scope of the intent of paragraph (f). All fishing would include any operations at sea in support of, or in preparation for, actual directed fishing operations, including processing. Paragraph (f) was not intended to

prohibit operations other than directed fishing.

2. Regulations implementing the GOA FMP stipulate that the State of Alaska has management responsibility for directed fishing standards for demersal shelf rockfish when caught in other directed fishing operations in the Southeast Outside District. Section 672.20(g)(3) is changed to refer to Alaska Administrative Code 28.170 for directed fishing standards that apply to demersal shelf rockfish. This change is included to clarify authority for State of Alaska management of the demersal shelf rockfish fishery.

3. A definition of non-pelagic trawl, a term already used elsewhere in implementing regulations, is added to 50 CFR 672.2 and 675.2 for purposes of clarifying regulations by providing a definition of a trawl that is not a pelagic trawl.

4. In 50 CFR 675.20(h)(2), the first sentence is changed to read, "Using trawl gear for yellowfin sole, 'other flatfish,' or arrowtooth flounder until May 1". The purpose of this change is to clarify the intent of the regulation to accommodate larger bycatch amounts of yellowfin sole, "other flatfish," and arrowtooth flounder in directed fisheries for rock sole before the general flatfish season starts on May 1. After the general flatfish season starts on May 1, retainable individual amounts of yellowfin sole, "other flatfish," or arrowtooth flounder would be allowed in amounts up to 20 percent of other fish species on board.

5. Sections 672.2 and 675.2 are amended by changing the definitions of groundfish. Rather than list individual groundfish species, the definitions would reference §§ 672.20(a)(1) or 675.20(a)(1). The present definitions of groundfish include species that often are not consistent with those in table 1 of the notices of harvest limits, which may be updated annually. Confusion will be prevented if only a single list is referenced.

6. Paragraphs 672.24(a) and 675.24(a) are amended to require fishermen using pots in the groundfish fishery to mark each pot with a tag that identifies the pot as being used in the groundfish fishery. This change is proposed in response to a Council recommendation to address enforcement problems. These problems arise especially for the State of Alaska in managing crab fisheries off Alaska. Crab fisheries are conducted only with pot gear by regulations. When the State of Alaska closes areas to crab fishing, groundfish pots would not be prohibited in the same water. Although technical difference exist between Tanner crab pots and groundfish pots, no difference exists between king crab pots and groundfish pots.

Fishermen conceivably could continue fishing for crab during a closure in the guise of fishing for groundfish. Unless fishermen are actually observed retaining crab after retrieving pot gear, detecting a violation is difficult. If an enforcement officer boarded a fishing vessel while pot gear is being retrieved, fishermen could contend that the pots are being used for groundfish and discard crab while under observation by the enforcement officer.

By requiring fishermen to tag their pots as being groundfish pots, they would be committing themselves to using groundfish pots. Pots not tagged would be assumed to be crab pots. A violation would occur if non-tagged pots are retrieved in areas closed to fishing for crab. Fishermen would not be required to use any certain type of tag but would be responsible for tagging their pots in such a way that the tag has the word "groundfish" on it.

Classification

Section 304(a)(1)(C) of the Magnuson Act, as amended by Public Law 99–659, requires NMFS to publish regulations proposed by a Council within 15 days of receipt of the FMP amendment and regulations. At this time NMFS has not determined that the FMP amendments these regulations would implement are consistent with the national standards, other provisions of the Magnuson Act, and other applicable law. NMFS, in making that determination, will take into account the data, views, and comments received during the comment period.

The Council prepared an environmental assessment (EA) for these FMP amendments that discusses the impact on the environment as a result of this rule. A copy of the EA may be obtained from the Council (see ADDRESSES) and comments on it are requested.

The Assistant Administrator for Fisheries, NOAA (Assistant Administrator), has initially determined that the proposed rule is not a "major rule" requiring a regulatory impact analysis under Executive Order 12291. This proposed rule, if adopted, is not likely to result in an annual effect on the economy of $100 million or more; a major increase in costs or prices for consumers, individual industries, Federal, State, or local govenment agencies, or geographic regions; or a significant adverse effect on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets.

The Council prepared a regulatory impact review (RIR) that concludes that none of the proposed measures in this rule would cause impacts considered significant for purposes of this Executive Order. A copy of the RIR is available from the Council (see **ADDRESSES**).

The Council prepared an initial regulatory flexibility analysis as part of the RIR that concludes that this proposed rule, if adopted, would have significant effects on small entities. The proposed groundfish fishing closures around walrus haulout sites precludes the fishing industry from the opportunity to fish in the closure zones. Fishermen using pots in the groundfish fishery would be required to mark each pot that identifies the pot as being used in the groundfish fishery. A total of 1,649 vessels had Federal permits for fishing for groundfish off Alaska as of March 19, 1991; many of which would be affected by this proposed rule. A copy of this analysis is available from the Council (see **ADDRESSES**).

NMFS concluded formal Section 7 consultation on the BSAI and GOA FMPs and fisheries. The biological opinions issued for the consultations concluded that the FMPs and fisheries are not likely to jeopardize the continued existence and recovery of an endangered or threatened species under the jurisdiction of NMFS. Adoption of the management measures described in this proposed rule will not affect listed species in a way that was not already considered in the aforementioned biological opinions. NMFS has determined that no further section 7 consultation is required for adoption of these FMP amendments.

This proposed rule contains a collection of information requirement for purposes of the Paperwork Reduction Act. A collection of information request has been submitted to the Office of Management and Budget for approval. Information collected under the proposed rule regarding experimental fishing permits is limited to that necessary to determine whether such a permit should be issued and to monitor the progress of the experimental fishing. The additional burden is estimated to be about 240 hours per year, assuming 20 applicants apply for a permit each year. The 240-hour estimate assumes that such applicant might spend as many as 10 hours preparing an application and 2 hours preparing and submitting a report about the experiment. Each applicant would spend 12 hours per year. Therefore, 20 applicants would spend a total of 240 hours per year. Send

comments regarding this burden estimate or any other aspect of this collection of information to NMFS (see **ADDRESSES**) and to the Office of Information and Budget, (see **ADDRESSES**). In addition, this proposed rule includes changes to statistical areas that would affect reporting requirements already approved by OMB under Approval Number 0648–0213.

The Council determined that this rule, if adopted, will be implemented in a manner that is consistent to the maximum extent practicable with the approved coastal management proram of Alaska. This determination has been submitted for review by the responsible State agencies under section 307 of the Coastal Zone Management Act.

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

List of Subjects in 50 CFR Parts 672 and 675

Fisheries, Fishing vessels, Reporting and recordkeeping requirements.

Dated: November 27, 1991.

Samuel W. McKeen,

Acting Assistant Administrator for Fisheries, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR parts 672 and 675 are proposed to be amended as follows:

PART 672—GROUNDFISH OF THE GULF OF ALASKA

1. The authority citation for part 672 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.*

2. In § 672.2, the definition of "Groundfish" is revised, the definition of "Statistical area" is amended by removing paragraph (7) and revising the introductory text of the definition and pararaph (6), and the definition of "Non-pelagic trawl" is revised, in alphabetical order, to read as follows:

§ 672.2 Definitions.

* * * * *

Groundfish means target species categories and the "other species" category contained in Table 1, referenced in § 672.20(a)(1).

* * * * *

Non-pelagic trawl means a trawl which has discs, bobbins, rollers, or other chafe protection gear attached to the foot rope, or which does not otherwise conform with the definition of a pelagic trawl contained in this section.

* * * * *

Statistical area means any one of the six statistical areas of the EEZ in the Gulf of Alaska defined as follows:

* * * * *

(6) Statistical Area 65—between 132°40′ and 140° W. longitudes and north of 54°30′ N. latitude;

* * * * *

3. Section 672.6, which was reserved, is added to read as follows:

§ 672.6 Experimental fisheries.

(a) *General.* For limited experimental purposes, the Regional Director may authorize, after consulting with the Council, fishing for groundfish in a manner that would otherwise be prohibited. No experimental fishing may be conducted unless authorized by an experimental fishing permit issued by the Regional Director to the participating vessel owner in accordance with the criteria and procedures specified in this section. Experimental fishing permits will be issued without charge and will expire at the end of a calendar year unless otherwise provided for under paragraph (e) of this section.

(b) *Application.* An applicant for an experimental fishing permit shall submit to the Regional Director at least 60 days before the desired effective date of the experimental fishing permit a written application including, but not limited to, the following information:

(1) The date of the application;

(2) The applicant's name, mailing address, and telephone number;

(3) A statement of the purpose and goal of the experiment for which an experimental fishing permit is needed, including a general description of the arrangments for disposition of all species harvested under the experimental fishing permit;

(4) Technical details about the experiment, including:

(i) Amounts of each species to be harvested that are necessary to conduct the experiment, and arrangement for disposition of all species taken;

(ii) Area and timing of the experiment;

(iii) Vessel and gear to be used;

(iv) Experimental design (e.g., sampling procedures, the data and samples to be collected, and analysis of the data and samples); and

(v) Provision for public release of all obtained information, and submission of interim and final reports;

(5) The willingness of the applicant to carry observers, if required by the Regional Director, and a description of accommodations and work space for the observer(s);

(6) Details for all coordinating parties engaged in the experiment and signatures of all representatives of all principal parties;

(7) Information about each vessel to be covered by the experimental fishing permit, including:

(i) Vessel name;

(ii) Name, address, and telephone number of owner and master;

(iii) U.S. Coast Guard documentation, State license, or registration number;

(iv) Home port;

(v) Length of vessel;

(vi) Net tonnage;

(vii) Gross tonnage;

(8) The signature of the applicant; and

(9) The Regional Director may request from an applicant additional information necessary to make the determinations required under this section. An incomplete application will not be considered until corrected in writing. An applicant for an experimental fishing permit need not be the owner or operator of the vessel(s) for which the experimental fishing permit is requested.

(c) *Review procedures.* (1) The Regional Director, in consultation with the Alaska Fishery Science Center, will review each application and will make a preliminary determination whether the application contains all the information necessary to determine if the proposal constitutes a valid experimental program appropriate for further consideration. If the Regional Director finds any application does not warrant further consideration, the applicant will be notified in writing of the reasons for the decision.

(2) If the Regional Director determines any application is complete and warrants further consideration, he will initiate consultation with the Council by forwarding the application to the Council. The Council's Executive Director shall notify the applicant of a meeting at which the Council will consider the application and invite the applicant to appear in support of the application if the applicant desires. If the Regional Director initiates consultation with the Council, the Secretary will publish a notice of receipt of the application in the **Federal Register** with a brief description of the proposal.

(d) *Notifying the applicant.* (1) The decision of the Regional Director, after consulting with the Council, to grant or deny an experimental fishing permit is the final action of the agency. The Regional Director shall notify the applicant in writing of the decision to grant or deny the experimental fishing permit and, if denied, the reasons for the denial, including:

(i) The applicant has failed to disclose material information required, or has

made false statements as to any material fact, in connection with the application;

(ii) According to the best scientific information available, the harvest to be conducted under the permit would detrimentally affect living marine resources, including marine mammals and birds, and their habitat in a significant way;

(iii) Activities to be conducted under the experimental fishing permit would be inconsistent with the intent of this section or the management objectives of the FMP;

(iv) The applicant has failed to demonstrate a valid justification for the permit;

(v) The activity proposed under the experimental fishing permit could create a significant enforcement problem;

(vi) The applicant failed to make available to the public information that had been obtained under a previously issued experimental fishing permit; or

(vii) The proposed activity had economic allocation as its sole purpose.

(2) In the event a permit is denied on the basis of incomplete information or design flaws, the applicant will be provided an opportunity to resubmit the application, unless a permit is denied because experimental fishing would detrimentally affect living marine resources, have economic allocation as its sole purpose, be inconsistent with the management objectives of the FMP, or create significant enforcement problems.

(e) *Terms and conditions.* The Regional Director may attach terms and conditions to the experimental fishing permit that are consistent with the purpose of the experiment, including but not limtied to:

(i) The maximum amount of each species that can be harvested and landed during the term of the experimental fishing permit, including trip limitations, where appropriate;

(ii) The number, sizes, names, and identification numbers of the vessels authorized to conduct fishing activities under the experimental fishing permit;

(iii) The time(s) and place(s) where experimental fishing may be conducted;

(iv) The type, size, and amount of gear that may be used by each vessel operated under the experimental fishing permit;

(v) The condition that observers be carried aboard vessels operated under an experimental fishing permit;

(vi) Reasonable data reporting requirements (OMB Approval No. 0648–0206);

(vii) Such other conditions as may be necessary to assure compliance with the purposes of the experimental fishing permit and consistency with the FMP objectives; and

(viii) Provisions for public release of data obtained under the experimental fishing permit.

(f) *Effectiveness.* Unless otherwise specified in the experimental fishing permit or a superseding notice or regulation, an experimental fishing permit is effective for no longer than 1 year but may be revoked, suspended, or modified. Experimental fishing permits may be renewed following the application procedures in paragraph (b) of this section.

(4) In § 672.20, the section heading "General allocations" and paragraphs (f)(1) (i) through (iii) and (g)(3) are revised to read as follows:

§ 672.20 General limitations.

* * * * *

(f) * * *

(1) * * *

(i) *Trawl gear.* If, during the fishing year, the Regional Director determines that the catch of halibut by operators of vessels using trawl gear and delivering their catch to foreign vessels (JVP vessels) or operators of vessels using trawl gear and delivering their catch to U.S. fish processors or processing their catch on board (DAP vessels) will reach their proportional share of the seasonal allocation of the halibut PSC limit provided for under paragraph (f)(2) of this section, NMFS will publish a notice in the **Federal Register** prohibiting directed fishing for groundfish by JVP or DAP vessels, as appropriate, with trawl gear other than pelagic trawl gear for the remainder of the season to which the PSC allocation applies.

(ii) *Hook-and-line gear.* If, during the year, the Regional Director determines that the catch of halibut by operators of vessels using hook-and-line gear and delivering their catch to foreign vessels (JVP vessels) or operators of vessels using hook-and-line gear and delivering their catch to U.S. fish processors or processing their catch on board (DAP vessels) will reach their promotional share of the seasonal allocation of the halibut PSC limit provided for under paragraph (f)(2) of this section NMFS will publish a notice in the **Federal Register** prohibiting directed fishing for groundfish by JVP or DAP vessels, as appropriate, with hook-and-line gear for the remainder of the season to which the PSC allocation applies.

(iii) *Pot gear.* If during the year, the Regional Director determines that the catch of halibut by operators of vessels using pot gear and delivering their catch to foreign vessels (JVP vessels) or operators of vessels using pot gear and delivering their catch to U.S. fish processors or processing their catch on board (DAP vessels) will reach their proportional share of the seasonal allocation of the halibut PSC limit provided for under paragraph (f)(2) of this section, NMFS will publish a notice in the **Federal Register** prohibiting directed fishing for groundfish by JVP or DAP vessels, as appropriate, with pot gear for the remainder of the season to which the PSC allocation applies.

* * * * *

(g) * * *

(3) *Other*—(i) *Groundfish other than demersal shelf rockfish.* Except as provided under paragraphs (g) (1) and (2) of this section, the operator of a vessel is engaged in the directed fishing for a specific species or species group if at any particular time during a trip that species or species group is retained in an amount equal to or greater than 20 percent of the amount of all other fish species retained at the same time by the vessel during the same trip.

(ii) *Demersal shelf rockfish.* Directed fishing standards for demersal shelf rockfish in management areas within the Eastern Regulatory Area where the total allowable catch is specified are governed by title 5 of the Alaska Administrative Code, section 28.170.

* * * * *

5. In § 672.24, paragraph (a)(3) is added to read as follows:

§ 672.24 Gear limitations.

(a) * * *

(3) All pots carried aboard or used by any vessel regulated under this part shall be marked with a label that is maintained in good condition and that includes the word "groundfish".

* * * * *

PART 675—GROUNDFISH OF THE BERING SEA AND ALEUTIAN ISLANDS AREA

6. The authority citation for part 675 continues to read as follows:

Authority: 16 U.S.C. 1801 et seq.

7. In § 675.2, the definition of "Bering Sea and Aleutian Islands management area" is amended by revising paragraph (a) and adding paragraph (c); the definition of "Groundfish" is revised; the definition of "Statistical area" is amended by revising the introductory text by removing existing paragraph (e), redesignating existing paragraphs (f) and (g) as (e) and (f), redesignating existing paragraphs (h) through (k) as (i) through (l), and adding new paragraphs (g) and (h); and a new definition for "Non-pelagic trawl" is added, in alphabetical order, to read as follows:

§ 675.2 Definitions.

* * * * *

Bering Sea and Aleutian Islands management area * * *

(a) The Bering Sea subarea of the management area means that part of the EEZ contained in areas I, exclusive of the Bogoslof subarea, II, and III of Figure 1.

* * * * *

(c) The Bogoslof subarea of the management unit means that portion of the EEZ contained in Statistical Area 518 as defined in this section.

* * * * *

Groundfish means target species categories and the "other species" category contained in Table 1, referenced in § 675.20(a)(1)

* * * * *

Non-pelagic trawl means a trawl which has discs, bobbins, rollers, or other chafe protection gear attached to the foot rope, or which does not otherwise conform with the definition of a pelagic trawl contained in this section.

* * * * *

Statistical area means any one of the 12 statistical area of the Bering Sea and Aleutian Islands management area defined as follows (Figure 2):

* * * * *

(g) Statistical area 518—south of straight lines connecting the following coordinates in the order listed: 55°46′ N. 170°00 W., 54°30′ N. 167°00′ W., then south to straight lines between the Aleutian Islands connecting the following coordinates in the order listed: 54°23.9′ N. 164°44.0′ W., 54°11.9′ N. 165°23.3′ W., 54°08.9′ N. 165°38.8′ W., 54°07.7′ N. 165°40.6′ W., 54°02.9′ N. 166°03.0′ W., 53°59.0′ N. 166°17.2′ W., 53°23.8′ N. 167°50.1′ W., 53°18.7′ N. 167°51.4′ W., 52°49.8′ N. 169°06.3′ W., and 52°49.2′ N. 169°40.4′ W., 52°49.2′ N. 170°00.0′ W., then north to 55°46.0′ N. 170°00.0′ W.

(h) Statistical Area 519—the area bounded by the following coordinates in the order listed: 54°30′ N. 167°00′ W., 54°30′ N. 165°00′ W., 53°30′ N. 167°00′ W., and 54°30′ N. 167°00′ W.

* * * * *

8. Section 675.6, which was reserved, is added to read as follows:

§ 675.6 Experimental fisheries.

(We are proposing to add § 675.6 "Experimental fisheries." The text is identical to that of § 672.6 of this chapter.)

9. In § 675.20, (h)(2) is revised to read as follows:

§ 675.20 General limitations.

* * * * *

(h) * * *

(2) *Using trawl gear for yellowfin sole, "other flatfish," or arrowtooth flounder*—(i) *Before the May 1 season starting date in § 675.23(c).* The operator of a vessel is engaged in directed fishing for yellowfin sole, "other flatfish," or arrowtooth flounder if he retains at any time during a trip an aggregate amount of yellowfin sole, "other flatfish," and arrowtooth flounder caught using trawl gear equal to or greater than a total of:

(A) 35 percent of the amount of rock sole retained at the same time on the vessel during the same trip, plus

(B) 20 percent of the total amount of other fish species (besides rock sole, yellowfin sole, "other flatfish," and arrowtooth flounder) retained at the same time by the vessel during the same trip.

(ii) *On and after the May 1 season starting date in § 675.23(c).* The operator of a vessel is engaged in directed fishing for yellowfin sole, "other flatfish," or arrowtooth flounder if he retains at any particular time during a trip an amount of any one of these species that is 20 percent or more of the total amount of other fish retained at the same time by the vessel during the same trip.

* * * * *

10. In § 675.22, paragraph (f) is revised to read as follows:

§ 675.22 Time and area closures.

* * * * *

(f) From April 1 through September 30 of any fishing year, vessels permitted under § 675.4 are prohibited in that part of the Bering Sea subarea between 3 and 12 miles seaward of the baseline used to measure the territorial sea around islands named Round Island and The Twins, as shown on National Ocean Survey Chart 16315, and around Cape Peirce (58°33′ N. latitude, 161°43′ W. longitude).

11. In § 675.24, paragraph (a) is revised to read as follows:

§ 675.24 Gear limitations.

* * * * *

(a) *Marking of gear.* (1) All longline marker buoys carried aboard or used by any vessel regulated under this part shall be marked with at least one of the following:

(i) The vessel's name; and

(ii) The vessel's Federal permit number; or

(iii) The vessel's registration number.

(2) Markings shall be in characters at least 4 inches (10.16 cm) in height and one-half inch (1.27 cm) in width in a contrasting color visible above the water line and shall be maintained in good condition.

(3) All pots carried aboard or used by any vessel regulated under this part shall be marked with a label that is maintained in good condition and that includes the word "groundfish".

* * * * *

12. Figure 2 to part 675 is revised to read as follows:

BILLING CODE 3510-22-M

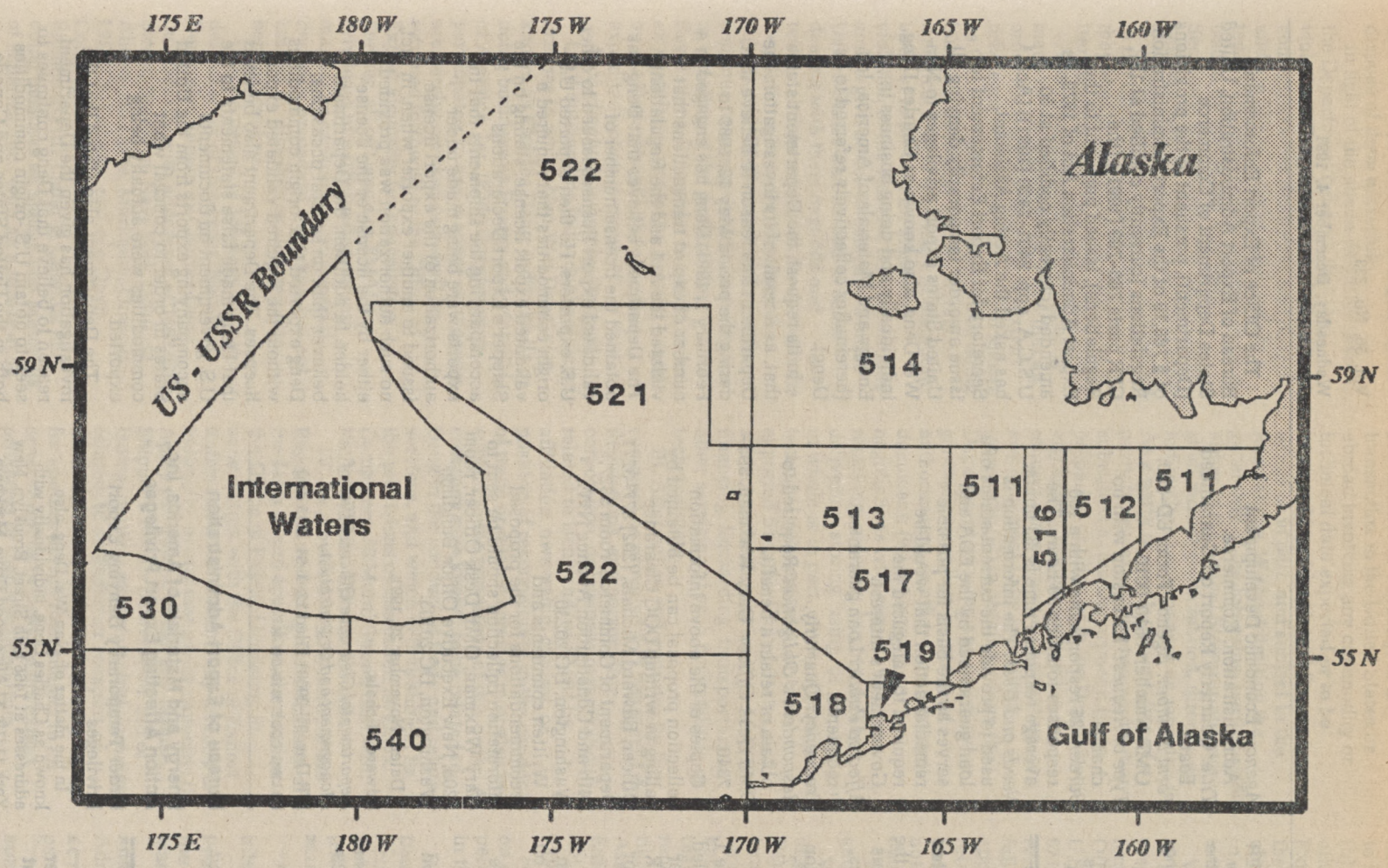


Figure 2. Reporting areas and bycatch limitation zones in Bering Sea and Aleutian Islands Management Area. Zone 1 = 511+512+516; Zone 2 = 513+517+521; and Zone 2H = 517.

10/91

[FR Doc. 91-29004 Filed 11-29-91; 3:35 pm]
BILLING CODE 3510-22-C

Notices

Federal Register
Vol. 56, No. 233
Wednesday, December 4, 1991

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.

COMMISSION ON CIVIL RIGHTS

Public Meeting Cancellation of the New Jersey State Advisory Committee

Notice is hereby given, pursuant to the provisions of the Rules and Regulations of the U.S. Commission on Civil Rights, that a meeting of the New Jersey Advisory Committee to the Commission which was to have been convened at 2 p.m. and adjourned at 5 p.m. on December 9, 1991, in the Quality Inn Conference Center, board room, Route 1, South, North Brunswick, N.J. is canceled.

The original notice for the December 9, 1991 meeting was published at 56 FR 216 (November 7, 1991). A new date for the meeting will be announced. The business segment of the canceled meeting was to have included program planning and review of a draft report on law enforcement practices in New Jersey. These items will proceed at the next meeting to be announced.

Persons desiring additional information, or planning a presentation to the Committee, should contact Chairperson Zulima Farber or John I. Binkley, Director of the Eastern Regional Division of the Commission at (202/523–5264 or TDD 202/376–8117).

Dated at Washington, DC, November 29, 1991.

Carol-Lee Hurley,

Chief, Regional Programs Coordination Unit.

[FR Doc. 91–29046 Filed 12–3–91; 8:45 am]

BILLING CODE 6335–01–M

DEPARTMENT OF COMMERCE

Agency Information Collection Under Review by the Office of Management and Budget (OMB)

DOC has submitted to OMB for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

Agency: Economic Development Administration, Commerce.
Title: Quarterly Report on Guaranteed Loans
Form Number: Agency Form: ED–700; OMB Number: 0610–0010
Type of Request: Extension with no change.
Burden: 25 respondents with a 100 responses totalling 33 hours. The average response time is .33 hours.
Needs and Uses: The information is used to provide the current status of a loan guaranteed by the EDA and serves as the basis for possible remedial action that would be required to safeguard the Government's interest.
Affected Public: Loan guarantee recipients.
Frequency: Quarterly.
Respondent's Obligation: Required to obtain or retain a benefit.
OMB Desk Officer: Gary Waxman, 395–7340.

Copies of the above information collection proposal can be obtained by calling or writing DOC Clearance Officer, Edward Michals, (202) 377–3271, Department of Commerce, room 5327, 14th and Constitution Avenue NW., Washington, DC 20230.

Written comments and recommendations for the proposed information collection should be sent to Gary Waxman, OMB Desk Officer, room 3208, New Executive Office Building, Washington, DC 20503.

Dated: November 29, 1991.

Edward Michals,

Departmental Clearance Officer, Office of Management and Organization.

[FR Doc. 91–29091 Filed 12–3–91; 8:45 am]

BILLING CODE 3510–CW–M

Bureau of Export Administration

Energy and Materials of America, Inc.; Action Affecting Export Privileges

Order Temporarily Denying Export Privileges

In the matter of: Nan-Wei Deng, also known as Charles Deng, individually with addresses at 1465 67th Street, Brooklyn, New York 11219; 32 Alicewood Drive, Markham, Ontario L3S 3C9, Canada and c/o Onyx Computers, 30 Mural Street, Unit #10, Richmond Hill, Ontario, Canada and doing business as Energy and Materials of America, Inc., 54 Walker Street, New York, New York 10013, Respondents.

The Office of Export Enforcement, Bureau of Export Administration, United States Department of Commerce (Department), pursuant to the provisions of § 788.19 of the Export Administration Regulations (currently codified at 15 CFR parts 768–799 (1991)) (the Regulations), issued pursuant to the Export Administration Act of 1979, as amended (currently codified at 50 U.S.C.A. app. 2401–2420 (1991)) (Act),[1] has asked the Acting Assistant Secretary for Export Enforcement to issue an order temporarily denying all United States export privileges to Nan-Wei Deng, also known as Charles Deng, individually and doing business in Energy and Materials of America, Inc. (hereinafter collectively referred to as Deng).

In its request, the Department states that, as a result of its investigation, the Department has reason to believe that, during the period May 12, 1989 to February 1, 1991, Deng has engaged in a number of export transactions that violated the Act and the Regulations. The Department believes that Deng has obtained the license number of validated export licenses issued to other U.S. exporters. He then exported U.S.-origin commodities that required a validated export license, stating on the Shipper's Export Declarations accompanying the shipments that the exports were being made under authorization of the export license issued to another exporter when, in fact, no such authorization was provided either by the license or the license-holder. In addition, the Department believes that, on several occasions, Deng exported U.S.-origin commodities without the required validated export licenses. The Department also believes that Deng made false statements to the U.S. government on documents accompanying exports from the United States in order to conceal what commodities were actually being exported.

The Department also stated that the investigation has given the Department reason to believe that Deng continues to seek to obtain U.S.-origin commodities both in the United States and Canada,

[1] The Act expired on September 30, 1990. Executive Order 12730 (55 FR 40373, October 2, 1990) continued the Regulations in effect under the International Emergency Economic Powers Act (50 U.S.C.A. 1701–1706 (1991)).

and that, if he is successful, he may dispose of them unlawfully.

In light of the above-described events, the Department believes that the violations Deng is suspected of having committed were deliberate and covert and are likely to occur again unless a temporary denial order naming Deng is issued by the Acting Assistant Secretary. In addition, the Department believes that the temporary denial order is necessary to give notice to companies in the United States and abroad that they should cease dealing with Deng in transactions involving U.S.-origin goods.

Accordingly, based on the showing made by the Department, I find that an order temporarily denying the export privileges of Nan-Wei Deng, also known as Charles Deng, individually and doing business as Energy and Materials of America, Inc., is necessary in the public interest to prevent an imminent violation of the Act and the Regulations and to give notice to companies in the United States and abroad to cease dealing with them in goods and technical data subject to the Act and the Regulations, in order to reduce the substantial likelihood that they will continue to engage in activities that are in violation of the Act and the Regulations. This order is issued on an *ex parte* basis without a hearing based on the Department's showing that expedited action is required.

Accordingly, it is hereby Ordered

I. All outstanding individual validated licenses in which Nan-Wei Deng, also known as Charles Deng, individually or doing business as Energy and Materials of America, Inc. (EMAI), appears or participates, in any manner or capacity, are hereby revoked and shall be returned forthwith to the Office of Export Licensing for cancellation. Further, all of Deng's or EMAI's privileges of participating, in any manner or capacity, in any special licensing procedure, including, but not limited to, distribution licenses, are hereby revoked.

II. For a period of 180 days from the date of entry of this order, Nan-Wei Deng, also known as Charles Deng, individually with addresses at 1465 67th Street, Brooklyn, New York 11219, 32 Alicewood Drive, Markham, Ontario L3S 3C9, Canada, and c/o Onyx Computers, 30 Mural Street, Unit #10, Richmond Hill, Ontario, Canada; and doing business as Energy and Materials of America, Inc., with an address at 54 Walker Street, New York, New York 10013, and all their successors, assignees, officers, partners, representatives, agents, and employees, hereby are denied all privileges of participating, directly or indirectly, in any manner or capacity, in any transaction in the United States or abroad involving any commodity or technical data exported or to be exported from the United States, in whole or in part, and subject to the Regulations. Without limiting the generality of the foregoing, participation, either in the United States or abroad, shall include participation, directly or indirectly, in any manner or capacity: (i) As a party or as a representative of a party to any export license application submitted to the Department; (ii) in preparing or filing with the Department any export license application or request for reexport authorization, or any document to be submitted therewith; (iii) in obtaining from the Department or using any validated or general export license, reexport authorization, or other export control document; (iv) in carrying on negotiations with respect to, or in receiving, ordering, buying, selling, delivering, storing, using, or disposing of, in whole or in part, any commodities or technical data exported or to be exported from the United States and subject to the Regulations; and (v) in financing, forwarding, transporting, or other servicing of such commodities or technical data.

III. After notice and opportunity for comment as provided in § 788.3(c) of the Regulations, any person, firm, corporation, or business organization related to Deng and/or EMAI by affiliation, ownership, control, or position of responsibility in the conduct of trade or related services may also be subject to the provisions of this order. A company now known to be related to Deng in the conduct of trade and related services, and which is thus subject to the provisions of this order, is: Onyx Computers, 30 Mural Street, Unit #10, Richmond Hill, Ontario, Canada.

IV. As provided in § 787.12(a) of the Regulations, without prior disclosure of the facts to and specific authorization of the Office of Export Licensing, in consultation with the Office of Export Enforcement, no person may directly or indirectly, in any manner or capacity: (i) Apply for, obtain, or use any license, Shipper's Export Declaration, bill of lading, or other export control document relating to an export or reexport of commodities or technical data by, to, or for another person then subject to an order revoking or denying his export privileges or then excluded from practice before the Bureau of Export Administration; or (ii) order, buy, receive, use, sell, deliver, store, dispose of, forward, transport, finance, or otherwise service or participate: (a) In any transaction which may involve any commodity or technical data exported or to be exported from the United States; (b) in any reexport thereof; or (c) in any other transaction which is subject to the Export Administration Regulations, if the person denied export privileges may obtain any benefit or have any interest in, directly or indirectly, any of these transactions.

V. In accordance with the provisions of § 788.19(e) of the Regulations, either respondent may, at any time, appeal this temporary denial order by filing with the Office of the Administrative Law Judge, U.S. Department of Commerce, room H-6716, 14th Street and Constitution Avenue, NW., Washington, DC 20230, a full written statement in support of the appeal. That section also provides that a related person may appeal a finding that he is related to a respondent but may not appeal the underlying temporary denial order.

VI. This order is effective immediately and shall remain in effect for 180 days.

VII. In accordance with the provisions of § 788.19(d) of the Regulations, the Department may seek renewal of this temporary denial order by filing a written request not later than 20 days before the expiration date. Either respondent may oppose a request to renew this temporary denial order by filing a written submission with the Assistant Secretary for Export Enforcement, which must be received not later than seven days before the expiration date of this order.

A copy of this order shall be served on each respondent and the related person and this order shall be published in the **Federal Register.**

Dated: November 27, 1991.

Douglas E. Lavin,

Acting Assistant Secretary for Export Enforcement.

[FR Doc. 91-29049 Filed 12-3-91; 8:45 am]

BILLING CODE 3510-DT-M

International Trade Administration

President's Export Council: Meeting of the President's Export Council Foreign Market Development Subcommittee

AGENCY: International Trade Administration, Commerce.

ACTION: Amendment to notice of a partially closed meeting.

SUMMARY: The Closed session will include briefings and discussion on the North American Free Trade Agreement (NAFTA) negotiations, Pacific Rim countries, including Vietnam, and other sensitive matters properly classified under Executive Order 12356. The

Subcommittee will discuss possible recommendations to the full Council in these areas. The briefings and discussion in the open session will cover ways to promote the development of trade in the U.S.S.R., Eastern Europe and Latin America and review the Enterprise for the Americas initiative.

DATES: December 9, 1991. Open Session from 10 a.m. to 11 a.m. Closed Session from 11 a.m. to 12:30 p.m.

ADDRESSES: Main Commerce Building, room 4830, 14th Street and Constitution Avenue, NW., Washington, DC 20230. Seating is limited and will be on a first come, first serve basis.

FOR FURTHER INFORMATION CONTACT: Ms. Annette Richard, President's Export Council, room 3215, Washington, DC 20230.

Dated: November 27, 1991.

Wendy H. Smith,

Staff Director and Executive Secretary, President's Export Council.

[FR Doc. 91-29092 Filed 12-3-91; 8:45 am]

BILLING CODE 3510-DR-M

National Oceanic and Atmospheric Administration

Caribbean Fishery Management Council; Public Meeting

AGENCY: National Marine Fisheries Service, NOAA, Commerce.

The Caribbean Fishery Management Council's (Council) Scientific and Statistical Committee (SSC) will hold a public meeting on December 3, 1991, at 10 a.m., at the Council's office (address below.) Among other agenda topics, the SSC will discuss the Coral and the Shallow-water Reef Fish Fishery Management Plans.

For more information, contact Miguel A. Rolon, Executive Director, Caribbean Fishery Management Council, Banco de Ponce Building, suite 1108, Hato Rey, Puerto Rico 00918-2577; telephone: 809-766-5926.

Dated: November 27, 1991.

David S. Crestin,

Deputy Director, Office of Fisheries Conservation and Management, National Marine Fisheries Service.

[FR Doc. 91-29021 Filed 12-3-91; 8:45 am]

BILLING CODE 3510-22-M

Gulf of Mexico Fishery Management Council; Public Meeting

AGENCY: National Marine Fisheries Service, NOAA, Commerce.

The Gulf of Mexico Fishery Management Council's (Council) Texas Habitat Protection Advisory Panel (Advisory Panel) will convene a public meeting on December 12, 1991, from 9 a.m. to 4 p.m., at the Council's office (address below).

The Advisory Panel will discuss: Actions taken by the Council on previous recommendations of the Florida/Alabama Habitat Advisory Panel; mercury in the environment, and include a discussion of related activities of the Florida Department of Environmental Regulation and detection of mercury in marine fisheries investigations; the Gulf of Mexico Program's Habitat Degradation Subcommittee's activities and goals; and the Florida Department of Natural Resources Habitat Restoration Program.

For more information contact Wayne E. Swingle, Executive Director, Gulf of Mexico Fishery Management Council, 5401 West Kennedy Boulevard, suite 331, Tampa, FL: telephone: (813) 228-2815.

Dated: November 27, 1991.

David S. Crestin,

Deputy Director, Office of Fisheries Conservation and Management, National Marine Fisheries Service.

[FR Doc. 91-29022 Filed 12-3-91; 8:45 am]

BILLING CODE 3510-22-M

Endangered Species

AGENCY: National Marine Fisheries Service, NOAA, Commerce.

ACTION: Issuance of Permit to Import Endangered Fish (P77#58).

On October 16, 1991, notice was published in the **Federal Register** (56 FR 51880) that an application had been filed by the Southwest Fisheries Science Center, National Marine Fisheries Service, 8604 La Jolla Shores Drive, La Jolla, CA 92038, to import one whole frozen totoaba specimen (*Cynoscion macdonaldi*) from Mexico for scientific purposes. The National Seafood Inspection Laboratory, Pascagoula, MS, will analyze samples to determine distinguishing characteristics of totoaba muscle tissue which will enable NMFS inspectors to identify mislabeled totoaba fillets and thereby to stop illegal importation.

Notice is hereby given that on November 27, 1991, as authorized by the provisions of the Endangered Species Act 1972 (16 U.S.C. 1504-1543), the National Marine Fisheries Service issued a Permit for the above importation, subject to conditions set forth therein.

The application and accompanying documentation satisfy the issuance criteria for scientific research permits. The requested activities are consistent with the purposes and policies of the ESA and the research will further a *bona fide* scientific purpose that does not involve unnecessary duplication of other research.

Issuance of this Permit, as required by the Endangered Species Act of 1973, is based on the finding that the Permit: (1) Was applied for in good faith; (2) will not operate to the disadvantage of the endangered species which is the subject of the Permit; and (3) is consistent with the purposes and policies set forth in section 2 of the Act. This Permit was also issued in accordance with and is subject to parts 220-222 of title 50 CFR, the National Marine Fisheries Service regulations governing endangered species permits.

Documents submitted in connection with this permit are available for review in the following offices:

By appointment: Permit Division, Office of Protected Resources, National Marine Fisheries Service, 1335 East-West Hwy., suite 7324, Silver Spring, Maryland 20910 (301/427-2289);

Director, Southwest Region, National Marine Fisheries Service, 300 South Ferry Street, Terminal Island, California 90731-7415 (213/514-6196);

Director, Southeast Region, National Marine Fisheries Service, 9450 Koger Blvd., St. Petersburg, Florida 33702 (813/893-3141).

Dated: November 27, 1991.

Nancy Foster,

Director, Office of Protected Resources.

[FR Doc. 91-29084 Filed 12-3-91; 8:45 am]

BILLING CODE 3510-22-M

Marine Mammals

AGENCY: National Marine Fisheries Service, NOAA, Commerce.

ACTION: Application for Scientific Research Permit (P171B).

Notice is hereby given that Ms. Deborah Glockner-Ferrari and Mr. Mark J. Ferrari, Covington, LA 70433, have applied in due form for a Permit to take marine mammals as authorized by the Marine Mammal Protection Act of 1972 (16 U.S.C. 1361-1407), the Regulations Governing the Taking and Importing of Marine Mammals (50 CFR part 216), the Endangered Species Act of 1973 (16 U.S.C. 1531-1544), and the regulations governing endangered fish and wildlife permits (50 CFR parts 217-222).

Species and Type of Take: The applicant requests a Permit to harass annually, over a five-year period, up to three times each: up to 1,500 humpback whales (*Megaptera novaeangliae*) during observational/photo-

identification studies and collection of sloughed skin samples; and up to 500 bottlenose dolphins (*Tursiops truncatus*), 500 spotted dolphins (*Stenella attenuata*), 1000 spinner dolphins (*Stenella longirostris*), 200 false killer whales (*Pseudorca crassidens*), 100 pilot whales (*Globicephala macrorhynchus*) during opportunistic observation/photo-identification studies. The purpose of the proposed research is to continue the applicant's long-term study of the social roles, life histories, reproductive histories, and distribution of North Pacific humpback whales and to enhance the body of knowledge on life histories, reproductive histories, and distribution of North Pacific humpback whales and to enhance the body of knowledge on the vital parameters and behavior of the subject small cetacean species.

Location of Activity: Activities will be conducted in the Hawaiian Islands area, specifically the waters of the Auau Channel in the four island region of Maui, Lanai, Kahoolawe, and Molokai.

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 its 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 Hwy., room 7324, 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 office:

By appointment: Office of Protected Resources, Marine Fisheries Service, 1335 East-West Hwy., suite 7324, Silver Spring, Maryland 20910 (301/427–2289);

Coordinator, Pacific Area Office, Southwest Region, National Marine Fisheries Service, 2570 Dole Street, Honolulu, Hawaii 96822–2396 (808/955–8831); and

Director, Southwest Region, National Marine Fisheries Service, 300 South Ferry Street, Terminal Island, California 90731–7415 (213/514–6196).

Dated: November 27, 1991.

Nancy Foster,

Director, Office of Protected Resources.

[FR Doc. 91–29085 Filed 12–3–91; 8:45 am]

BILLING CODE 3510–22–M

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Adjustment of an Import Limit for Certain Cotton Textile Products Produced or Manufactured in Poland

November 27, 1991.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Issuing a directive to the Commissioner of Customs increasing a limit.

EFFECTIVE DATE: December 5, 1991.

FOR FURTHER INFORMATION CONTACT: Naomi Freeman, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 377–4212. For information on the quota status of this limit, refer to the Quota Status Reports posted on the bulletin boards of each Customs port or call (202) 566–5810. For information on embargoes and quota re-openings, call (202) 377–3715.

SUPPLEMENTARY INFORMATION:

Authority: Executive Order 11651 of March 3, 1972, as amended; section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854).

The current limit for Categories 338/339 is being increased by recrediting swing subtracted in a previous directive.

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 55 FR 50756, published on December 10, 1990). Also see 56 FR 23685, published on May 23, 1991.

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

November 27, 1991.

Commissioner of Customs,

Department of the Treasury, Washington, DC 20229.

Dear Commissioner: This directive amends, but does not cancel, the directive issued to you on December 4, 1990, by the Chairman, Committee for the Implementation of Textile Agreements. That directive concerns imports of certain cotton, wool, man-made fiber, silk blend and other vegetable fiber textile products, produced or manufactured in Poland and exported during the twelve-month period which began on January 1, 1991 and extends through December 31, 1991.

Effective on December 5, 1991, you are directed to amend further the directive dated December 4, 1990 to increase the limit for Categories 338/339 to 1,060,000 dozen [1], as provided under the terms of the current bilateral textile agreement between the Governments of the United States and the Republic of Poland.

The Committee for the Implementation of Textile Agreements has determined that this action falls 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. 91–29032 Filed 12–3–91; 8:45 am]

BILLING CODE 3510–DR–F

Announcement of Import Restraint Limits and Amendment of Visa Requirements for Certain Cotton, Wool, Man-Made Fiber, Silk Blend and Other Vegetable Fiber Textiles and Textile Products Produced or Manufactured in Romania

November 27, 1991.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Issuing a directive to the Commissioner of Customs establishing limits for the new agreement year and amending visa requirements.

EFFECTIVE DATE: January 1, 1992.

FOR FURTHER INFORMATION CONTACT: Naomi Freeman, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 377–4212. For information on the quota status of these limits, refer to the

[1] The limit has not been adjusted to account for any imports exported after December 31, 1990.

Quota Status Reports posted on the bulletin boards of each Customs port or call (202) 566–5810. For information on embargoes and quota re-openings, call (202) 377–3715.

SUPPLEMENTARY INFORMATION:

Authority: Executive Order 11651 of March 3, 1972, as amended; section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854).

The Bilateral Cotton Textile Agreement, effected by exchange of notes dated January 28 and March 31, 1983, as amended and extended; and the Bilateral Wool and Man-Made Fiber Textile Agreement, effected by exchange of notes dated November 7 and 16, 1984, as amended and extended, establishes limits for the period January 1, 1992 through December 31, 1992.

Also effective on January 1, 1992, Category 670 shall be subject to visa requirements.

A copy of the bilateral agreement is available from the Textiles Division, Bureau of Economic and Business Affairs, U.S. Department of State, (202) 647–3889.

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 55 FR 50756, published on December 10, 1990). Also see 49 FR 493, published on January 4, 1984. Information regarding the 1992 CORRELATION will be published in the **Federal Register** at a later date.

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 agreements, but are designed to assist only in the implementation of certain of their provisions.

Auggie D. Tantillo,

Chairman, Committee for the Implementation of Textile Agreements.

Committee for the Implementation of Textile Agreements

November 27, 1991.

Commissioner of Customs,
Department of the Treasury, Washington, DC 20229.

Dear Commissioner: Under the terms of section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854), and the Arrangement Regarding International Trade in Textiles done at Geneva on December 20, 1973, as further extended on July 31, 1991; pursuant to the Bilateral Cotton Textile Agreement, effected by exchange of notes dated January 28 and March 31, 1983, as amended and extended; and the Bilateral Wool and Man-Made Fiber Textile Agreement, effected by exchange of notes dated November 7 and 16, 1984, as amended and extended, between the Governments of the United States and Romania; and in accordance with the provisions of Executive Order 11651 of March 3, 1972, as amended, you are directed to prohibit, effective on January 1, 1992, entry into the United States for consumption and withdrawal from warehouse for consumption of cotton, wool, man-made fiber, silk blend and other vegetable fiber textiles and textile products in the following categories, produced or manufactured in Romania and exported during the twelve-month period beginning on January 1, 1992 and extending through December 31, 1992, in excess of the following levels of restraint:

Category	Twelve-month restraint limit
Group I	
200, 201, 218–220, 222–227, 229, 237, 239, 300, 301, 313–315, 317, 326, 330–342, 345, 347–354, 359–363, 369, 800, 810, 831–836, 838–840, 842–847, 850–852, 858, 859, 863, 870, 871 and 899, as a group.	45,390,437 square meters equivalent.
Sublevels in Group I	
237	61,000 dozen.
313	1,672,255 square meters.
314	1,254,191 square meters.
315	2,390,706 square meters.
333/833	94,686 dozen.
334	257,153 dozen of which not more than 36,320 dozen shall be in Category 334–K [1]
335/835	119,935 dozen.
338/339	517,616 dozen.
340	225,935 dozen.
341/840	94,686 dozen.
347/348	403,993 dozen.
350	27,000 dozen.
352	181,818 dozen.
359	652,174 kilograms.
361	515,000 numbers.
369	295,821 kilograms.
810	4,180,637 square meters.
847	75,000 dozen.
Group II	
410, 414, 464, 465, 469, 611, 613–615, 617–622, 624–629, 665, 666, 669 and 670, as a group.	10,033,528 square meters equivalent.
Sublevels in Group II	
410	167,225 square meters.
465	129,600 square meters.
618	1,672,255 square meters.
666	116,306 kilograms.
Group III	
431–436, 438–440, 442–448, 459, 630–654 and 659, as a group.	49,277,879 square meters equivalent.
Sublevels in Group III	
433/434	6,945 dozen.
435	5,180 dozen.
442	8,026 dozen.
443	101,171 numbers.
444	32,991 numbers.
448	6,500 dozen.
459	34,019 kilograms.
633	44,199 dozen.
634	53,687 dozen of which not more than 36,604 dozen shall be in knit coats (Category 634–K) [2] and not more than 17,083 dozen shall be in non-knit coats (Category 634–W) [3].
635	79,265 dozen.
638/639	445,004 dozen.
640	80,225 dozen.
641	34,775 dozen.
643–K/644–K [4]	24,996 numbers.
643–W/644–W [5]	610,637 numbers.
645/646	263,306 dozen.
647	80,737 dozen.
648	57,746 dozen.
659	101,768 kilograms.
Level not in a group	
604	1,534,033 kilograms.

[1] Category 334–K: all HTS numbers except 6101.20.0010, 6101.20.0020 and 6112.11.0010.

[2] Category 634–K: only HTS numbers 6101.30.1000, 6101.30.2010, 6.01.30.2020, 6101.90.0030, 6103.23.0036, 6103.29.1010, 6112.12.0010, 6112.19.1010, 6112.20.1010, 6112.20.1030 and 6113.00.0025.

[3] Category 634–W: only HTS numbers 6201.13.4015, 6201.13.4020, 6201.13.4030, 6201.13.4040, 6201.19.0030, 6201.93.2010, 6201.93.3000, 6201.93.3510, 6201.93.3520, 6201.99.0030, 6203.23.0050, 6203.29.2010, 6210.20.1020, 6210.40.1020, 6211.20.1515, 6211.29.2030 and 6211.33.0035.

[4] Category 643–K: only HTS numbers 6103.12.2000, 6103.19.1500 and 6103.19.4050; Category 644–K: only HTS numbers 6104.13.2000, 6104.19.1500 and 6104.19.2060.

[5] Category 643–W: only HTS numbers 6203.12.2010, 6203.12.2020, 6203.19.3000 and 6203.19.4050; Category 644–W: only HTS numbers 6204.13.2010, 6204.13.2020, 6204.19.2000 and 6204.19.3060.

Imports charged to these category limits for the period January 1, 1991 through December 31, 1991, shall be charged against those levels of restraint to the extent of any unfilled balances. In the event the limits established for that period have been exhausted by previous entries, such goods shall be subject to the levels set forth in this directive.

The levels set forth above are subject to adjustment in the future according to the provisions of the current bilateral agreements between the Governments of the United States and Romania.

The conversion factors for the following merged categories are listed below:

Category	Conversion factor (square meters equivalent/category unit)
341/840	12.1
433/434	35.2
638/639	12.96

Also effective on January 1, 1992, you are directed to amend further the December 29, 1983 directive to require an export visa for shipments of man-made fiber textile products in Category 670, produced or manufactured in Romania and exported from Romania on and after January 1, 1992. Shipments entered or withdrawn from warehouse on and after

January 1, 1992 which are not accompanied by an appropriate visa shall be denied entry.

In carrying out the above directions, the Commissioner of Customs should construe entry into the United States for consumption to include entry for consumption into the Commonwealth of Puerto Rico.

The Committee for the Implementation of Textile Agreements has determined that these actions fall within the foreign affairs exception of 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. 91-29030 Filed 12-3-91; 8:45 am]

BILLING CODE 3510-DR-F

Announcement of Import Restraint Limits for Certain Cotton, Wool and Man-Made Fiber Textile Products Produced or Manufactured in Singapore

November 27, 1991.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Issuing a directive to the Commissioner of Customs establishing limits for the new agreement year.

EFFECTIVE DATE: January 1, 1992.

FOR FURTHER INFORMATION CONTACT: Jennifer Tallarico, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 377-4212. For information on the quota status of these limits, refer to the Quota Status Reports posted on the bulletin boards of each Customs port or call (202) 535-6736. For information on embargoes and quota re-openings, call (202) 377-3715.

SUPPLEMENTARY INFORMATION:

Authority: Executive Order 11651 of March 3, 1972, as amended; Section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854).

The Bilateral Cotton, Wool and Man-Made Fiber Textile Agreement, effected by exchange of notes dated May 31 and June 5, 1986, as amended and extended, between the Governments of the United States and the Republic of Singapore establishes limits for the period beginning on January 1, 1992 and extending through December 31, 1992.

A copy of the agreement is available from the Textiles Division, Bureau of Economic and Business Affairs, U.S. Department of State, (202) 647-3889.

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 55 FR 50756, published on December 10, 1990). Information regarding the 1992 CORRELATION will be published in the **Federal Register** at a later date.

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

November 27, 1991.

Commissioner of Customs,

Department of the Treasury, Washington, DC 20229.

Dear Commissioner: Under the terms of section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854), and the Arrangement Regarding International Trade in Textiles done at Geneva on December 20, 1973, as further extended on July 31, 1991; pursuant to the Bilateral Cotton, Wool and Man-Made Fiber Textile Agreement, effected by exchange of notes dated May 31 and June 5, 1986, as amended and extended, between the Governments of the United States and Singapore; and in accordance with the provisions of Executive Order 11651 of March 3, 1972, as amended, you are directed to prohibit, effective on January 1, 1992, entry into the United States for consumption and withdrawal from warehouse for consumption of cotton, wool and man-made fiber textile products in the following categories, produced or manufactured in Singapore and exported during the twelve-month period beginning on January 1, 1992 and extending through December 31, 1992, in excess of the following levels of restraint:

Category	Twelve-month restraint limit
239	399,725 kilograms.
331	379,596 dozen pairs.
334	61,073 dozen.
335	183,709 dozen.
338/339	989,968 dozen of which not more than 578,546 dozen shall be in Category 338 and not more than 643,270 dozen shall be in Category 339.
340	692,830 dozen.
341	174,213 dozen.
342	107,208 dozen.
347/348	859,717 dozen of which not more than 537,323 dozen shall be in Category 347 and not more than 417,918 dozen shall be in Category 348.
435	6,452 dozen.
604	769,090 kilograms.
631	402,029 dozen pairs.
634	233,166 dozen.
635	238,608 dozen.
638	856,381 dozen.
639	3,099,241 dozen.
640	147,705 dozen.
641	240,923 dozen.
645/646	131,346 dozen.
647	479,642 dozen.
648	1,448,651 dozen.
Group II 200-229, 237, 300/301, 313-330, 332, 333/633, 336, 345, 349, 350, 351/651, 352/652, 353/354/653/654, 359-369, 400-434, 436, 438, 439, 440-444, 445/446, 447, 448, 459-469, 600-603, 606, 607, 611-630, 632, 636, 642-644, 649, 650, 659-S [1], 659-V [2], 659-O [3] and 665-670, as a group.	38,461,859 square meters equivalent.
Sublevels within Group II	
200	251,996 kilograms.
201	259,196 kilograms.
218	1,672,255 square meters.
219	1,672,255 square meters.
220	1,672,255 square meters.
222	337,080 kilograms.
223	119,366 kilograms.
224	1,672,255 square meters.
225	1,672,255 square meters.
226	1,672,255 square meters.
227	1,672,255 square meters.
229	122,592 kilograms.
237	213,724 dozen.
300/301	197,214 kilograms.
313	1,672,255 square meters.
314	1,672,255 square meters.
315	1,672,255 square meters.
317	1,672,255 square meters.
326	1,672,255 square meters.
330	1,176,471 dozen.
332	434,783 dozen pairs.
333/633	41,500 dozen.
336	70,000 dozen.
345	54,348 dozen.
349	416,667 dozen.
350	39,216 dozen.
351/651	38,462 dozen.
352/652	148,148 dozen.
353/354/653/654	48,426 dozen.
359	197,214 kilograms.
360	1,818,182 numbers.
361	322,581 numbers.
362	289,855 numbers.
363	4,000,000 numbers.
369	197,214 kilograms.
400	34,019 kilograms.
410	125,419 square meters.
414	45,359 kilograms.
431	71,429 dozen pairs.
432	53,571 dozen pairs.
433	4,167 dozen.
434	6,000 dozen.
436	3,049 dozen.
438	10,000 dozen.
439	20,012 kilograms.
440	6,250 dozen.
442	10,000 dozen.
443	33,336 numbers.
444	33,336 numbers.
445/446	20,000 dozen.
447	8,333 dozen.
448	8,333 dozen.

Category	Twelve-month restraint limit
459	34,019 kilograms.
464	52,338 kilograms.
465	139,355 square meters.
469	34,019 kilograms.
600	259,196 kilograms.
603	266,819 kilograms.
606	83,228 kilograms.
607	259,196 kilograms.
611	1,672,255 square meters.
613	1,672,255 square meters.
614	1,672,255 square meters.
615	1,672,255 square meters.
617	1,672,255 square meters.
618	1,672,255 square meters.
619	1,672,255 square meters.
620	1,672,255 square meters.
621	116,306 kilograms.
622	1,672,255 square meters.
624	1,672,255 square meters.
625	1,672,255 square meters.
626	1,672,255 square meters.
627	1,672,255 square meters.
628	1,672,255 square meters.
629	1,672,255 square meters.
630	1,176,471 dozen.
632	434,783 dozen pairs.
636	140,000 dozen.
642	221,652 dozen.
643	444,444 numbers.
644	444,444 numbers.
649	416,667 dozen.
650	39,216 dozen.
659–S	145,150 kilograms.
659–V	145,150 kilograms.
659–O	145,150 kilograms.
665	1,858,061 square meters.
666	116,306 kilograms.
669	116,306 kilograms.
670	453,592 kilograms.

[1] 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.

[2] Category 659–V: only HTS numbers 6110.30.1030, 6110.30.1040, 6110.30.2030, 6110.30.2040, 6110.30.3030, 6110.30.3035, 6110.90.0052, 6110.90.0054, 6201.93.2020, 6202.93.2020, 6211.33.0050 and 6211.43.0080.

[3] Category 659–O: all HTS numbers except 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, 6211.12.1020 (Category 659–S); 6110.30.1030, 6110.30.1040, 6110.30.2030, 6110.30.2040, 6110.30.3030, 6110.30.3035, 6110.90.0052, 6110.90.0054, 6201.93.2020, 6202.93.2020, 6211.33.0050 and 6211.43.0080 (Category 659–V).

Imports charged to these category limits for the period January 1, 1991 through December 31, 1991 shall be charged against those levels of restraint to the extent of any unfilled balances. In the event the limits established for that period have been exhausted by previous entries, such goods shall be subject to the levels set forth in this directive.

The conversion factor for merged Categories 352/652 is 11.3 square meters equivalent per dozen.

The limits set forth above are subject to adjustment in the future pursuant to the provisions of the bilateral agreement, effected by exchange of notes dated May 31 and June 5, 1986, as amended, between the Governments of the United States and Singapore.

In carrying out the above directions, the Commissioner of Customs should construe entry into the United States for consumption to include entry for consumption into the Commonwealth of Puerto Rico.

The Committee for the Implementation of Textile Agreements has determined that these actions fall within the foreign affairs exception of 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. 91–29029 Filed 12–3–91; 8:45 am]

BILLING CODE 3510–DR–F

DEPARTMENT OF DEFENSE

Office of the Secretary

Joint Defense Policy Board/Defense Science Board Task Force on Nonstrategic Nuclear Forces

ACTION: Notice of Task Force meeting.

SUMMARY: The Joint Defense Policy Board/Defense Science Board Task Force on Nonstrategic Nuclear Forces will meet in closed session on 17–18 December 1991 from 0900 until 1700 at the Science Applications International Corporation Tower, McLean, Virginia, and at the Pentagon from 0900 to 1700 on 19 December 1991. The mission of the Joint Defense Policy Board/Defense Science Board Task Force is to provide the Secretary of Defense, Deputy Secretary of Defense, Under Secretary of Defense for Policy and the Under Secretary of Defense for Acquisition with independent, informed advice and opinion concerning matters relating to nonstrategic nuclear force policy and acquisition. At the meeting the Task Force will hold classified discussions on national security matters.

In accordance with section 10(d) of the Federal Advisory Committee Act, Public Law No. 92–463, as amended (5 U.S.C. app. II, (1982)), it has been determined that this Joint Task Force meeting concerns matters listed in 5 U.S.C. 552b(c)(1) (1982), and that accordingly this meeting will be closed to the public.

Dated: 29 November 1991.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 91–29043 Filed 12–3–91; 8:45 am]

BILLING CODE 3810–01–M

Department of the Air Force

USAF Scientific Advisory Board Meeting

The USAF Scientific Advisory Board of the Space and C³I Panel of 1992 Summer Study on Global Reach/Global Power will meet on 18–20 December 1991 from 8 a.m. to 5 p.m. at the ANSER Corporation, 1215 Jefferson Davis Highway, Arlington, VA.

The purpose of this meeting is to receive presentations and to hold discussions on Air Force Space and C³I projects and programs relevant to Global Reach/Global Power. This meeting will involve discussions of classified defense matters listed in section 552b(c) of title 5, United States Code, specifically subparagraph (1) thereof, and accordingly will be closed to the public.

For further information, contact the Scientific Advisory Board Secretariat at (703) 697–4648.

Patsy J. Conner,

Air Force Federal Register Liaison Officer.

[FR Doc. 91–29000 Filed 12–3–91; 8:45 am]

BILLING CODE 3910–01–M

Department of the Army

Army Science Board; Closed Meeting

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), announcement is made of the following Committee Meeting:

Name of the Committee: Army Science Board (ASB).

Dates of the Meeting: 17, 18, 19 December 1991.

Time: 0800–1600.

Place: Pentagon, Washington, DC.

Agenda: The Army Science Board (ASB) Ad Hoc Subgroup on Initiatives to Improve HBCU/MIs Infrastructure will meet to finalize the draft report. This meeting will be closed to the public in accordance with section 552b(c) of title 5, U.S.C., specifically subparagraph (4) thereof, and title 5, U.S.C., appendix 2, subsection 10(d). The proprietary and nonproprietary information to be discussed is so inextricably intertwined so as to preclude opening any portion of the meeting. The ASB Administrative Officer, Sally Warner, may be contacted for further information (703)695–0781.

Sally A. Warner,

Administrative Officer, Army Science Board.

[FR Doc. 91–29054 Filed 12–3–91; 8:45 am]

BILLING CODE 3710–08–M

Army Science Board; Closed Meeting

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Public Law 92–463), announcement is made of the following Committee Meeting:

Name of the Committee: Army Science Board (ASB).

Dates of the Meeting: 16–20 December 1991.

Time: 0800–1600.

Place: Pentagon, Washington, DC.

Agenda: The Army Science Board (ASB) Ad Hoc Subgroup on the Comanche International will meet for discussions on the mission of the group, issues surrounding the development, and plans for future operations of the group. This meeting will be closed to the public in accordance with section 552b(c) of title 5, U.S.C., specifically subparagraphs (1) and (4) thereof, and title 5, U.S.C., appendix 2, subsection 10(d). The classified and unclassified matters and proprietary information to be discussed is so inextricably intertwined so as to preclude opening any portion of the meeting. The ASB Administrative Officer, Sally Warner, may be contacted for further information (703) 695–0781.

Sally A. Warner,

Administrative Officer, Army Science Board.

[FR Doc. 91–29152 Filed 12–3–91; 8:45 am]

BILLING CODE 3710–08–M

Department of the Navy

Privacy Act of 1974; Addition of a Record System

AGENCY: Department of the Navy, DoD.

ACTION: Addition of a record system.

SUMMARY: The Department of the Navy proposes to add one system of records to its inventory of record systems subject to the Privacy Act of 1974, as amended (5 U.S.C. 552a).

DATES: The addition will be effective on January 3, 1992, unless comments are received that would result in a contrary determination.

ADDRESSES: Send comments to Mrs. Gwendolyn Aitken, Head, PA/FOIA Branch, Office of the Chief of Naval Operations (OP–09B30), Department of the Navy, The Pentagon, Washington, DC 20350–2000. Telephone (703) 614–2004.

SUPPLEMENTARY INFORMATION: The Department of the Navy record system notices for records systems subject to the Privacy Act of 1974, as amended, (5 U.S.C. 552a) were published in the **Federal Register** as follows:

51 FR 12908—Apr. 19, 1986
51 FR 18086—May 16, 1986 (DON Compilation changes follow)
51 FR 19884—June 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 25363—Jul. 6, 1988
53 FR 39499—Oct. 7, 1988
53 FR 41224—Oct. 20, 1988
54 FR 8322—Feb. 28, 1989
54 FR 14378—Apr. 11, 1989
54 FR 32682—Aug. 9, 1989
54 FR 40160—Sep. 291989
54 FR 41495—Oct. 10, 1989
54 FR 43453—Oct. 25, 1989
54 FR 45781—Oct. 31, 1989
54 FR 48131—Nov. 21, 1989
54 FR 51784—Dec. 18, 1989
54 FR 52976—Dec. 26, 1989
55 FR 21910—May 30, 1990 (Navy Mailing Addresses)
55 FR 37930—Sep. 14, 1990
55 FR 42758—Oct. 23, 1990
55 FR 47508—Nov. 14, 1990
55 FR 48678—Nov. 21, 1990
55 FR 53167—Dec. 27, 1990
56 FR 424—Jan. 4, 1991
56 FR 12721—Mar. 27, 1991
56 FR 27503—Jun. 14, 1991
56 FR 28144—Jun. 19, 1991
56 FR 31394—Jul. 10, 1991 (DoD Updated Indexes)
56 FR 40877—Aug. 16, 1991
56 FR 46167—Sep. 10, 1991

A new system report, as required by 5 U.S.C. 522a(r) of the Privacy Act, was submitted on November 21, 1991, to the Committee on Government Operations of the House of Representatives, the Committee on Governmental Affairs of the Senate, and the Office of Management and Budget (OMB) pursuant to paragraph 4b of Appendix I to OMB Circular No. A–130, "Federal Agency Responsibilities for Maintaining Records About Individuals," dated December 12, 1985 (50 FR 52738, December 24, 1985).

Dated: November 29, 1991.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

NO7230–2

SYSTEM NAME:

NEXCOM Payroll Processing.

SYSTEM LOCATION:

Navy Exchange Service Command (NEXCOM), Naval Station New York Staten Island, Staten Island, NY 10305–5097 and at all Navy Exchanges located in CONUS, Subic Bay, Guam, and Japan. Official mailing addresses are published as an appendix to the Navy's compilation of system of record notices.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

All Navy Exchange System employees located in CONUS, Subic Bay, Guam, and Japan.

CATEGORIES OF RECORDS IN THE SYSTEM:

The Master Payroll files and Leave Year Record File will contain at a minimum employee name, Social Security Number, department, exchange number, payroll number, birth date, marital status, citizenship, hire date, adjusted date of hire, job grade and step, employee category, pay basis, pay status (exempt/nonexempt), employee benefit, deduction information.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301, Departmental Regulations and Executive Order 9397.

PURPOSE(S):

To maintain a data base which will permit the contractor to supply bi-weekly payroll processing which includes, but is not limited to preparation and issuance of time cards, be-weekly pay checks and pay check stubs, check registers and payroll registers; preparation and issuance of various bi-weekly, monthly, quarterly, semi-annual and annual reports; establishment and maintenance of current payroll master file; annual preparation and distribution of wage and tax statements, Form W–2; and, payroll tax filing services.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

The "Blanket Routine Uses" that appear at the beginning of the Navy's compilation of systems notices apply to this system.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

The records are stored on computer tape.

RETRIEVABILITY:

Name, Social Security Number, exchange number, and payroll number.

SAFEGUARDS:

Contractor facility is protected with an ADT Alarm System which is in operation 24 hours per day, seven days a week. All rooms within the facility, as well as the entire perimeter of the facility, are on-line with this system. All alarms are wired to the Security Company as well as the local police station. The NEXCOM data cannot be obtained through any dial-up method by other than an authorized Navy Exchange location.

RETENTION AND DISPOSAL:

Records are maintained by the contractor for the life of the contract (three years or more). Once contract is complete, records are returned to NEXCOM where they are maintained for seven years and then destroyed.

SYSTEM MANAGER(S) AND ADDRESS:

Policy Official: Commander, Navy Exchange Service Command, Naval Station New York Staten Island, Staten Island, NY 10305–5097.

Record Holder Manager: Comptroller, Navy Exchange Service Command, Naval Station New York Staten Island, Staten Island, NY 10305–5097.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether this system of records contains information about themselves should address written inquiries to the Comptroller, Navy Exchange Service Command, Naval Station New York Staten Island, Staten Island, NY 10305–5097. The request must contain individual's full name and Social Security Number and must be signed.

RECORD ACCESS PROCEDURES:

Individuals seeking access to records about themselves contained in this system of records should address written inquiries to the Comptroller, Navy Exchange Service Command, Naval Station New York Staten Island, Staten Island, NY 10305–5097. The request must contain individual's full name and Social Security Number and must be signed.

CONTESTING RECORD PROCEDURES:

The Department of the Navy rules for accessing records and contesting contents and appealing initial determinations by the individual concerned are published in the Secretary of the Navy Instruction 5211.5; 32 CFR part 701; or may be obtained from the system manager.

RECORD SOURCE CATEGORIES:

Timekeeping management documents.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. 91–29045 Filed 12–3–91; 8:45 am]

BILLING CODE 3810–01–M

DEPARTMENT OF ENERGY

Floodplain and Wetland Involvement Notification for Characterization and Remedial Actions at Hanford Site; Richland, WA

AGENCY: Department of Energy (DOE).

ACTION: Notice of floodplain and wetland involvement.

SUMMARY: The DOE proposes to conduct characterization and remedial actions associated with the cleanup or stabilization of contaminated material at the 100 area and portions of the 200 and 600 area operable units located along the Columbia River at the Hanford Site in Washington. These activities would be conducted on areas that include portions of the wetlands and 100-year floodplain of the Hanford Reach of the Columbia River. These characterization and remedial actions are necessary to satisfy the applicable requirements of the Resource Conservation and Recovery Act and the Comprehensive Environmental Response, Compensation and Liability Act. Characterization would involve biological, archeological, geological and geophysical studies to characterize the flora and fauna, cultural resources, soil, groundwater and surface water in the area in order to identify the nature and extent of any contamination that may have resulted from Hanford site operations. Remedial actions could involve the removal of previously utilized facilities or sources of further contamination discovered during the characterization studies and remediation of contaminated soil, vegetation, ground water and surface water. Specific remedial actions that might be conducted in response to contamination encountered during the characterization studies could include, but are not limited to, removal of previously utilized facilities now located in the floodplain, groundwater pumping and treatment, removal or isolation of contaminated soils, surface water, or vegetation. These activities would be conducted in a manner that avoids or minimizes the impacts to the floodplain or wetlands. In accordance with the DOE regulations for compliance with floodplain/wetland environmental review requirements (10 CFR part 1022), DOE will prepare a floodplain and/or wetland assessment for each operable unit. For activities that would occur in the floodplain DOE will publish a Statement of Findings. Maps and further information are available from DOE at the address shown below.

DATES: Any comments are due on or before December 19, 1991.

ADDRESSES: Send comments to: Ms. Julie Erickson, DOE Field Office, Richland, Richland, Washington 99352, telephone (509) 376–3603. Fax comments to: (509) 376–7818.

Paul D. Grimm,

Principal Deputy Assistant Secretary for Environmental Restoration and Waste Management.

[FR Doc. 91–29086 Filed 12–3–91; 8:45 am]

BILLING CODE 6450–01–M

Award of a Grant; Noncompetitive Financial Assistance

AGENCY: DOE Field Office, Nevada.

ACTION: Notice of noncompetitive financial assistance.

SUMMARY: DOE announces that pursuant to the DOE Financial Assistance Rules, 10 CFR 600.14(e)(1), it intends to award a noncompetitive financial assistance grant to the state of Mississippi to provide abstractors and data coders for a descriptive epidemiological study in Lamar County, Mississippi.

This award will provide funds for data collection for a descriptive epidemiological study in the area of the Tatum Salt Dome Test Site in Lamar County, Mississippi.

The state of Mississippi will compile data, abstract data and code information, and provide review of the protocol for the study and final epidemiological report.

Eligibility for the award of this grant is being limited to the state of Mississippi because the applicant is a unit of government, and the activity to be supported is related to performance of a governmental function within the subject's jurisdiction, thereby precluding DOE provisions of support to another entity.

The term of this grant is for one year and will commence December 1, 1991, and end November 30, 1992. The total estimated cost of this award is $50,000.

FOR FURTHER INFORMATION CONTACT: DOE Field Office, Nevada, ATTN: Donald R. Elle, P.O. Box 98518, Las Vegas, Nevada 89193–8518.

Issued in Las Vegas, Nevada on November 12, 1991.

Nick C. Aquilina,

Manager, DOE Field Office, Nevada.

[FR Doc. 91–29087 Filed 12–3–91; 8:45 am]

BILLING CODE 6450–01–M

Federal Energy Regulatory Commission

[Docket No. EL85–19–118]

Nooksack River Basin, WA; Availability of Environmental Assessment

November 26, 1991.

In accordance with the National Environmental Policy Act of 1969 and the Federal Energy Regulatory Commission's (Commission's) regulations, 18 CFR part 380 (Order No. 486, 52 FR 47897), the Commission's staff reviewed the applications for license for the Nooksack Falls Project No. 3721, Boulder Creek Project No. 4270, Deadhorse Creek Project No. 4282, Canyon Creek Project No. 4312, Wells Creek Project No. 4628, Glacier Creek

Project No. 4738 located on the North Fork Nooksack River, and the application for exemption from licensing for the Canyon Lake Project No. 9231 located on the Middle Fork Nooksack River, in Whatcom County, Washington, and has prepared an Environmental Assessment (EA) for the seven proposed projects. In the EA the staff analyzed the potential for contributing to cumulative adverse environmental impacts and has concluded that all seven projects be processed together in a single environmental document that addresses both cumulative and site-specific impacts on the basin.

Copies of the EA are available for review in the Public Reference Branch Room 3104, 941 North Capitol Street, NE., Washington, DC 20426.

Lois D. Cashell,

Secretary.

[FR Doc. 91-29018 Filed 12-3-91; 8:45 am]

BILLING CODE 6717-01-M

[Docket Nos. CP91-780-000 and -002; CP91-2322-000 and -002]

Northwest Pipeline Corporation; Paiute Pipeline Co., Supplemental Intent To Prepare a Draft Environmental Impact Statement for the Proposed Northwest Pipeline Expansion Project and Request for Comments on Environmental Issues

November 29, 1991.

Summary

Notice is hereby given that the staff of the Federal Energy Regulatory Commission (FERC or the Commission) will prepare an environmental impact statement (EIS) on the facilities proposed in the above referenced dockets. The purpose of this notice is to notify interested parties of the change in scope of the project proposed by Northwest Pipeline Corporation (Northwest) and the inclusion of the facilities proposed by Paiute Pipeline Company (Paiute) in the EIS currently being prepared by the FERC for the Northwest Pipeline Expansion Project. The projects proposed by the two applicants will be referred to collectively as the Northwest Pipeline Expansion Project.

Northwest and Paiute, pursuant to section 7(b) and 7(c) of the Natural Gas Act, and 18 CFR 157.7(a) and 157.18 of the Commission's regulations, are each seeking a certificate of public convenience and necessity for authorization to construct and operate certain pipeline and appurtenant facilities in order to transport natural gas from both domestic and Canadian sources to various locations in the western United States.

On February 13, 1991 the FERC issued a notice of intent to prepare an EIS and requested comments on the scope of environmental issues (NOI) for a project proposed by Northwest. This proposal included approximately 625.7 miles of new loop and replacement pipeline in 29 major segments, approximately 148,250 horsepower (hp) of new and additional compression at 21 sites, and various other related facilities to be located in Washington, Oregon, Idaho, Wyoming, Utah, and Colorado.[1] Subsequently, Northwest filed an amendment to its application of October 7, 1991 to delete some of these facilities in Wyoming, Utah, and Colorado.

Partially as a result of the abovementioned expansion of Northwest's system, Paiute filed an application and amendment, on June 21, 1991 and October 21, 1991, respectively, for authorization to construct and operate facilities necessary to expand its existing natural gas transmission system capacity by 59,450 thousands cubic feet per day (Mcfd). Of the total, 31,285 Mcfd would be delivered to Paiute from Northwest at the Idaho/Nevada border and would be transported to various locations in the Reno, Nevada area.

By this notice, the FERC staff is requesting comments on the scope of the analysis of the Paiute facilities that should be conducted for this EIS. Comments should focus on potential environmental effects, alternatives to the proposal (including alternative routes), and measures to mitigate adverse impact. Written comments must be submitted by December 13, 1991 in accordance with the instructions provided at the end of this notice.

Proposed Action

As currently proposed, Northwest's project consists of 378 miles of various diameter pipeline loop and 114,070 hp of new and additional compression at 17 sites, as well as the related metering and communication facilities (see tables 1 and 2, and figures 1 and 2).[2] Northwest's amended application primarily involved the elimination of all proposed pipeline facilities south of Muddy Creek, Wyoming. Most notably, both the Baxter Pass Loop, which involved a 68.7-mile deviation from its existing right-of-way in Colorado and Utah, and the Cahone South Loop in Montezuma County, Colorado have now been deleted from the project, thereby eliminating many of the important environmental issues that had been identified in those areas. The changes in Northwest's proposed project did not include any modifications of construction procedures or land requirements from those reported in the original NOI; therefore, they will not be repeated here.

The general location of Paiute's facilities proposed in Docket Nos. CP91-2322-000 and -002 are shown on figure 3. A listing of the pipeline and compression facilities is provided in tables 1 and 2. The proposed facilities would include 3.3 miles of new 8-inch and 10-inch-diameter loop and replacement pipeline near Lake Tahoe, 38.7 miles of 12-inch-diameter loop pipeline along Paiute's Reno and Elko laterals, the requalification of 31.9 miles of existing pipeline on its Carson lateral near Carson City, Nevada to allow a higher operating pressure, the modification of three existing compressor stations along Paiute's existing mainline system, and the installation of a 300-hp compressor on the proposed Elko lateral loop near Elko, Nevada. Paiute's system expansion would also include the installation, relocation, replacement, and/or upgrading of various pressure regulating, measurement, and delivery point facilities on its system. The total estimated cost of the Paiute expansion project is $18.7 million.

Land Requirements

All of Paiute's proposed new pipeline facilities would be installed within existing pipeline easements and/or highway rights-of-way. Although no additional operational rights-of-way would be required for this project, some additional temporary construction rights-of-way would be disturbed. Construction of new pipeline for the North Tahoe Loop and the South Tahoe Loop would utilize only existing paved road surfaces and shoulders. Paiute's proposed requalification of portions of its Carson Lateral would require the hydrostatic testing of each pipeline segment. Land disturbance would be confined within the existing operational rights-of-way.

Most of the aboveground facilities that would be modified would not require disturbance of any land outside the existing sites. However, expansion of two of the existing compressor stations would each require approximately 0.15 acre of additional

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[1] A pipeline loop is a segment of pipeline which is usually installed adjacent to an existing pipeline and connected to it at both ends. The loop allows more gas to be moved through the pipeline system at the location in which the loop is installed.

[2] Figures 1, 2 and 3 are not being printed in the **Federal Register**, but copies are available from the Commission's Public Reference Branch at (202) 208-1371.

property. The temporary compressor facility proposed on the Elko Lateral would require a 50-foot by 50-foot (0.6 acre) area completely within the boundaries of the existing operational right-of-way. Construction and operation of the five new pressure regulating stations would require 0.02 acre for each station, confined to the existing rights-of-way.

Perennial streams, major washes, and intermittent streams would be crossed using backhoe-type equipment and would require additional temporary work areas up to 100 feet wide and averaging 100 feet in length. These work areas would be located a minimum of 50 feet from the streambanks.

Construction

As with Northwest's proposed facilities, Paiute's facilities would be constructed, operated and maintained in accordance with the U.S. Department of Transportation regulations and other applicable Federal and state regulations. However, Paiute has proposed additional, site-specific procedures for the construction of its facilities.

Specifically, Paiute has indicated that prior to construction the right-of-way would be staked along its centerline and exterior boundaries. The staking would remain in place throughout construction and until final grading and cleanup is completed. Clearing of the right-of-way would be done using bulldozers and other grading equipment. Next, a trench would be excavated 8 to 10 feet from existing pipeline. Double ditching techniques would be used to separate topsoil from subsoil, which would be stored in separate piles on the non-working side of the trench. The depth of the trench would vary with conditions encountered. The minimum cover over the pipeline would be at least 36 inches, except in consolidated rock where minimum cover would be at least 24 inches.

After ditching is complete, the pipe sections would be strung along the trench, bent to conform to the contour of the trench, aligned, welded, and radiographically inspected. Prior to lowing the welded pipeline joints into the trench, screened native material, or imported material where necessary would be placed in the trench as "bedding." The pipeline would be laid in the trench, followed by backfill of native, unscreened material.

After backfilling and testing is complete, all waste material would be cleaned up and removed from the site prior to the final grading. The right-of-way would be graded to original contours and the excess trench material would be spread evenly across the right-of-way surface. Water bars would be constructed as needed to control erosion. Reseeding of the right-of-way would be conducted according to land managing agency or landowner specifications during the next seeding seasons after construction. Where the right-of-way intersects public roads, earthen berms or rock piles would be constructed on the right-of-way, where requested, to control its unauthorized use by off-road vehicles.

Areas of rugged topography would require cut and fill construction techniques where sidehill slopes would be cut by a bulldozer to create a stable, level workpad. Following construction, the sidehill would be restored to original profiles, withe the fill stabilized with vegetation or other appropriate stabilization measures. In areas of shallow bedrock, blasting may be required for grading or trenching. All blasting would be conducted during daylight hours and would not begin until occupants of nearby buildings, residences, and places of business, and area ranchers have been notified.

Streams would be dry-crossed using a flume technique to minimize turbidity and maintain adequate streamflow. Paiute has indicated that streamflows would be maintained at all times, and banks would be reclaimed to their original profiles and stabilized to minimize erosion. Upon completion of the crossing, any water diversions would be removed to prevent trapping or stranding of fish.

All road crossings would be constructed in compliance with the crossing requirements of the state, county, or city under whose jurisdiction the crossing permit is issued. Roadways would be open cut or bored, depending on the determination of the appropriate regulatory agency. Where agency regulations disallow open cutting, the road crossing would be constructed by boring at a minimum depth of 4 to 5 feet under the road surface.

Cooperating Agencies

The following Federal agencies are cooperating agencies in the production of the EIS: Department of Ariculture: U.S. Forest Service. Department of the Interior: Bureau of Indian Affairs, Bureau of Land Management.

Any other Federal, state, or local agencies desiring cooperating agency status should send a request describing how they would like to be involved to Ms. Lois Cashell, Secretary, Federal Energy Regulatory Commission. The request should reference Docket Nos. CP91–2322–000 and –002 and should be received by December 13, 1991. An additional copy of the request should be sent to the FERC project manager identified at the end of this notice.

Scoping and Comment Procedures

Comments are solicited on any topics of environmental concern to residents and others in the project area. After comments in response to this notice are received and analyzed and the various issues investigated, the staff will prepare an EIS for the Northwest Pipeline Expansion Project. The EIS will be based on the FERC staff's independent analysis of the proposal and, together with the comments received, will comprise part of the record to be considered by the Commission in these proceedings.

A copy of this notice has been distributed to Federal, state, and local agencies, public interest groups, libraries, newspapers, parties in the proceeding, and other interested individuals. Written comments will be used to help identify significant issues or concerns related to the proposed actions, to determine the scope of the issues, and to identify and eliminate from detailed study the issues that are not significant. All comments on specific environmental issues should contain supporting documentation and rationale. Written comments must be filed on or before December 13, 1991, reference Docket Nos. CP91–2322–000 and –002, and should be addressed to the Secretary, Federal Energy Regulatory Commission, 825 North Capitol St., NE., Washington, DC 20426. A copy of these comments should also be sent to the project manager identified below.

The draft EIS will be mailed to Federal, state, and local agencies, public interest groups, interested individuals, newspapers, libraries, and the parties in this proceeding. As noted in the previous NOI, 45 days will be allotted for comment on the draft EIS.

After comments on the draft EIS are reviewed, any new issues are investigated, and modifications are made to the draft EIS, a final EIS will then be published by the staff and distributed. The final EIS will contain the staff's responses to comments received on the draft EIS.

Organizations and individuals receiving this Federal notice have been selected to ensure public awareness of this project and public involvement in the review process under the National Environmental Policy Act and to ensure the FERC's compliance with section 106 of the National Historic Preservation Act. The draft EIS for the Northwest Pipeline Expansion Project will be sent automatically to the appropriate state and Federal agencies, libraries in the

project area, and those persons or organizations who responded to the original NOI or attended one of the scoping meetings held in March 1991. Other than those persons mentioned above, only those who return the attached appendix to this notice by December 13, 1991 will receive a copy of the draft EIS in order to reduce printing and mailing costs. Anyone who responded to the previous NOI need not do so a second time.

Additional information about this proposed project is available from Ms. Lauren O'Donnell, Project Manager, Federal Energy Regulatory Commission, room 7407, 825 North Capitol St., NE., Washington, DC 20426, or call (202) 208–0874.

Lois D. Cashell,
Secretary.

TABLE 1.—NORTHWEST PIPELINE EXPANSION PROJECT PROPOSED PIPELINE FACILITIES

Applicant/pipeline system/proposed facilities	Pipe diameter (in)	Approximate length (mi)[a]	Milepost location	County, State
NORTHWEST:				
Mainline:				
Chehalis North Loop	30	25.1	1335.0–1309.9	Thurston/Pierce, WA.
Washougal North Loop	30	13.9	1230.1–1216.2	Clark, WA.
Plymouth South Loop	24	14.9	1064.0–1063.6 1062.7–1048.2	Umatilla, OR, Benton, WA.
Burley North Loop	24	30.4	712.6–682.2	Twin Falls/Cassia, ID.
Pocatello North Loop	24	60.9	668.2–607.3	Power/Cassia, ID.
Pocatello South Loop	24	14.7	607.3–592.6	Bannock/Power, ID.
Lava Hot Springs North Loop	24	20.8	588.2–567.4	Bannock, ID.
Lava Hot Springs South Loop	24	19.6	567.4–547.8	Bannock/Caribou, ID.
Soda Springs South Loop	24	15.3	528.7–513.4	Bear Lake, ID.
Pegram South Loop	24	18.8	495.5–476.7	Bear Lake, ID, Rich, UT, Lincoln, WY.
Kemmerer South Loop	24	9.0	462.4–454.9	Lincoln, WY.
Grants Pass Lateral:				
Washougal South Loop	20	7.3	0.0–7.3	Clark, WA, Multnomah, OR.
Oregon City North Loop	20	1.4	19.6–21.0	Clackamas, OR.
Oregon City South Loop	16	20.2	21.1–41.3	Clackamas, OR.
Albany North Loop	12	23.7	59.7–83.4	Linn/Marion, OR.
Albany South Loop	10	34.5	83.5–117.6	Linn/Lane, OR.
Klamath Falls Lateral:				
Klamath Falls Replacement Line	6	14.8	0.0–14.8	Klamath, OR.
North Tacoma Lateral:				
North Tacoma Loop	10	0.8	0.0–0.8	Pierce, WA.
Reno Lateral:				
Little Valley South Loop	16	31.9	32.9–64.8	Owyhee, ID.
Total		378.0		
PAIUTE:				
North Tahoe Lateral:				
North Tahoe Loop	8	2.6	17.2–19.8	Washoe, NV.
South Tahoe Lateral:				
South Tahoe Loop	10	0.7	6.8–7.5	Douglas, NV.
Reno Lateral:				
Reno Loop	12	12.4	9.6–22.0	Washoe, NV.
Elko Lateral:				
Elko Loop	12	26.3	111.0–137.3	Eureka/Elko, NV.
Total		42.0		

[a] Scaled from U.S. Geological Survey 7.5-minute series topographic maps. Actual length of pipeline to be installed would be slightly greater due to terrain relief.

TABLE 2.—NORTHWEST PIPELINE EXPANSION PROJECT COMPRESSOR STATIONS

Applicant/pipeline segment/proposed facilities	New horsepower	Added horsepower	Milepost	County, State
NORTHWEST:				
Mainline:				
Sumas		25,200	1484.5	Whatcom, WA.
Mt. Vernon		4,390	1440.2	Skagit, WA.
Snohomish [a]			1394.0	Snohomish, WA.
Willard	11,000		1175.2	Skamania, WA.
Roosevelt	6,500		1097.6	Klickitat, WA.
Meacham	8,780		1004.0	Umatilla, OR.
Boise	13,000		802.2	Ada, ID.
Buhl	5,500		730.0	Twin Falls, ID.
Burley [a]			682.2	Cassia, ID.
Pocatello [a]			607.3	Power, ID.
Lava Hot Springs [a]			567.4	Bannock, ID.
Soda Springs [a]			528.7	Bear Lake, ID.
Pegram		4,390	495.5	Bear Lake, ID.
Kemmerer [a]			455.0	Lincoln, WY.

TABLE 2.—NORTHWEST PIPELINE EXPANSION PROJECT COMPRESSOR STATIONS—Continued

Applicant/pipeline segment/proposed facilities	New horsepower	Added horsepower	Milepost	County, State
Muddy Creek		4,390	437.7	Lincoln, WY.
Green River [a]			391.9	Sweetwater, WY.
Cisco	11,000		184.3	Grand, UT.
Moab		4,390	127.6	San Juan, UT.
Pleasant View	8,780		61.6	Montezuma, CO.
Grants Pass				
Winchester	1,350		62.2	Douglas, OR.
Spokane				
Mesa	1,350		47.3	Franklin, WA.
Reno				
Little Valley		1,350	32.9	Owyhee, ID.
Owyhee		1,350	84.3	Owyhee, ID.
Stainfield Interconnect				
Stanfield	1,350		1048.2	Umatilla, OR.
Total	68,610	45,460		
PAIUTE:				
Mainline:				
Paradise		[b] 1,305		Humboldt, NV.
Winnemucca		[b] 3,718		Humboldt, NV.
Rye Patch		[b] 1,749		Pershing, NV.
Lovelock [c]				Pershing, NV.
Elko Lateral				
Elko [d]	300			Elko, NV.
Total	300	6,772		

[a] Only piping modifications are proposed for these stations. No changes in compression have been proposed.
[b] Horsepower added includes increases from the uprating of existing compressors, and the transfer of an existing 1,140-hp compressor from the Winnemucca Station to the Rye Patch Station.
[c] A compressor was added at this station under an emergency, temporary certificate issued by the FERC. Consequently, it will not be addressed further in the EIS.
[d] The Elko Compressor Facility is proposed to be a temporary installation, lasting from 2 to 3 years.

[FR Doc. 91-29012 Filed 12-3-91; 8:45 am]
BILLING CODE 6717-01-M

[Docket No. EL85-19-119]

Skagit River Basin, Washington; Availability of Environmental Assessment

November 27, 1991.

In accordance with the National Environmental Policy Act of 1969 and the Federal Energy Regulatory Commission's (Commission's) regulations, 18 CFR part 380 (Order No. 486, 52 FR 47897), the Commission's staff reviewed the applications for license for the Skagit River Project (No. 553), Anderson Creek Project (No. 10416), Bear Creek Project (No. 10371), Rocky Creek Project (No. 10311), Jackman Creek Project (No. 10269), Irene Creek Project (No. 10100), Jordan Creek Project (No. 9787), Boulder Creek Project (No. 6984), Diobsud Creek Project (No. 4437), Rocky Creek Project (No. 4376), Thunder Creek Project (No. 3913) and the Olson Creek Project (No. 10141) located in the Skagit River Basin, Skagit County, Washington, and has prepared an Environmental Assessment (EA) that assessed potential cumulative impacts from the twelve proposed projects. In the EA, the staff analyzed the potential for the projects to contribute to cumulative adverse environmental impacts and has concluded that three projects would not contribute to cumulative impacts and nine projects would. The three projects that would not contribute to cumulative impacts will have separate EA's prepared for them. The other nine projects that were determined would contribute to cumulative impacts will be analyzed in a single environmental document that addresses both cumulative and site-specific impacts of the projects on resources within the basin.

Copies of the EA are available for review in the Public Reference Branch Room 3104, 941 North Capitol Street, NE., Washington, DC 20426.

Lois D. Cashell,

Secretary.

[FR Doc. 91-29009 Filed 12-3-91; 8:45 am]
BILLING CODE 6717-01-M

[Docket No. TQ92-2-24-002]

Equitrans, Inc.; Proposed Change in FERC Gas Tariff

November 26, 1991.

Take notice that Equitrans, Inc. (Equitrans) on November 13, 1991 tendered for filing with the Federal Energy Regulatory Commission (Commission) the following alternative tariff sheet to its FERC Gas Tariff, Original Volume No. 1, to become effective December 1, 1991.

Substitute Alternative Thirty-First Revised Sheet No. 10

This filing is intended to replace Equitrans' alternate tariff sheet filed on October 30, 1991 in Docket No. TQ92-2-24-000, and Equitrans states that the earlier tariff sheet is withdrawn.

This filing corrects surcharge adjustment rates for the demand and commodity component of Rate Schedule PLS to reflect the pending certificate before the Commission in Docket No. CP92-109-000, to provide firm sales service of up to 50,000 dekatherm (Dth) per day of natural gas to Texas Eastern Transmission Corporation during the winter season of November through March, according to Equitrans.

Equitrans states that a copy of its filing has been served upon its purchasers and interested state commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE, Washington, DC 20426, in accordance with §§ 385.211 and 385.214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). All such motions or protests should be filed on or before December 3, 1991. Protests will be

considered by the Commission in determining the appropriate action to be taken, but will not service 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. 91–29013 Filed 12–3–91; 8:45 am]

BILLING CODE 6717–01–M

[Docket Nos. RP91–187–000 and CP91–2448–000]

Florida Gas Transmission Co.; Informal Settlement Conference

November 26, 1991.

Take notice that a conference will be convened in the above-referenced proceedings on December 11, 1991, at 10 a.m., and continuing at this same time on December 12 and 13, 1991, at the offices of the Federal Energy Regulatory Commission, 810 First Street, NE., Washington, DC, for the purpose of exploring the possible settlement of the issues in this proceeding.

Any party, as defined by 18 CFR 385.102(c), or any participant, as defined by 18 CFR 385.102(b), 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 Warren C. Wood (202) 208–2091 or Donald Williams (202) 208–0743.

Lois D. Cashell,

Secretary.

[FR Doc. 91–29019 Filed 12–3–91; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. ER91–635–000]

Pennsylvania Power & Light Co.; Filing

November 27, 1991.

Take notice that Pennsylvania Power & Light Company on November 20, 1991, tendered for filing an executed Second Supplemental Agreement implementing a Second Revised Exhibit A to an executed Transmission Service Agreement (Agreement), dated as of June 20, 1991, between PP&L and Continental Energy Associates (CEA). The Agreement was previously submitted for Commission approval in this docket on September 11, 1991. The Agreement sets forth the terms and conditions under which PP&L will transmit electric output from CEA's cogeneration facility in the Humboldt Industrial Park, Huzleton, Pennsylvania to Public Service Electric & Gas Company for delivery and sale to Consolidated Edison Company (Con Ed). The effect of the revised exhibit A is to reduce the transmission rate from $2.65 per Kw per month to $1.73 per Kw per month, based on a new transmission charge study by PP&L using data provided in PPL's most recent wholesale rate filing in Docket No. ER91–322–000.

PP&L requests waiver of the notice requirements of section 205 of the Federal Power Act and § 35.3 of the Commission's Regulations so that the proposed rate schedule can be made effective upon commencement of CEA's energy sales to Con Ed.

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 and 18 CFR 385.214). All such motions or protests should be filed on or before December 9, 1991. 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. 91–29011 Filed 12–3–91; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. CP92–202–000]

Gas Company of New Mexico a Division of Public Service Company of New Mexico; Northwest Pipeline Corporation; Transwestern Pipeline Co.; Application

November 27, 1991.

Take notice that on November 20, 1991, Gas Company of New Mexico (GCNM), 2444 Louisiana, NE., Albuquerque, New Mexico 87110, Northwest Pipeline Corporation (Northwest), P.O. Box 58900, Salt Lake City, Utah 84158 and Transwestern Pipeline Company (Transwestern) 1400 Smith Street, P.O. Box 1188, Houston, Texas 77251, collectively referred to as Applicants, jointly filed an application in Docket No. CP92–202–000, pursuant to section 7 of the Natural Gas Act for a limited jurisdictional certificate of public convenience and necessity authorizing GCNM to acquire certain natural gas facilities, all as more fully set forth in the application which is on file with the Commission and open to public inspection.

GCNM request authorization to acquire approximately a one-third (⅓) undivided interest in certain natural gas facilities to be constructed by Transwestern and Northwest in San Juan County. New Mexico (hereinafter referred to as the ("Blanco Hub"). GCNM also requests that the authorization be granted effective prior to December 15, 1991, the date Blanco Hub is expected to be placed in service. If the Commission has not granted such operation prior to the date the Blanco Hub is placed in service, Northwest and Transwestern request that the Commission either determine that no abandonment authorization is required or issue an order permitting and approving the abandonment by each of them approximately one-half (½) of the undivided interest that is to be transferred to GCNM.

GCNM further requests that the Commission (1) determine that GCNM may own and utilize its share of the Blanco Hub facilities without jeopardizing its Hinshaw exemption; (2) authorize GCNM to participate in any additional construction or changes that Northwest and Transwestern are authorized to make under their respective blanket authorizations to the same extent as if GCNM held such blankets; and (3) waive all reporting, filing and accounting requirements associated with ownership and operation of interstate pipeline facilities.

GCNM states that it has contracts to purchase natural gas that is processed in various processing plants located in San Juan County, New Mexico and that the most efficient method for GCNM to attach those supplies to its facilities in the area is to acquire an undivided interest in the Blanco Hub facilities that are being constructed by Transwestern and Northwest pursuant to the blanket facilities certificates held by Transwestern and Northwest. GCNM states that if it did not participate in the Blanco Hub facilities, in order to achieve equivalent operational flexibility and to transport its gas on an economic basis, GCNM would have to duplicate the Blanco Hub facilities by constructing its own intrastate facilities, which would not be subject to Commission jurisdiction. GCNM states that its participation in the Blanco Hub would be more economical than construction of duplicate facilities and would provide environmental benefits by eliminating unnecessary duplication of facilities. GCNM further states that the benefit of

the cost reduction due to GCNM's participation in the Blanco Hub will accrue to both interstate and intrastate markets and that both intrastate and interstate customers will benefit from the greater efficiencies in movement of gas by transportation, exchange, or displacement afforded by the integrated hub.

GCNM states that each of the companies would utilize its interest in the facilities as part of its general system and to recover costs associated with the facilities on a rolled-in basis. GCNM also states that none of the companies propose to charge incremental rates for transportation of gas through the Blanco Hub facilities.

Any person desiring to be heard or to make any protest with reference to said application should on or before December 9, 1991, 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 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 Applicants to appear or be represented at the hearing.

Lois D. Cashell,

Secretary.

[FR Doc. 91-29010 Filed 12-3-91; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RP89-141-006]

Sea Robin Pipeline Co.; Compliance Filing

November 26, 1991.

Take notice that Sea Robin Pipeline Company (Sea Robin) on November 6, 1991, tendered for filing First Revised Sheet No. 4D to Original Volume 1 of its FERC Gas Tariff, proposed to be effective December 6, 1991.

Sea Robin states that it is submitting this tariff sheet in compliance with Ordering Paragraph (B) of the Commission's Order dated October 7, 1991, in Docket No. RP89-141-000, to reconcile the eligible costs claimed by it in its take-or-pay cost recovery filing.

Sea Robin states that copies of the foregoing document were served upon each person designated on the official service list compiled by the Secretary in this proceeding.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with rule 211 of the Commission's Rules of Practice and Procedures, 18 CFR 385.211. All such protests should be filed on or before December 3, 1991. 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. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 91-29020 Filed 12-3-91; 8:45 am]

BILLING CODE 6717-01-M

Office of Fossil Energy

[FE Docket No. 91-89-NG]

Aectra Refining and Marketing, Inc.; Application To Export Natural Gas to Mexico

AGENCY: Department of Energy, Office of Fossil 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 October 28, 1991, of an application filed by Aectra Refining and Marketing, Inc. (Aectra), requesting blanket authorization to export from the United States to Mexico up to 146 Bcf of natural gas on a short-term or spot market basis over a two-year period beginning with the date of first delivery. Aectra intends to use existing U.S. pipeline facilities at various points on the U.S./Mexican border. Aectra 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.

DATES: 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., eastern time, January 3, 1992.

ADDRESSES: 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:

Larine A. Moore, Office of Fuels Programs, Fossil Energy, U.S. Department of Energy, Forrestal Building, room 3F-056, 1000 Independence Avenue SW., Washington, DC 20585, (202) 586-9478.

Diane Stubbs, Office of Assistant General Counsel for Fossil Energy, U.S. Department of Energy, Forrestal Building, room 6E-042, 1000 Independence Avenue SW., Washington, DC 20575, (202) 586-6667.

SUPPLEMENTARY INFORMATION: Aectra is a Texas corporation with its principal place of business in Houston, Texas. According to Aectra, the gas to be exported would be purchased from U.S. producers on the spot market and would be surplus to domestic need. The requested authority would be used primarily for sales to Petroleos Mexicanos (Pemex), Mexico's national oil company. All sales would result from arms-length negotiations and prices would be determined by 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.

NEPA Compliance.

The National Environmental Policy Act (NEPA), 42 U.S.C., 4321 *et seq.*, requires DOE to give appropriate consideration to the environmental effects of its proposed actions. No final decision will be issued in this proceeding until DOE has met its NEPA responsibilities.

Public Comment Procedures

In response to this notice, any person may file a protest, motion to intervene or notices of intervention, as applicable, and written comments. Any person wishing to become a party to the proceeding and to have their 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 Aectra'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 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays.

Issued in Washington, DC, on November 26, 1991.

Clifford P. Tomaszewski,

Acting Deputy Assistant Secretary for Fuels Programs, Office of Fossil Energy.

[FR Doc. 91–29088 Filed 12–3–91; 8:45 am]

BILLING CODE 6450–01–M

[FE Docket No. 91–54–NG]

Vermont Gas Systems, Inc.; Authorization To Import Natural Gas from Canada

AGENCY: Department of Energy, Office of Fossil Energy.

ACTION: Notice of long-term authorization to import natural gas from Canada.

SUMMARY: The Office of Fossil Energy of the Department of Energy (DOE) gives notice that it has issued an order granting Vermont Gas Systems, Inc. authorization to import up to 32,000 Mcf per day of natural gas from Canada beginning with the date of the order through October 31, 2006.

A copy of this order 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 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays.

Issued in Washington, DC on November 26, 1991.

Clifford P. Tomaszewski,

Acting Deputy Assistant Secretary for Fuels Programs, Office of Fossil Energy.

[FR Doc. 91–29089 Filed 12–3–91; 8:45 am]

BILLING CODE 6450–01–M

Office of Hearings and Appeals

Proposed Refund Procedures

AGENCY: Office of Hearings and Appeals, Department of Energy.

ACTION: Notice of proposed implementation of special refund procedures.

SUMMARY: The Office of Hearing and Appeals (OHA) of the Department of Energy (DOE) announces the proposed procedures for the disbursement of $375,000, plus accrued interest, obtained by the DOE under the terms of a consent order entered into with Otis Ainsworth. The OHA has tentatively determined that the funds will be distributed in accordance with the DOE's Modified Statement of Restitutionary Policy Concerning Crude Oil Overcharges, 51 FR 27899 (August 4, 1986).

DATES AND ADDRESS: Comments must be filed in duplicate by January 3, 1992 and should be addressed to the Office of Hearings and Appeals, Department of Energy, 1000 Independence Avenue SW., Washington, DC 20585. All comments should display a reference to case number LEF–0039.

FOR FURTHER INFORMATION CONTACT: Thomas L. Wieker, Deputy Director, Office of Hearings and Appeals, Department of Energy, 1000 Independence Avenue SW., Washington, DC 20585, (202) 586–2390.

SUPPLEMENTARY INFORMATION: In accordance with § 205.282(b) of the procedural regulations of the Department of Energy (DOE), 10 CFR 205.282(b), notice is hereby given of the issuance of the Proposed Decision and Order set out below. The Proposed Decision and Order sets forth the procedures that the DOE has tentatively formulated to distribute $375,000 that has been remitted by Otis Ainsworth to the DOE. The DOE is currently holding the funds in an interest bearing account pending distribution.

The DOE has tentatively determined to distribute these funds in accordance with the DOE's Modified Statement of Restitutionary Policy Concerning Crude Oil Overcharges, 51 FR 27899 (August 4, 1986). Under the Modified Policy, crude oil overcharge monies are divided among the states, federal government,

and injured purchasers of refined products. Under the plan we are proposing, refunds to the states would be in proportion to each state's consumption of petroleum products during the period of price controls. Refunds to eligible purchasers would be based on the number of gallons of petroleum products which they purchased and the extent to which they can demonstrate injury.

Applications for refund should not be filed at this time. Appropriate public notice will be given when the submission of Claims is authorized.

Any member of the public may submit written comments regarding the proposed refund procedures. Commenting parties are requested to submit two copies of their comments. Comments should be submitted within 30 days of the publication in the **Federal Register**, and should be sent to the address set forth at the beginning of this notice. All comments received will be available for public inspection between the hours of 1 p.m. through 5 p.m., Monday through Friday, except federal holidays, in the Public Reference Room of the Office of Hearings and Appeals, located in room 1E–234, 1000 Independence Avenue SW., Washington, DC 20585.

Dated: November 26, 1991.

George B. Breznay,

Director, Office of Hearings and Appeals.

November 26, 1991.

Name of Firm: Otis Ainsworth
Date of Filing: October 31, 1991.
Case Number: LEF–0039.

Under the procedural regulations of the Department of Energy (DOE), the Economic Regulatory Administration (ERA) may request that the Office of Hearings and Appeals (OHA) formulate and implement special refund procedures. 10 CFR 205.281. These procedures are used to refund monies to those injured by actual or alleged violations of the DOE price regulations.

In this Decision and Order, we consider a Petition for Implementation of Special Refund Procedures filed by the ERA on October 31, 1991 for crude oil overcharge funds. The funds at issue in these Petitions were obtained from Otis Ainsworth (Ainsworth). On June 17, 1985, the OHA issued a Remedial Order against Ainsworth for violations of the crude oil producer price regulations during the period from November 1973 through December 1977. *Otis Ainsworth*, 13 DOE ¶83,018 (1985). Ainsworth subsequently filed an appeal with the Federal Energy Regulatory Commission (FERC). On February 26, 1987, FERC reduced in part and affirmed the Remedial Order and ordered Ainsworth to make restitution in the amount of $440,639.00. The United States filed suit on January 31, 1990 in the United States District Court for the Southern District of Mississippi to enforce the Remedial Order. In September 1990, the Chancery Court for the Second Judicial District of Jones County, Mississippi (Chancery Court) appointed Alva Sue Dickey Ainsworth as the Conservator for the Estate of Otis Ainsworth. The United States and the Conservator reached a compromise and settlement which was approved by the Chancery Court on June 13, 1991. On July 1, 1991, the United States executed a General and Absolute Release in settlement of the matters set forth in the Remedial Order in consideration for $375,000 remitted on that day by the Conservator. The DOE has received the $375,000. This Proposed Decision and Order sets forth the OHA's tentative plan to distribute those funds. Comments are solicited.

The general guidelines which the OHA may sue to formulate and implement a plan to distribute refunds are set forth in 10 CFR part 205, subpart V. The subpart V process may be used in situations where the DOE cannot readily identify the persons who may have been injured as a result of actual or alleged violations of the regulations or ascertain the amount of the refund each person should receive. For a more detailed discussion of subpart V and the authority of the OHA to fashion procedures to distribute refunds, see *Office of Enforcement*, 9 DOE ¶82,508 (1981), and *Office of Enforcement*, 8 DOE ¶82,597 (1981). We have considered the ERA's request to implement subpart V procedures with respect to the monies received from Ainsworth and have determined that such procedures are appropriate.

I. Background

On July 28, 1986, the DOE issued a Modified Statement of Restitutionary Policy Concerning Crude Oil Overcharges, 51 27899 (August 4, 1986) (the MSRP). The MSRP, issued as a result of a court-approved Settlement Agreement in *In re: The Department of Energy Stripper Well Exemption Litigation*, M.D.L. No. 378 (D. Kan. 1986) (the Stripper Well Agreement), provides that crude oil overcharge funds will be divided among the states, the federal government, and injured purchasers of refined petroleum products. Under the MSRP, up to twenty percent of these crude oil overcharge funds will be reserved to satisfy valid claims by injured purchasers of petroleum products. Eighty percent of the funds, and any monies remaining after all valid claims are paid, are to be disbursed equally to the states and federal government for indirect restitution.

Shortly after the issuance of the MSRP, the OHA issued an Order that announced its intention to apply the Modified Policy in all subpart V proceedings involving alleged crude oil violations. Order Implementing the MSRP, 51 29689 (August 20, 1986). In that Order, the OHA solicited comments concerning the appropriate procedures to follow in processing refund applications in crude oil refund proceedings. On April 6, 1987, the OHA issued a Notice analyzing the numerous comments and setting forth generalized procedures to assist claimants that file refund applications for crude oil monies under the subpart V regulations. 52 11737 (April 10, 1987) (the April Notice).

The OHA has applied these procedures in numerous cases since the April Notice, i.e., *New York Petroleum, Inc.*, 18 DOE ¶ 85,435 (1988) (*NYP*); *Shell Oil Co.*, 17 DOE ¶ 85,204 (1988) (*Shell*); *Ernest A. Allerkamp*, 17 DOE ¶85,079 (1988) (*Allerkamp*), and the procedures have been approved by the United States District Court for the District of Kansas as well as the Temporary Emergency Court of Appeals (TECA). In the case *In re: The Department of Energy Stripper Well Exemption Litigation*, various states filed a Motion with the Kansas District Court, claiming that the OHA violated the Stripper Well Agreement by employing presumptions of injury for end-users and by improperly calculating the refund amount to be used in those proceedings. *In re: The Department of Energy Stripper Well Exemption Litigation*, 671 F. Supp. 1318 (D. Kan. 1987), *aff'd*, 857 F. 2d 1481 (Temp. Emer. Ct. App. 1988). On August 17, 1987, Judge Theis issued an Opinion and Order denying the states' Motion in its entirety. The court concluded that the Stripper Well Agreement "does not bar (the) OHA from permitting claimants to employ reasonable presumptions in affirmatively demonstrating injury entitling them to a refund." *Id.* at 1323. The court also ruled that, as specified in the April Notice, the OHA could calculate refunds based on a portion of the M.D.L. 378 overcharges. *Id.*, at 1323–24.

II. The Proposed Refund Procedures

A. Refund Claims

We now propose to apply the procedures discussed in the April Notice to the crude oil Subpart V proceeding that is the subject of the present determination. As noted above, an alleged crude oil violation amount of $375,000, plus interest, is covered by this proposed Decision. We have decided to reserve the full twenty percent of the alleged crude oil violation amount, or $75,000, plus interest, for direct refunds to claimants, in order to insure that sufficient funds will be available for refunds to injured parties.

The process which the OHA will use to evaluate claims based on alleged crude oil violations will be modeled after the process the OHA has used in Subpart V proceedings to evaluate claims based upon alleged overcharges involving refined products. *E.g.*, *Mountain Fuel Supply Co.*, 14 DOE ¶ 85,475 (1986) (*Mountain Fuel*). As in non-crude oil cases, applicants will be required to document their purchase volumes and prove that they were injured as a result of the alleged violations. Applicants who were end-users or ultimate consumers of petroleum products, whose businesses are unrelated to the petroleum industry, and who were not subject to the DOE price regulations are presumed to have been injured by any alleged crude oil overcharges. In order to receive a refund, end-users need not submit any further evidence of injury beyond the volume of petroleum products purchased during the period of price controls. *E.g.*, *A. Tarricone, Inc.*, 15 DOE ¶ 85,495 at 88,893–96 (1987). However, the end-user presumption of injury can be rebutted by evidence which establishes that the specific end-user in question was not injured by the crude oil overcharges. *E.g.*, *Berry Holding Co.*, 16 DOE

¶ 85,405 at 88,797 (1987). If an interested party submits evidence that is sufficient to cast serious doubt on the end-user presumption, the applicant will be required to produce further evidence of injury. *E.g., NYP*, 18 DOE at 88,701–03.

Reseller and retailer claimants must submit detailed evidence of injury, and may not rely on the presumptions of injury utilized in refund cases involving refined petroleum products. They can, however, use econometric evidence of the type employed in the OHA Report to the District Court in the Stripper Well Litigation, reprinted in 6 Fed. Energy Guidelines ¶ 90,507. Applicants who executed and submitted a valid waiver pursuant to one of the escrows established in the Stripper Well Agreement have waived their rights to apply for crude oil refunds under subpart V. *Mid-American Dairyman, Inc.* v. *Herrington*, 878 F. 2d 1448 (Temp. Emer. Ct. App. 1989); *accord, Boise Cascade Corp.*, 18 DOE ¶ 85,970 (1989).

Refunds to eligible claimants who purchased refined petroleum products will be calculated on the basis of a volumetric refund amount derived by dividing the alleged crude oil violation amounts involved in this determination ($375,000) by the total consumption of petroleum products in the United States during the period of price controls (2,020,997,335,000 gallons). *Mountain Fuel*, 14 DOE at 88,868 n.4. This yields a volumetric refund amount of $0.000000185 per gallon.

As we stated in previous Decisions, a crude oil refund applicant will be required to submit only one Application for crude oil overcharge funds. *E.g., Allerkamp*, 17 DOE at 88,176. Any party that has previously submitted a refund Application in the crude oil refund proceedings need not file another Application. That previously filed Application will be deemed to be filed in all crude oil proceedings as the procedures are finalized. The DOE has established June 30, 1992 as the current deadline for filing an Application for Refund from the crude oil funds. *Quintana Energy Corp.*, 21 DOE ¶ 85,032 (1991). It is the policy of the DOE to pay all crude oil refund claims filed within this deadline at the rate of $.0008 per gallon. However, while we anticipate that applicants that filed their claims within the original June 30, 1988 deadline will receive a supplemental refund payment, we will decide in the future whether claimants that filed later Applications should receive additional refunds. *E.g., Seneca Oil Co.*, 21 DOE ¶ 85,327 (1991). Notice of any additional amounts available in the future will be published in the **Federal Register.**

B. Payments to the States and Federal Government

Under the terms of the MSRP, we propose that eighty percent of the alleged crude oil violation amounts subject to this Proposed Decision, or $300,000, plus interest, should be disbursed in equal shares to the states and federal government for indirect restitution. Refunds to the states will be in proportion to the consumption of petroleum products in each state during the period of price controls. The share or ratio of the funds which each state will receive is contained in Exhibit H of the Stripper Well Agreement. When disbursed, these funds will be subject to the same limitations and reporting requirements as all other crude oil monies received by the states under the Stripper Well Agreement.

It is Therefore Ordered That:

The refund amounts remitted to the Department of Energy by Otis Ainsworth pursuant to the General and Absolute Release executed on July 1, 1991 will be distributed in accordance with the foregoing Decision.

[FR Doc. 91–29090 Filed 12–3–91; 8:45 am]

BILLING CODE 6450–01–M

ENVIRONMENTAL PROTECTION AGENCY

[FRL–4038–2]

Open Meeting of the Policy Dialogue Committee on Mining Wastes

AGENCY: Environmental Protection Agency.

ACTION: Cancellation of FACA Committee Meeting—Policy Dialogue Committee on Mining Wastes.

SUMMARY: On November 18, 1991 (56 FR 58246) EPA announced the data and location of the December meeting of the Policy Dialogue Committee on Mining Waste. EPA has determined that the meeting cannot be held as announced due to scheduling difficulties. The January meeting will be held as scheduled. A location will be announced shortly.

FOR FURTHER INFORMATION CONTACT: Persons needing further information on substantive aspects of the mining waste program should call Steve Hoffman, Office of Solid Waste, U.S. EPA, (703) 308–8413. Summaries of previous meetings will be made available upon written request to Patricia Whiting, Office of Solid Waste, (OS–323W), Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460.

Persons needing further information on administrative matters such as committee arrangements or procedures should contact Deborah Dalton, EPA Regulatory Negotiation Project, (202) 382–5495 or the Committee's facilitator, John Ehrman, The Keystone Center, (303) 468–5822.

Dated: November 29, 1991.

Deborah Dalton,

Designated Federal Official Deputy Director, Consensus and Dispute Resolution Project, Office of Policy, Planning and Evaluation.

[FR Doc. 91–29078 Filed 12–3–91; 8:45 am]

BILLING CODE 6560–50–M

[OPTS–62112; FRL–4005–6]

Availability of Applications for 1992 Award Cycle of the Asbestos School Hazard Abatement Act

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA is announcing the availability of applications for the 1992 award cycle of the Asbestos School Hazard Abatement Act of 1990 program. The program was established to offer financial assistance to financially needy schools so that they may abate asbestos materials which pose a serious health hazard to building occupants. Assistance is offered in the form of loans and/or grants and is available for public and non-profit private elementary and secondary schools.

DATES: All completed applications must be submitted by Local Education Agencies (LEAs) to State ASHAA Designees by January 24, 1992, and by the States to EPA by February 3, 1992, to be considered for FY 92 funding awards.

ADDRESSES: For obtaining an application package written request should be sent to: EPA ASHAA Coordination Center, c/o ATLIS Federal Services, Inc., 6011 Executive Blvd., Rockville, MD 20652.

FOR FURTHER INFORMATION CONTACT: David Kling, Acting Director, Environmental Assistance Division (TS–799), Office of Toxic Substances, Environmental Protection Agency, rm. E–545, 401 M St., SW., Washington, DC 20460. Toll free: 1–800–835–6700, TDD: (202) 554–0551.

SUPPLEMENTARY INFORMATION: In 1990 Congress reauthorized the Asbestos School Hazard Abatement Act (ASHAA) to offer financial assistance to financially needy schools so that they may abate asbestos materials which pose a serious health hazard to building occupants. Assistance is offered in the form of loans and/or grants and is available for public and non-profit private elementary and secondary schools. Since 1985, over $291 million has been offered to Local Education Agencies (LEAs) for 2,672 abatement projects.

In November, congressional appropriation allowed approximately $52 million for the 1992 asbestos in schools program. Congress intended that Federal funds under the ASHAA loan and grant program be directed to school districts which have the most serious asbestos hazards and the greatest financial need. To apply for these funds a school district must submit a 1992

ASHAA application in accordance with the following schedule: (1) LEAs must submit applications to State ASHAA Designees by January 24, 1992, and (2) States must submit applications to EPA by February 3, 1992.

An application package for the 1992 award cycle may be obtained through the ASHAA Coordination Center by calling the toll free line: 1–800–462–6706 or by making a written request to the EPA ASHAA Coordination Center at the address listed under the ADDRESSES unit. The package includes a policy statement explaining the selection process, an application containing detailed instructions for applying for funds, and the addresses of the State ASHAA Designees to whom LEAs should submit their applications. EPA will announce 1992 award recipients before the end of April 1992.

Dated: November 22, 1991.

Joseph A. Carra,

Acting Director, Office of Toxic Substances.

[FR Doc. 91–29061 Filed 12–3–91; 8:45 am]

BILLING CODE 6560–50–F

[FRL–4037–9]

Proposed Settlement Under Section 122(g) of the Comprehensive Environmental Response, Compensation and Liability Act: Atlas Die Inc., et al.

AGENCY: U.S. Environmental Protection Agency.

ACTION: Request for public comment.

SUMMARY: The U.S. Environmental Protection Agency is proposing to enter into a settlement under section 122(g) of the Comprehensive environmental Response, Compensation, and Liability Act of 1980, as amended (CERCLA), 42 U.S.C. 9622(g). The proposed settlement is intended to resolve the liabilities under CERCLA of four de minimis parties for response costs incurred and to be incurred at the I. Jones Recycling, Clinton Street facility in Fort Wayne, Indiana.

DATES: Comments must be provided on or before January 3, 1992.

ADDRESSES: Comments should be addressed to the Docket Clerk, U.S. environmental Protection Agency, Region V, 230 South Dearborn Street, Chicago, Illinois, 60604, and should refer to: In Re I. Jones Recycling Site in Fort Wayne, Indiana, U.S. EPA Docket No. V–W–91C–129.

FOR FURTHER INFORMATION CONTACT: Thomas J. Krueger, U.S. Environmental Protection Agency, Office of Regional Counsel, 5CS–TUB–7, 230 South Dearborn Street, Chicago, Illinois, 60604, (312) 886-0562.

Notice of De Minimis Settlement: In accordance with section 122(i)(1) of the Comprehensive Environmental Response, Compensation and Liability Act of 1984, as amended (CERCLA), notice is hereby given of a proposed administrative settlement concerning the I. Jones Recycling hazardous waste site at 3651 Clinton Street in Fort Wayne, Indiana. The present agreement was proposed to Settling Parties by EPA Region V on April 5, 1991. Subject to review by the public pursuant to this Notice, the agreement has been approved by the United States Department of Justice and the Department of the Interior. The proposed order was issued to the following parties, who have executed binding certifications of their consent to participate in the settlement: Atlas Die, Inc.—Atlas Chem Milling Division; Opcon, Inc.; Portland General (Systech, Inc.); and the Regional Vocational Center (Fort Wayne Community Schools).

The present proposed settlement offers essentially the same terms of settlement to the four parties as those offered parties to the de minimis settlement for the same site in U.S. EPA Docket No. V–W–89C–009. The earlier settlement was approved by the Department of Justice on July 31, 1989, published for notice and comment on September 5, 1989, and became final on October 25, 1989. All of the parties to the present settlement would have been eligible to participate in the original 1989 de minimis settlement but, through no fault of their own, never received timely notice of that settlement offer. Accordingly, the present settlement essentially represents a supplement to the original settlement cited *supra*.

The Settling Parties have agreed to pay a total of $57,604.62 under the agreement, subject to the contingency that EPA may elect not to complete the settlement based on matters brought to its attention during the public comment period established by this Notice. The payments made by the parties are calculated on the same basis as the 1989 settlement. Payments would be made into the Hazardous Substances Superfund to reimburse the Fund for a portion of the Agency's past response costs at the I. Jones Recycling site.

EPA is entering into this agreement under the authority of sections 122(g) and 107 of CERCLA. Section 122(g) authorizes early settlements with *de minimis* parties to allow them to resolve their liabilities at Superfund sites without incurring substantial transaction costs. Under this authority, the agreement proposes to settle with parties in the I. Jones case who are each responsible for less than .45 percent of the volume of hazardous substances at the site. The proposed settlement reflects, and was agreed to based on, conditions as known to the parties as of the date it was proposed to the Settling Parties.

The Environmental Protection Agency will receive written comments relating to this agreement for 30 days from the date of publication of this notice.

A copy of the proposed administrative settlement agreement may be obtained in person or by mail from the EPA's Region V Office of Regional Counsel, 230 South Dearborn Street, Chicago, Illinois, 60604. Additional background information relating to the settlement is available for review at the EPA's Region V Office of Regional Counsel.

Authority: The Comprehensive Environmental Response, Compensation, and Liability Act, as amended, 42 U.S.C. 9601–9675.

Ralph R. Bayer,

Acting Administrator.

[FR Doc. 91–29057 Filed 12–3–91; 8:45 am]

BILLING CODE 6560–50–M

[FRL–4038–1]

Proposed Settlement Under Section 122(h) of the Comprehensive Environmental Response, Compensation and Liability Act; General Electric Corporation, et al.

AGENCY: U.S. Environmental Protection Agency.

ACTION: Request for public comment.

SUMMARY: The U.S. Environmental Protection Agency is proposing to enter into a settlement under section 122 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (CERCLA), 42 U.S.C. 9622. The proposed settlement is intended to resolve the liabilities under CERCLA of thirty-nine parties for response costs incurred and to be incurred at the I. Jones Recycling, Clinton Street facility in Fort Wayne, Indiana.

DATES: Comments must be provided on or before January 3, 1992.

ADDRESSES: Comments should be addressed to the Docket Clerk, U.S. Environmental Protection Agency, Region V, 230 South Dearborn Street, Chicago, Illinois, 60604, and should refer to: In Re I. Jones Recycling Site in Fort Wayne, Indiana, U.S. EPA Docket Nos. V–W–91C–089 and 090.

FOR FURTHER INFORMATION CONTACT: Thomas J. Krueger, U.S. Environmental Protection Agency, Office of Regional Counsel, 5CS–TUB–7, 230 South Dearborn Street, Chicago, Illinois, 60604, (312) 886–0562.

Notice of Settlement: In accordance with section 122(i)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1984, as amended (CERCLA), notice is hereby given of a proposed administrative settlement concerning the I. Jones Recycling hazardous waste site at 3651 Clinton Street in Fort Wayne, Indiana. The present agreement was proposed to the settling parties by EPA Region V on March 1, 1991. Subject to review by the public pursuant to this Notice, the agreement has been approved by the United States Department of Justice. The proposed order was issued to the following parties, who have executed binding certifications of their consent to participate in the settlement: General Electric Corporation; Franklin Electric Co., Inc.; Essex Group, Inc. and United Technologies Automotive, Inc.; General Motors Corporation; Navistar International Transportation Corp. (International Harvester); Hendrickson Suspension Division, The Boler Company (Hendrickson-Tandem Corporation); Queen City Barrel; Uniroyal Plastics Company, Inc.; Borg-Warner Corporation (Warner Gear); Dana Corporation (Weatherhead Company); Ashland Chemical, Inc.; Freuhauf Trailer; Magnavox Government and Industrial Electronics Co.; RR Donnelley & Sons Company; Ford Motor Company; Owens-Illinois, Inc., and O.I. Brockway Glass; Jones Chemicals, Inc.; Federal Paper Board Company, Inc.; Tecumseh Products, Inc. (Taylor Products Division); Group Dekko International, Inc. (Fine Wire, Inc.); Zollner Corporation; Lyon Metal Products, Inc. (Paltier Corporation); Parker Hannifin Corporation; Colwell/General, Inc.; Sturgis Iron & Metal, Inc. and Michiana Refuse; Dayton Walther Corp.; The Scott Fetzer Company (Douglas Division); Owens-Corning Fiberglas Corporation; SPX Corporation (Robinair Manufacturing); GCI, Inc.; Mechanics Laundry & Supply, Inc. (Coverall Rental); James W. Clark (Coverall Rental); Interdyne Corporation; United States Air Force on behalf of Indiana Air National Guard; Fort Wayne Clutch, Inc.; Bessie Levy (Levin & Sons); Chemical Waste Management, Inc. for Adams Center Landfill (Jenkins and Schlatter); McCoy Bolt Works, Inc.; Preferred, Inc.; and Gleave Construction.

These 39 parties will pay into EPA's Hazardous Substance Superfund a total of $1,151,926.83 in settlement payments under the agreement, subject to the contingency that EPA may elect not to complete the settlement based on matters brought to its attention during the public comment period established by this Notice. Of this amount, $594,173.16 would reimburse EPA for a portion of its past response costs at the I. Jones Recycling site. The remainder of the settlement payments would represent settlement of the potential liability of certain settling parties for penalties for their failure to respond to previous orders issued by EPA at this site, and settlement of the potential liability of the settling parties for interest. In addition, these parties will pay a total of $32,736.22 to the Department of the Interior to resolve their potential liability for natural resource damages.

EPA is entering into this agreement under the authority of sections 107 and 122 of CERCLA, 42 U.S.C. 9607 and 9622. Under this authority, the agreement proposes to settle with these parties for unreimbursed costs for response action taken at the I. Jones Facility.

EPA issued a preliminary settlement proposal on November 15, 1990, and invited comments on that proposal by all interested parties. On March 1, 1991, EPA issued final revisions to the proposed settlement, which included several modifications made in response to comments submitted on behalf of 13 potentially responsible parties (PRPs) and one PRP group. The EPA also provided its response to major comments which the Agency determined did not require changes to the settlement proposal. The proposed settlement reflects, and was agreed to based on, conditions as known to the parties as of March 1, 1991. One minor revision to the schedule of payments was made subsequent to that date to allow the addition of The Scott Fetzer Company to the proposed settlement.

Those Settling Parties that did not comply with EPA's July 27, 1988, unilateral cleanup order for the I. Jones Recycling, Clinton Street site will be required to pay their volumetric share of response costs at the site. In addition, those settling parties will be required to pay additional amounts, in settlement of their potential liability for prejudgment interest on those response costs and for noncompliance penalties related to the cleanup order. Those Settling Parties who did fully comply with the EPA's July 27, 1988 unilateral cleanup order (expending in excess of $5 million) will be required to waive their legal claims for reimbursement from EPA and the other Settling Parties. The general structure of this proposed settlement was based upon earlier administrative settlements for this site.

The Environmental Protection Agency will receive written comments relating to this agreement for 30 days from the date of publication of this notice.

A copy of the proposed administrative settlement agreement may be obtained in person or by mail from the EPA's Region V Office of Regional Counsel, 230 South Dearborn Street, Chicago, Illinois, 60604. Additional background information relating to the settlement is available for review at the EPA's Region V Office of Regional Counsel.

Authority: The Comprehensive Environmental Response, Compensation, and Liability Act, as amended, 42 U.S.C. 9601–9675.

Ralph R. Bauer,

Acting Regional Administrator.

[FR Doc. 91–29058 Filed 12–3–91; 8:45 am]

BILLING CODE 6560–50–M

[OPTS–140163; FRL–4003–3]

Access to Confidential Business Information by PRC, Incorporated

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has authorized its contractor, PRC, Incorporated (PRC), of McLean, Virginia, for access to information which has been submitted to EPA under all sections of the Toxic Substances Control Act (TSCA). Some of the information may be claimed or determined to be confidential business information (CBI).

DATES: Access to the confidential data submitted to EPA will occur no sooner than December 16, 1991.

FOR FURTHER INFORMATION CONTACT: David Kling, Acting Director, TSCA Environmental Assistance Division (TS–799), Office of Toxic Substances, Environmental Protection Agency, rm. E–545, 401 M St., SW., Washington, DC 20460, (202) 554–1404, TDD: (202) 554–0551.

SUPPLEMENTARY INFORMATION: Under contract no. 68–01–7361, contractor PRC, of 1500 Planning Research Dr., McLean, VA, will assist the Office of Toxic Substances (OTS) in performing systems development, software enhancements, and information retrievals on OTS CBI systems.

In accordance with 40 CFR 2.306(j), EPA has determined that under EPA

contract number 68–01–7361, PRC will require access to CBI submitted to EPA under all sections of TSCA to perform successfully the duties specified under the contract. PRC personnel will be given access to information submitted to EPA under all sections of TSCA. Some of the information may be claimed or determined to be CBI.

In a previous notice published in the **Federal Register** of September 27, 1988 (53 FR 37640), PRC was authorized for access to CBI submitted to EPA under all sections of TSCA. EPA is issuing this notice to extend PRC's access to TSCA CBI under an extension of contract number 68–01–6371.

EPA is issuing this notice to inform all submitters of information under all sections of TSCA that EPA may provide PRC access to these CBI materials on a need-to-know basis only. All access to TSCA CBI under this contract will take place at EPA Headquarters only.

Clearance for access to TSCA CBI under this contract may continue until March 31, 1992.

PRC personnel will be required to sign nondisclosure agreements and will be briefed on appropriate security procedures before they are permitted access to TSCA CBI.

Dated: November 22, 1991.

Linda A. Travers,

Director, Information Management Division, Office of Toxic Substances.

[FR Doc. 91–29062 Filed 12–3–91; 8:45 am]

BILLING CODE 6560–50–F

[OPTS–140164; FRL–4003–4]

Access to Confidential Business Information by Research and Evaluation Associates, Incorporated

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has authorized its contractor, Research and Evaluation Associates, Inc. (REA), of Chapel Hill, North Carolina, for access to information which has been submitted to EPA under sections 4, 5, 6, and 8 of the Toxic Substances Control Act (TSCA). Some of the information may be claimed or determined to be confidential business information (CBI).

DATES: Access to the confidential data submitted to EPA will occur no sooner than December 16, 1991.

FOR FURTHER INFORMATION CONTACT: David Kling, Acting Director, TSCA Environmental Assistance Division (TS–799), Office of Toxic Substances, Environmental Protection Agency, rm. E–545, 401 M St., SW., Washington, DC 20460, (202) 554–1404, TDD: (202) 554–0551.

SUPPLEMENTARY INFORMATION: Under contract number 68–D1–0136, contractor REA, of 100 Europa Dr., suite 590, Chapel Hill, NC, will assist the Office of Toxic Substances (OTS) in assessing potential adverse effects of existing chemicals on human health and the environment.

In accordance with 40 CFR 2.306(j), EPA has determined that under EPA contract number 68–D1–0136, REA will require access to CBI submitted to EPA under sections 4, 5, 6, and 8 of TSCA to perform successfully the duties specified under the contract. REA personnel will be given access to information submitted to EPA under sections 4, 5, 6, and 8 of TSCA. Some of the information may be claimed or determined to be CBI.

EPA is issuing this notice to inform all submitters of information under sections 4, 5, 6, and 8 of TSCA that EPA may provide REA access to these CBI materials on a need-to-know basis only. All access to TSCA CBI under this contract will take place at EPA authorized facilities and REA's Chapel Hill, NC facility only.

REA will be authorized access to TSCA CBI at its facility under the EPA "Contractor Requirements for the Control and Security of TSCA Confidential Business Information" security manual. Before access to TSCA CBI is authorized at REA's facility, EPA will approve REA's security plan, perform the required inspection of its facility, and ensure that the facility is in compliance with the manual. Upon completing review of the CBI materials, REA will return all transferred materials to EPA.

Clearance for access to TSCA CBI under this contract may continue until September 30, 1995.

REA personnel will be required to sign nondisclosure agreements and will be briefed on appropriate security procedures before they are permitted access to TSCA CBI.

Dated: November 22, 1991.

Linda A. Travers,

Director, Information Management Division, Office of Toxic Substances.

[FR Doc. 91–29063 Filed 12–3–91; 8:45 am]

BILLING CODE 6560–50–F

[OPTS–140165; FRL–4004–6]

Access to Confidential Business Information by Science Applications International Corporation

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has authorized its contractor, Science Applications International Corporation (SAIC), of Falls Church, Virginia, for access to information which has been submitted to EPA under sections 4, 5, 6, 8, 9, and 21 of the Toxic Substances Control Act (TSCA). Some of the information may be claimed or determined to be confidential business information (CBI).

DATES: Access to the confidential data submitted to EPA will occur no sooner than December 16, 1991.

FOR FURTHER INFORMATION CONTACT: David Kling, Acting Director, TSCA Environmental Assistance Division (TS–799), Office of Toxic Substances, Environmental Protection Agency, rm. E–545, 401 M St., SW., Washington, DC 20460, (202) 554–1404, TDD: (202) 554–0551.

SUPPLEMENTARY INFORMATION: Under contract number 68–D1–0156, contractor SAIC, of 7600–A Leesburg Pike, Falls Church, VA will assist the Office of Toxic Substances (OTS) in providing health, environmental, and pollution prevention assessments.

In accordance with 40 CFR 2.306(j), EPA has determined that under EPA contract number 68–D1–0156, SAIC will require access to CBI submitted to EPA under sections 4, 5, 6, 8, 9, and 21 of TSCA to perform successfully the duties specified under the contract. SAIC personnel will be given access to information submitted to EPA under sections 4, 5, 6, 8, 9, and 21 of TSCA. Some of the information may be claimed or determined to be CBI.

EPA is issuing this notice to inform all submitters of information under sections 4, 5, 6, 8, 9, and 21 of TSCA that EPA may provide SAIC access to these CBI materials on a need-to-know basis only. All access to TSCA CBI under this contract will take place at EPA Headquarters and SAIC's Falls Church facility only.

SAIC will be authorized access to TSCA CBI at its facility under the EPA "Contractor Requirements for the Control and Security of TSCA Confidential Business Information" security manual. Before access to TSCA CBI is authorized at SAIC's facility, EPA will approve SAIC's security plan, perform the required inspection of its

facility, and ensure that the facility is in compliance with the manual. Upon completing review of the CBI materials, SAIC will return all transferred materials to EPA.

Clearance for access to TSCA CBI under this contract may continue until September 30, 1994.

SAIC personnel will be required to sign nondisclosure agreements and will be briefed on appropriate security procedures before they are permitted access to TSCA CBI.

Dated: November 22, 1991.

Linda A. Travers,

Director, Information Management Division, Office of Toxic Substances.

[FR Doc. 91–29064 Filed 12–3–91; 8:45 am]

BILLING CODE 6560–50–F

[OPTS–140166; FRL–4004–7]

Access to Confidential Business Information by Radian Corporation

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has authorized its subcontractor, Radian Corporation (RAD), of Herndon, Virginia, under contract with ABT Associates, Incorporated (ABT), of Cambridge, Massachusetts, for access to information which has been submitted to EPA under sections 4, 5, 6, 8, 9, and 21 of the Toxic Substances Control Act (TSCA). Some of the information may be claimed or determined to be confidential business information (CBI).

DATES: Access to the confidential data submitted to EPA will occur no sooner than December 16, 1991.

FOR FURTHER INFORMATION CONTACT: David Kling, Acting Director, TSCA Environmental Assistance Division (TS–799), Office of Toxic Substances, Environmental Protection Agency, rm. E–545, 401 M St., SW., Washington, DC 20460, (202) 554–1404, TDD: (202) 554–0551.

SUPPLEMENTARY INFORMATION: Under contract number 68–D0–0020, subcontractor RAD, of 2455 Horsepen Rd., Herndon, VA, will assist the Office of Toxic Substances (OTS) in providing health and environmental hazard assessments for EPA regulatory decision making under TSCA.

In accordance with 40 CFR 2.306(j), EPA has determined that under EPA contract number 68–D0–0020, RAD will require access to CBI submitted to EPA under sections 4, 5, 6, 8, 9, and 21 of TSCA to perform successfully the duties specified under the contract. RAD personnel will be given access to information submitted to EPA under sections 4, 5, 6, 8, 9, and 21 of TSCA. Some of the information may be claimed or determined to be CBI.

In a previous notice published in the **Federal Register** of January 11, 1991 (56 FR 1185), ABT was authorized for access to CBI submitted to EPA under sections 4, 5, 6, 8, 9, and 21 of TSCA. EPA is issuing this notice to provide TSCA CBI access under contract number 68–D0–0020 for ABT's subcontractor RAD.

EPA is issuing this notice to inform all submitters of information under sections 4, 5, 6, 8, 9, and 21 of TSCA that EPA may provide RAD access to these CBI materials on a need-to-know basis only. All access to TSCA CBI under this contract will take place at EPA Headquarters and RAD's Herndon, VA facility only.

RAD will be authorized access to TSCA CBI at its facility under the EPA "Contractor Requirements for the Control and Security of TSCA Confidential Business Information" security manual. Before access to TSCA CBI is authorized at RAD's facility, EPA will approve RAD's security plan, perform the required inspection of its facility, and ensure that the facility is in compliance with the manual. Upon completing review of the CBI materials, RAD will return all transferred materials to EPA.

Clearance for access to TSCA CBI under this subcontract may continue until September 30, 1993.

RAD personnel will be required to sign nondisclosure agreements and will be briefed on appropriate security procedures before they are permitted access to TSCA CBI.

Dated: November 22, 1991.

Linda A. Travers,

Director, Information Management Division, Office of Toxic Substances.

[FR Doc. 91–29065 Filed 12–3–91; 8:45 am]

BILLING CODE 6560–50–F

[OPTS–59924; FRL 4006–6]

Certain Chemicals; Premanufacture Notices

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: Section 5(a)(1) of the Toxic Substances Control Act (TSCA) requires any person who intends to manufacture or import a new chemical substance to submit a premanufacture notice (PMN) to EPA at least 90 days before manufacture or import commences. Statutory requirements for section 5(a)(1) premanufacture notices are discussed in the final rule published in the **Federal Register** of May 13, 1983 (48 FR 21722). In the **Federal Register** of November 11, 1984, (49 FR 46066) (40 CFR 723.250), EPA published a rule which granted a limited exemption from certain PMN requirements for certain types of polymers. Notices for such polymers are reviewed by EPA within 21 days of receipt. This notice announces receipt of 11 such PMN(s) and provides a summary of each.

DATES: Close of review periods:

Y 92–53, 92–54, 92–55, 92–56, 92–57, 92–58, 92–59, 92–60, 92–61, 92–62, December 9, 1991.

Y 92–63, December 10, 1991.

FOR FURTHER INFORMATION CONTACT: David Kling, Acting Director, Environmental Assistance Division (TS–799), Office of Toxic Substances, Environmental Protection Agency, rm. E–545, 401 M St., SW., Washington, DC, 20460, (202) 554–1404, TDD (202) 554–0551.

SUPPLEMENTARY INFORMATION: The following notice contains information extracted from the nonconfidential version of the submission provided by the manufacturer on the PMNs received by EPA. The complete nonconfidential document is available in the TSCA Public Docket Office, NE–G004 at the above address between 8 a.m. and noon and 1 p.m. and 4 p.m., Monday through Friday, excluding legal holidays.

Y 92–53

Manufacturer. Confidential.

Chemical. (G) Aqueous acrylic polymer.

Use/Production. (G) Open, nondispersive use. Prod. range: Confidential.

Y 92–54

Manufacturer. Confidential.

Chemical. (G) Aqueous acrylic polymer.

Use/Production. (G) Open, nondispersive use. Prod. range: Confidential.

Y 92–55

Manufacturer. Confidential.

Chemical. (G) Aqueous acrylic polymer.

Use/Production. (G) Open, nondispersive use. Prod. range: Confidential.

Y 92–56

Manufacturer. Confidential.

Chemical. (G) Aqueous acrylic polymer.

Use/Production. (G) Open, nondispersive use. Prod. range: Confidential.

Y 92-57

Manufacturer. Confidential.

Chemical. (G) Aqueous acrylic polymer.

Use/Production. (G) Open, nondispersive use. Prod. range: Confidential.

Y 92-58

Manufacturer. Confidential.

Chemical. (G) Aqueous acrylic polymer.

Use/Production. (G) Open, nondispersive use. Prod. range: Confidential.

Y 92-59

Manufacturer. Confidential.

Chemical. (G) Aqueous acrylic polymer.

Use/Production. (G) Open, nondispersive use. Prod. range: Confidential.

Y 92-60

Manufacturer. Confidential.

Chemical. (G) Aqueous acrylic polymer.

Use/Production. (G) Open, nondispersive use. Prod. range: Confidential.

Y 92-61

Manufacturer. Confidential.

Chemical. (G) Aqueous acrylic polymer.

Use/Production. (G) Open, nondispersive use. Prod. range: Confidential.

Y 92-62

Manufacturer. Confidential.

Chemical. (G) Aqueous acrylic polymer.

Use/Production. (G) Open, nondispersive use. Prod. range: Confidential.

Y 92-63

Manufacturer. Arizona Chemical Company.

Chemical. (G) Phenolic modified rosin ester.

Use/Production. (S) Printing ink resin. Prod. range: Confidential.

Dated: November 27, 1991.

Steven Newburg-Rinn,

Acting Director, Information Management Division, Office of Toxic Substances.

[FR Doc. 91-29066 Filed 12-3-91; 8:45 am]

BILLING CODE 6560-50-F

FEDERAL COMMUNICATIONS COMMISSION

Public Information Collection Requirement Submitted to Office of Management and Budget for Review

November 26, 1991.

The Federal Communications Commission has submitted the following information collection requirement to OMB for review and clearance under the Paperwork Reduction Act of 1980 (44 U.S.C. 3507).

Copies of this submission may be purchased from the Commission's copy contractor, Downtown Copy Center, 1114 21st Street, NW., Washington, DC 20036, (202) 452-1422. For further information on this submission contact Judy Boley, Federal Communications Commission, (202) 632-7513. Persons wishing to comment on this information collection should contact Jonas Neihardt, Office of Management and Budget, room 3235 NEOB, Washington, DC 20503, (202) 395-4814.

OMB Number: 3060-0330.

Title: Part 62—Applications to Hold Interlocking Directorates.

Action: Extension.

Respondents: Individuals or households, businesses or other for-profit (including small businesses).

Frequency of Response: On occasion reporting.

Estimated Annual Burden: 10 responses; 2 hours average burden per response; 20 hours total annual burden.

Needs and Uses: Congress mandated information collection under 47 U.S.C. Section 212 to be conducted by the Federal Communications Commission to monitor the effect of interlocking directorates on the telecommunications industry and to ensure they will not have any anticompetitive impact. Part 62 implements that statute. The information is used by Commission staff to deter anticompetitive practices.

Federal Communication Commission.

William F. Caton,

Acting Secretary.

[FR Doc. 91-29096 Filed 12-3-91; 8:45 am]

BILLING CODE 6712-01-M

[General Docket No. 82-243; DA 91-1422]

Revised Filing Window for Point-to-Multipoint Channels in the 900 MHZ Government/Non-Government Fixed Service

This Public Notice announces a revised filing window and summarizes the application filing process for non-Government point-to-multipoint channels in the 900 MHz Government/non-Government fixed service.[1] Applications for these channels must be filed during the appropriate two-day period designated for each area as specified below. All applications will be treated as being filed at the same time. The proper filing window is based on the state (or other area) where the master/control station's transmitter site is located, regardless of the applicant's mailing address, the location of the applicant's office, or any other factor.

Geographic Division of the U.S. for Filing Purposes

January 7 and 8, 1992	*January 14 and 15, 1992*
Connecticut	Alabama
Delaware	Arkansas
District of Columbia	Florida
Maine	Georgia
Maryland	Louisiana
Massachusetts	Mississippi
New Hampshire	North Carolina
New Jersey	South Carolina
New York	Tennessee
Pennsylvania	
Rhode Island	
Vermont	
Virginia	
West Virginia	

January 21 and 22, 1992	*January 28 and 29, 1992*
Illinois	Colorado
Indiana	Kansas
Iowa	Montana
Kentucky	Nebraska
Michigan	New Mexico
Minnesota	North Dakota
Missouri	Oklahoma
Ohio	South Dakota
Wisconsin	Texas
	Utah
	Wyoming

February 4 and 5, 1992 [2]

Alaska
Arizona
California
Hawaii
Idaho
Nevada
Oregon
Puerto Rico and other outlying U.S. areas
Washington

A list of the 932/941 MHz point-to-multipoint channels is appended to this public notice. The specific filing requirements will vary depending upon the nature of the facilities requested, as described below. Applications received at the official filing locations before or after the appropriate two-day period as

[1] *See Third Report and Order/Memorandum Opinion and Order*, GEN Docket No. 82-243, 6 FCC Rcd 4320 (1991). The specific frequencies that are available for point-to-multipoint use are located at 932-932.5 MHz and 941-941.5 MHz. For convenience, we refer to these frequencies as the 932/941 MHz point-to-multipoint channels.

[2] Federal Government applications will also be filed during this period.

designated above will be dismissed as untimely filed.

Applications Requiring a Fee

Common Carrier Bureau applications must be filed on FCC Form 401 and must comply with all pertinent standards of part 22 of the Commission's Rules. Each individual application must be accompanied by FCC Form 155 with Fee Type Code CMP designated in the appropriate column and a single check made payable to the Federal Communications Commission in the amount of $230 times the fee multiple (number of transmitters). Each individual application must be in a sealed, manila envelope with the following inscription on the face of the envelope: Federal Communications Commission, 932/941 MHz Point-to-Multipoint Channels, Common Carrier Bureau, P.O. Box 358924, Pittsburgh, PA 15251–5924.

Private Radio Bureau applications must be filed on FCC Form 402 and must comply with all pertinent standards of Parts 1 and 94 of the Commission's Rules.[3] FCC Form 155 is not required for these private radio applications. Each individual application must be accompanied by a separate check made payable to the Federal Communications Commission in the amount of $155. Each individual application must be in a sealed, manila envelope with the following inscription on its face: Federal Communications Commission, 932/941 MHz Point-to-Multipoint Channels, Private Radio Bureau, P.O. Box 358675, Pittsburgh, PA 15250–5675.

Applications may be delivered to the Mellon Bank in one of two ways, either walked in or mailed in.

Walk-Ins

Applications may be delivered to One Mellon Bank Center, 500 Grant Street, Pittsburgh, PA 15258, anytime between 12:01 a.m. on Tuesday and 11:59 p.m. on Wednesday during the appropriate filing period. The street entrance to the Window Filing location is on the Grant Street side of the building (across from Oliver Flowers). Signs will be posted in both One Mellon Bank Center and Three Mellon Bank Center indicating the Filing Window location.

The "deliverer" should proceed directly to the street entrance described above and identify himself (herself) as having applications for the 932/941 MHz point-to-multipoint channels filing window.

Caution: One Mellon Bank Center is not the customary address for filing applications requiring a fee. This location has been established to accommodate this filing window. Do not deliver these applications to any other location! These applications will not be accepted at any other facility.

Consistent with Commission procedure, Mellon Bank will provide a single receipt by date stamping any single sheet of paper.

Directions to One Mellon Bank Center

From the Greater Pittsburgh International Airport and Interstate 79:

Proceed east on Parkway (Interstate 279) towards downtown Pittsburgh. Go through the Fort Pitt Tunnels and across the Fort Pitt bridge. Follow signs to Parkway East (Monroeville). Travel approximately ¼ of a mile to the Grant Street exit (Exit 3). Proceed on Grant Street to One Mellon Bank Center. The street address is 500 Grant Street. Enter building at designated area and follow signs.

From Pennsylvania Turnpike:

Take exit 6 (Monroeville) to parkway (Interstate 376). Go west on parkway to the Grant Street exit (Exit 3). Proceed on Grant Street to One Mellon Bank Center. Enter the building at designated area and follow signs.

Parking is available in several parking garages which are within two blocks of One Mellon Bank Center. Chatham Garage is located on Fifth Avenue; and Mellon Square Garage is on Sixth Avenue (across from the Alcoa Building). There is also a loading area located behind One Mellon Bank Center on Ross Street.

Mail-Ins

Filings may be mailed to one of the two lockboxes listed below. Applications must be received on either Tuesday or Wednesday of the appropriate filing window.

For Common Carrier Bureau applications, mail to: Federal Communications Commission, 932/941 MHz Point-to-Multipoint Channels, Common Carrier Bureau, P.O. Box 358924, Pittsburgh, PA 15251–5924.

For Private Radio Bureau applications, mail to: Federal Communications Commission, 932/941 MHz Point-to-Multipoint Channels, Private Radio Bureau, P.O. Box 358675, Pittsburgh, PA 15250–5675.

Questions

Any questions regarding filing fees should be directed to the Fees Hotline at (202) 632–FEES.

Special Note to Private Radio Applicants

We also take this opportunity to correct certain misconceptions that we understand are pervasive regarding the potential use and value of multiple address system (MAS) channels for private radio services.[4] Potential applicants for these channels are urged to be cautious of claims made by application preparers that MAS licensees could realize windfall profits. Private radio MAS channels are not suitable for providing a communications service to a large sector of the general public, such as channels the Commission has allocated for cellular, paging, or specialized mobile radio (SMR) services. Instead, potential users of MAS channels are limited to various types of businesses with specialized communications needs, generally internal to those businesses. For example, utilities employ MAS channels for load management and banks use MAS channels to facilitate electronic funds transfers.

Moreover, it is important to note that many MAS channels, in addition to those that are the subject of this public notice, are currently available for private radio use and can be applied for throughout the country in all but six markets. Completion of an application for an MAS license does not require special skills or qualifications other than a knowledge of the operational and technical specifics of the proposed system and its expected use.

An applicant that is awarded a private radio MAS license must construct at the coordinates specified in the application, place that station in operation within 12 months of the date of license grant, and may not assign the license to another party until these conditions are satisfied. After the closing of each window, major amendments to applications and modifications of licenses for these MAS frequencies, including station location changes, will not be accepted until subsequent windows are opened. Likewise, requests for construction extensions that may be required to accommodate station location changes will be reviewed on a case-by-case basis and be subject to a sufficient justification showing. Finally, we emphasize that our decision to employ a

[3] These applications will automatically have fee type code PEP entered by Mellon Bank for subsequent update of the Commission's automated database.

[4] MAS can be used interchangeably with point-to-multipoint.

lottery leading to the award of licenses for the MAS channels under consideration herein is based solely on reasons of administrative convenience to facilitate the overall licensing process.

Applications Not Requiring a Fee

Common Carrier Bureau applications not requiring a fee (*See* § 1,1112 of the Commission's Rules) must be filed on FCC Form 401 and must comply with all pertinent standards of part 22 of the Commission's Rules. Each individual application must be in a sealed, manila envelope with the following inscription on the face of the envelope: Federal Communications Commission, 932/941 MHz Point-to-Multipoint Channels, Office of the Secretary, room 222, 1919 M Street, NW., Washington, DC 20554.

Applications that are mailed must be received at the above address during the appropriate two-day window. Applications that are hand-delivered must be brought to the above address during the appropriate two-day period anytime between 8 a.m. and 5:30 p.m. Consistent with Commission procedure, the Secretary's Office will provide a single receipt by date stamping any single sheet of paper proffered.

Private Radio Bureau applications not requiring a fee (*See* Section 1.1112 of the Commission's Rules) must be filed on FCC Form 402 and must comply with all pertinent standards of parts 1 and 94 of the Commission's Rules. Each individual application must be in a sealed, manila envelope with the following inscription on the face of the envelope: Federal Communications Commission, 932/941 MHz Point-to-Multipoint Channels, 1270 Fairfield Road, Gettysburg, PA 17325–7245.

Applications that are mailed must be received at the above address during the appropriate two-day window. Applications that are hand-delivered must be brought to the above address during the appropriate two-day period anytime between 8 a.m. and 4:30 p.m. Consistent with Commission procedure, the Bureau will provide a single receipt by date stamping any single sheet of paper proffered.

All Applicants

Remember: Each individual complete application must be in an individual envelope marked as indicated above. If more than one application is being submitted, all applications, properly packaged, may be delivered in one larger, properly addressed container. However, each individual complete application requiring a check must be so accompanied, *i.e.*, two or more applications may not be paid for with a single check.

During the initial filing period applicants may specify a channel preference, but the Commission will treat all channels in these bands as fungible and, together with the National Telecommunications and Information Agency (NTIA), will assign all channels. Applicants for channels in these bands may apply for either a single channel or a paired channel. Requests for a single channel in these bands will be considered to be for a lower power 932 MHz channel unless an area of operation is provided that shows that there are remote stations more than 48 kilometers from the master/control station. A single channel applicant that does not plan to communicate with remotes farther than this distance but that requires a higher power 941 MHz channel must submit a showing with its application to support its request.

Applications that are found acceptable for filing will be assigned a number. A random drawing of the assigned numbers will be conducted in order to rank these applications. To the extent that there are channels available, each applicant will be assigned its channel preference. When this is not possible, or if no channel preference is listed, then the lowest available channel will be assigned. If it is not possible to assign a channel because of prior assignments to higher ranked applicants, then the application will be set aside to be dismissed. This procedure will continue until all applications have either been assigned a channel or set aside to be dismissed.

Applications for these channels, including Government applications filed with the NTIA, will be listed in a Commission public notice as soon as feasible after the filing window closes. Petitions to deny filed against any of these applications must comply with requirements set forth at either § 1.962(g) or § 22.30 of the Commission's Rules, whichever is applicable.

The Commission will issue lists of applications that have been granted as quickly as administratively possible. After all applications have been processed, a further public notice will be issued opening a new filing window for any remaining channels.

The Back-up Filings procedure shall not apply to General Docket No. 82–243. See Establishment of a Fee Collection Program to Implement the Provisions of the Omnibus Budget Reconciliation Act of 1989, Fees II, FCC 91–298, ¶¶ 17–23, Oct. 10, 1991.

APPENDIX: POINT-TO-MULTIPOINT CENTER FREQUENCIES IN MHZ

Transmit (or receive)	Receive (or transmit)
932.00625	941.00625
932.01875	941.01875
932.03125	941.03125
932.04375	941.04375
932.05625	941.05625
932.06875	941.06875
932.08125	941.08125
932.09375	941.09375
932.10625	941.10625
932.11875	941.11875
932.13125	941.13125
932.14375	941.14375
932.15625	941.15625
932.16875	941.16875
932.18125	941.18125
932.19375	941.19375
932.20625	941.20625
932.21875	941.21875
932.23125	941.23125
932.24375	941.24375
932.25625	941.25625
932.26875	941.26875
932.28125	941.28125
932.29375	941.29375
932.30625	941.30625
932.31875	941.31875
932.33125	941.33125
932.34375	941.34375
932.35625	941.35625
932.36875	941.36875
932.38125	941.38125
932.39375	941.39375
932.40625	941.40625
932.41875	941.41875
932.43125	941.43125
932.44375	941.44375
932.45625	941.45625
932.46875	941.46875
932.48125	941.48125
932.49375	941.49375

Federal Communications Commission.

William F. Caton,

Acting Secretary.

[FR Doc. 91–29097 Filed 12–3–91; 8:45 am]

BILLING CODE 6712–01–M

FEDERAL MARITIME COMMISSION

Agreement(s) Filed; Maryland Port Administration et al.

The Federal Maritime Commission hereby gives notice of the filing of the following agreement(s) pursuant to section 5 of the Shipping Act of 1984.

Interested parties may inspect and obtain a copy of each agreement at the Washington, DC Office of the Federal Maritime Commission, 1100 L Street, NW., room 10325. Interested parties may submit comments on each agreement to the Secretary, Federal Maritime Commission, Washington, DC 20573, within 10 days after the date of the **Federal Register** in which this notice appears. The requirements for comments are found in § 572.603 of title 46 of the Code of Federal Regulations.

Interested persons should consult this section before communicating with the Commission regarding a pending agreement.

Agreement No.: 224–200594.

Title: Maryland Port Administration/Transroll/Sealand Marine Terminal Agreement.

Parties:

Maryland Port Administration ("MPA") Transroll/Sealand ("TR/SL").

Synopsis: The Agreement, filed November 22, 1991, provides TR/SL with cranes and a berth 24 hours prior to the arrival of its vessel, the MV GALLANT, at the Dundalk Marine Terminal on or about November 22, 1991. The Agreement is not subject to renewal.

By Order of the Federal Maritime Commission.

Dated: November 29, 1991.

Ronald D. Murphy.

Assistant Secretary.

[FR Doc. 91–29047 Filed 12–3–91; 8:45 am]

BILLING CODE 6730–01–M

Security for the Protection of the Public Financial Responsibility To Meet Liability Incurred for Death or Injury to Passengers or Other Persons on Voyages; Issuance of Certificate (Casualty)

Notice is hereby given that the following have been issued a Certificate of Financial Responsibility to Meet Liability Incurred for Death or Injury to Passengers or Other Persons on Voyages pursuant to the provisions of section 2, Public Law 89–777 (46 U.S.C. 817(d)) and the Federal Maritime Commission's implementing regulations at 46 CFR part 540, as amended:

Cunard Line Limited and Cunard Steam-Ship Company P.L.C., 555 Fifth Avenue, New York, NY 10017.
Vessel: SAGAFJORD.

Dated: November 27, 1991.

Joseph C. Polking,

Secretary.

[FR Doc. 91–29048 Filed 12–3–91; 8:45 am]

BILLING CODE 6730–01–M

Security for the Protection of the Public Financial Responsibility To Meet Liability Incurred for Death or Injury to Passengers or Other Persons on Voyages; Issuance of Certificate (Casualty)

Notice is hereby given that the following have been issued a Certificate of Financial Responsibility to Meet Liability Incurred for Death or Injury to Passengers or Other Persons on Voyages pursuant to the provisions of section 2, Public Law 89–777 (46 U.S.C. 817(d)) and the Federal Maritime Commission's implementing regulations at 46 CFR part 540, as amended:

Hanseatic Tours Reisebedingungen, Renaissance Cruises, Inc., Nuove Armamento Sud di Navigazoine s.r.l., and Nuove Iniziative Armatoriali s.r.l., 1800 Eller Drive, Suite 300, Fort Lauderdale, Florida 33335–0307
Vessel: Hanseatic Renaissance (Renaissance V)

Dated: November 27, 1991.

Joseph C. Polking,

Secretary.

[FR Doc. 91–28986 Filed 12–3–91; 8:45 am]

BILLING CODE 6730–01–M

FEDERAL RESERVE SYSTEM

Agency Forms Under Review

November 27, 1991.

Background

Notice is hereby given of the submission of proposed information collection(s) to the Office of Management and Budget (OMB) for its review and approval under the Paperwork Reduction Act (Title 44 U.S.C. chapter 35) and under OMB regulations on Controlling Paperwork Burdens on the Public (5 CFR part 1320). A copy of the proposed information collection(s) and supporting documents is available from the agency clearance officer listed in the notice. Any comments on the proposal should be sent to the agency clearance officer and to the OMB desk officer listed in the notice.

DATE: Comments on this proposed revision to information collection are welcome and should be submitted on or before January 15, 1992.

FOR FURTHER INFORMATION CONTACT:

Federal Reserve Board Clearance Officer—Frederick J. Schroeder—Division of Research and Statistics, Board of Governors of the Federal Reserve System, Washington, DC 20551 (202–452–3829)

OMB Desk Officer—Gary Waxman—Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, room 3208, Washington, DC 20503 (202–395–3740)

Request for OMB approval to extend, without revision, the following report(s):

1. *Report title:* Country Exposure Report.
Agency form number: FFIEC 009.
OMB Docket number: 7100–0035.
Frequency: Quarterly.
Reporters: State member banks and bank holding companies that have a foreign office or subsidiary, International Banking Facility or Edge or Agreement subsidiary.
Annual reporting hours: 3,456.
Estimated average hours per response: 24.
Number of respondents: 36.
Small businesses are not affected.
General description of report: This information collection is mandatory [12 U.S.C. 248(a), 1844(c), and 3906] and is given confidential treatment [5 U.S.C. 552 (b)(4) and (b)(8)].

This interagency report collects information on international claims of U.S. banks and bank holding companies that is used for supervisory and analytical purposes. The information is used to monitor country exposure of banks to determine the degree of risk in their portfolios and the possible impact on U.S. banks of adverse developments in particular countries.

2. *Report title:* Country Exposure Information Report.
Agency form number: FFIEC 009a.
OMB Docket number: 7100–0035.
Frequency: Quarterly.
Reporters: State member banks and bank holding companies.
Annual reporting hours: 520.
Estimated average hours per response: 5.
Number of respondents: 26.
Small businesses are not affected.
General description of report: This information collection is mandatory [12 U.S.C. 248(a), 1844(c), and 3906]. The information is available to the public.

This report is a supplement to the Country Exposure Report (FFIEC 009) and provides publicly available information on material foreign country exposures (all exposures to a country in excess of one percent of total assets or 20 percent of capital, whichever is less) of U.S. banks and bank holding companies that file the FFIEC 009 report. Reporting institutions must also furnish a list of countries in which they have lending exposures above .75 percent of total assets or 15 percent of total capital, whichever is less.

Board of Governors of the Federal Reserve System, November 27, 1991.

William W. Wiles,

Secretary of the Board.

[FR Doc. 91–29041 Filed 12–3–91; 8:45 am]

BILLING CODE 6210–01–M

CVB Financial Corp.; Notice of Application to Engage de novo in Permissible Nonbanking Activities

The company listed in this notice has filed an application under § 225.23(a)(1) of the Board's Regulation Y (12 CFR 225.23(a)(1)) for the Board's approval under section 4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1843(c)(8)) and § 225.21(a) of Regulation Y (12 CFR 225.21(a)) to commence or to engage *de novo*, either directly or through a subsidiary, in a nonbanking activity that is listed in § 225.25 of Regulation Y as closely related to banking and permissible for bank holding companies. Unless otherwise noted, such activities will be conducted throughout the United States.

The application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether consummation of the proposal can "reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices." Any request for a hearing on this question must be accompanied by a statement of the reasons a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute, summarizing the evidence that would be presented at a hearing, and indicating how the party commenting would be aggrieved by approval of the proposal.

Comments regarding the application must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than December 26, 1991.

A. Federal Reserve Bank of San Francisco (Kenneth R. Binning, Director, Bank Holding Company) 101 Market Street, San Francisco, California 94105:

1. CVB Financial Corp., Ontario, California; to engage *de novo* through its subsidiary, Premier Results, Inc., Anaheim, California, in data processing activities pursuant to § 225.25(b)(7) of the Board's Regulation Y.

Board of Governors of the Federal Reserve System, November 27, 1991.

William W. Wiles,

Secretary of the Board.

[FR Doc. 91-29040 Filed 12-3-91; 8:45 am]

BILLING CODE 6210-01-F

Phenix-Girard Bancshares, Inc., et al.; Formations of; Acquisitions by; and Mergers of Bank Holding Companies

The companies listed in this notice have applied for the Board's approval under section 3 of the Bank Holding Company Act (12 U.S.C. 1842) and § 225.14 of the Board's Regulation Y (12 CFR 225.14) to become a bank holding company or to acquire a bank or bank holding company. The factors that are considered in acting on the applications are set forth in section 3(c) of the Act (12 U.S.C. 1842(c)).

Each application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank or to the offices of the Board of Governors. Any comment on an application that requests a hearing must include a statement of why a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute and summarizing the evidence that would be presented at a hearing.

Unless otherwise noted, comments regarding each of these applications must be received not later than December 26, 1991.

A. Federal Reserve Bank of Atlanta (Robert E. Heck, Vice President) 104 Marietta Street, NW., Atlanta, Georgia 30303:

1. Phenix-Girard Bancshares, Inc., Phenix City, Alabama; to become a bank holding company by acquiring 100 percent of the voting shares of Phenix-Girard Bank, Phenix City, Alabama.

B. Federal Reserve Bank of Chicago (David S. Epstein, Vice President) 230 South LaSalle Street, Chicago, Illinois 60690:

1. Capitol Bancorp Ltd., Lansing, Michigan; to acquire 100 percent of the voting shares of Oakland Commerce Bank, proposed successor to United Savings Bank, Lansing, Michigan.

2. Northwest Financial Corp., Spencer, Iowa; to become a bank holding company by acquiring 100 percent of the voting shares of Conover Bancorporation, Creston, Iowa, and thereby indirectly acquire The First National Bank in Creston, Creston, Iowa.

C. Federal Reserve Bank of Dallas (W. Arthur Tribble, Vice President) 400 South Akard Street, Dallas, Texas 75222:

1. Peoples National Holdings, Inc., Wilmington, Delaware; to become a bank holding company by acquiring 83.7 percent of the voting shares of Peoples National Bank, McKinney, Texas.

Board of Governors of the Federal Reserve System, November 27, 1991.

William W. Wiles,

Secretary of the Board.

[FR Doc. 91-29039 Filed 12-3-91; 8:45 am]

BILLING CODE 6210-01-F

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[WO-610-02-4111-16]

Information Collection Submitted to the Office of Management and Budget for Review Under the Paperwork Reduction Act

The proposal for the collection of information listed below has been submitted to the Office of Management and Budget for approval under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35). Copies of the proposed collections of information and related forms may be obtained by contacting the Bureau's Clearance Officer at the phone number listed below. Comments and suggestions on the requirements should be made directly to the Bureau Clearance Officer and to the Office of Management and Budget, Paperwork Reduction Project (1004–0137), Washington, DC 20503, telephone 202–395–7340.

Title: Well Completion Report and Log, 43 CFR part 3160.

OMB Approval Number: 1004–0137.

Abstract: Data submitted by oil and gas operators is used for agency approval of specific additional operations on a well and to report the completion of such additional work.

Bureau Form Number: 3160–4.

Frequency: Non-recurring.

Description of respondents: Oil and gas operators.

Estimated Completion time: 60 minutes.

Annual responses: 2,200.

Annual Burden Hours: 2,290.

Bureau Clearance Officer (Alternate): Gerri Jenkins 202–653–6105.

Dated: October 16, 1991.

Hillary Oden,

Assistant Director, Energy and Mineral Resources.

[FR Doc. 91–29051 Filed 12–3–91; 8:45 am]

BILLING CODE 4310–84–M

[WO–610–02–4111–16]

Information Collection Submitted to the Office of Management and Budget for Review Under the Paperwork Reduction Act

The proposal for the collection of information listed below has been submitted to the Office of Management and Budget for approval under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35). Copies of the proposed collections of information and related forms may be obtained by contacting the Bureau's Clearance Officer at the phone number listed below. Comments and suggestions on the requirements should be made directly to the Bureau Clearance Officer and to the Office of Management and Budget, Paperwork Reduction Project (1004–0136), Washington, DC 20503, telephone 202–395–7340.

Title: Application for Permit for Drill, Deepen, or Plug Back, 43 CFR part 3160.

OMB Approval Number: 1004–0136.

Abstract: Data submitted by oil and gas operators is used for agency approval of proposed drilling operations through review of technical and environmental factors.

Bureau Form Number: 3160–3.

Frequency: On occasion.

Description of Respondents: Oil and gas operators.

Estimated Completion time: 30 minutes.

Annual Responses: 4,000.

Annual Burden Hours: 2,222.

Bureau Clearance Officer (Alternate): Gerri Jenkins 202–653–6105.

Dated: October 16, 1991.

Hillary Oden,

Assistant Director, Energy and Mineral Resources.

[FR Doc. 91–29052 Filed 12–3–91; 8:45 am]

BILLING CODE 4310–84–M

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–330]

Computer System State Save/Restore Software; Commission Determination Not To Review an Initial Determination Granting a Motion To Amend the Complaint and Notice of Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined not to review an initial determination (ID) issued by the presiding administrative law judge (ALJ) in the above-captioned investigation granting a motion to amend the complaint and notice of investigation to add allegations of infringement of an additional patent claim.

ADDRESSES: Copies of the ID and all other nonconfidential documents filed in connection with this investigation are available for public 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 202–205–1000.

FOR FURTHER INFORMATION CONTACT: Daniel Hopen, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone 202–205–3108.

Hearing-impaired individuals are advised that information about this matter can be obtained by contacting the Commission's TDD terminal, 202–205–1810

SUPPLEMENTARY INFORMATION: On September 30, 1991, complainant Universal Vectors Corporation (UVC) filed a motion to amend the complaint and notice of investigation to add allegations of infringement of claim 12 of the patent in controversy, U.S. Letters Patent 4,763,333. The motion was opposed by respondents and supported by the Commission investigative attorney. On October 29, 1991, the presiding ALJ issued an ID (Order No. 5) granting the motion. No petitions for review of the ID or agency comments were received.

This action is taken under the authority of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) and section 210.53 of the Commission's Interim Rules of Practice and Procedure (19 CFR 210.53).

Issued: November 26, 1991.

By Order of the Commission.

Kenneth R. Mason,

Secretary.

[FR Doc. 91–29079 Filed 12–3–91; 8:45 am]

BILLING CODE 7020–02–M

[Investigations Nos. 303–TA–21 (Final) and 731–TA–519 (Final)]

Gray Portland Cement and Cement Clinker From Venezuela

AGENCY: United States International Trade Commission.

ACTION: Institution and scheduling of a final antidumping investigation and scheduling of the ongoing countervailing duty investigation.

SUMMARY: The Commission hereby gives notice of the institution of final antidumping investigation No. 731–TA–519 (Final) under section 735(b) of the Tariff Act of 1930 (19 U.S.C. 1673d(b)) (the act) to determine whether an industry in the United States is materially injured, or is threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports from Venezuela of gray portland cement and cement clinker, provided for in subheadings 2523.29.00 and 2523.10.00 of the Harmonized Tariff Schedule of the United States. The Commission also gives notice of the schedule to be followed in this antidumping investigation and the ongoing countervailing duty investigation regarding imports of gray portland cement and cement clinker from Venezuela (inv. No. 303–TA–21 (Final)). The schedules for the subject investigations will be identical, pursuant to Commerce's alignment of its final subsidy and dumping determinations (56 FR 43907, September 5, 1991).

For further information concerning the conduct of these investigations, hearing procedures, and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts A and C (19 CFR part 207).

EFFECTIVE DATE: November 4, 1991.

FOR FURTHER INFORMATION CONTACT: Debra Baker (202–205–3180), Office of Investigations, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission

should contact the Office of the Secretary at 202–205–2000.

SUPPLEMENTARY INFORMATION:

Background

The subject antidumping investigation is being instituted as a result of an affirmative preliminary determination by the Department of Commerce that imports of gray portland cement and cement clinker from Venezuela are being sold in the United States at less than fair value within the meaning of section 733 of the act (19 U.S.C. 1673b). The Commission instituted the subject countervailing duty investigation effective August 19, 1991 (56 FR 47225, September 18, 1991). Both investigations were requested in a petition filed on May 21, 1991, by counsel for the Ad Hoc Committee of Florida Producers of Gray Portland Cement, Washington, DC.

Participation in the Investigations and Public Service List

Any person having already filed an entry of appearance in the countervailing duty investigation is considered a party in the antidumping investigation. Any other persons wishing to participate in the investigations as parties must file an entry of appearance with the Secretary to the Commission, as provided in § 201.11 of the Commission's rules, not later than twenty-one (21) days after publication of this notice in the **Federal Register**. The Secretary will prepare a public service list containing the names and addresses of all persons, or their representatives, who are parties to the investigations upon the expiration of the period for filing entries of appearance.

Limited Disclosure of Business Proprietary Information (BPI) Under an Administrative Protective Order (APO) and BPI Service List

Pursuant to § 207.7(a) of the Commission's rules, the Secretary will make BPI gathered in these final investigations available to authorized applicants under the APO issued in the investigations, provided that the application is made not later than twenty-one (21) days after the publication of this notice in the **Federal Register**. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Staff Report

The prehearing staff report in these investigations will be placed in the nonpublic record on March 6, 1992, and a public version will be issued thereafter, pursuant to § 207.21 of the Commission's rules.

Hearing

The Commission will hold a hearing in connection with these investigations beginning at 9:30 a.m. on March 24, 1992, at the U.S. International Trade Commission Building. Requests to appear at the hearing should be filed in writing with the Secretary to the Commission on or before March 16, 1992. A nonparty who has testimony that may aid the Commission's deliberations may request permission to present a short statement at the hearing. All parties and nonparties desiring to appear at the hearing and make oral presentations should attend a prehearing conference to be held at 9:30 a.m. on March 19, 1992, at the U.S. International Trade Commission Building. Oral testimony and written materials to be submitted at the public hearing are governed by §§ 201.6(b)(2), 201.13(f), and 207.23(b) of the Commission's rules.

Written Submissions

Each party is encouraged to submit a prehearing brief to the Commission. Prehearing briefs must conform with the provisions of § 207.22 of the Commission's rules; the deadline for filing is March 17, 1992. Parties may also file written testimony in connection with their presentation at the hearing, as provided in § 207.23(b) of the Commission's rules, and posthearing briefs, which must conform with the provisions of § 207.24 of the Commission's rules. The deadline for filing posthearing briefs is April 1, 1992; witness testimony must be filed no later than three (3) days before the hearing. In addition, any person who has not entered an appearance as a party to the investigations may submit a written statement of information pertinent to the subject of the investigations on or before April 1, 1992. All written submissions must conform with the provisions of § 201.8 of the Commission's rules; any submissions that contain BPI must also conform with the requirements of §§ 201.6, 207.3, and 207.7 of the Commission's rules.

In accordance with §§ 201.16(c) and 207.3 of the rules, each document filed by a party to the investigations must be served on all other parties to the investigations (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

Authority: These investigations are being conducted under authority of the Tariff Act of 1930, title VII. This notice is published pursuant to section § 207.20 of the Commission's rules.

Issued: November 22, 1991.

By order of the Commission.

Kenneth R. Mason,

Secretary.

[FR Doc. 91–29080 Filed 12–3–91; 8:45 am]

BILLING CODE 7020–02–M

[Investigation No. 731–TA–517 (Final)]

Refined Antimony Trioxide From the People's Republic of China

AGENCY: United States International Trade Commission.

ACTION: Revised schedule for the subject investigation.

EFFECTIVE DATE: November 6, 1991.

FOR FURTHER INFORMATION CONTACT: Brad Hudgens (202–205–3189), Office of Investigations, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000.

SUPPLEMENTARY INFORMATION: On October 23, 1991, the Commission instituted the subject investigation and established a schedule for its conduct (56 FR 54887). Subsequently, the Department of Commerce extended the date for its final determination in the investigation from December 16, 1991, to February 21, 1992 (56 FR 56631). The Commission, therefore, is revising its schedule in the investigation to conform with Commerce's new schedule.

The Commission's new schedule for the investigation is as follows: requests to appear at the hearing must be filed with the Secretary to the Commission not later than February 19, 1992; the prehearing conference will be held at the U.S. International Trade Commission Building on February 20, 1992; the prehearing staff report will be placed in the nonpublic record on February 10, 1992; the deadline for filing prehearing briefs is February 21, 1991; the hearing will be held at the U.S. International Trade Commission Building on February 25, 1991; and the deadline for filing posthearing briefs is March 4, 1992.

For further information concerning this investigation see the Commission's notice of investigation cited above and the Commission's Rules of Practice and Procedure, part 201, subparts A through

E (19 CFR part 201), and part 207, subparts A and C (19 CFR part 207).

Authority: This investigation is being conducted under authority of the Tariff Act of 1930, title VII. This notice is published pursuant to § 207.20 of the Commission's rules.

Issued: November 26, 1991.

By order of the Commission.

Kenneth R. Mason,

Secretary.

[FR Doc. 91-29081 Filed 12-3-91; 8:45 am]

BILLING CODE 7020-02-M

[Investigation No. 337-TA-320]

Rotary Printing Apparatus; Commission Decision Designating the Investigation More Complicated

In the Matter of: Certain Rotary Printing Apparatus Using Heated Ink Composition, Components Thereof and Systems Containing Said Apparatus and Components.

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to designate the above-captioned investigation "more complicated" and to extend the administrative deadline for completion of the investigation by two months, *i.e.*, from November 29, 1991, to January 29, 1992.

ADDRESSES: Copies of 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 202-205-2000.

FOR FURTHER INFORMATION CONTACT: Wayne Herrington, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone 202-205-3092.

Hearing-impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202-205-1810.

SUPPLEMENTARY INFORMATION: On August 28, 1991, the presiding administrative law judge (ALJ) issued an ID finding a violation of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) in the subject investigation. Petitions for review of the ID were filed by complainant Markem Corporation and by the respondents. Previously, after the close of the evidentiary hearing, the ALJ issued Order No. 5 permitting the parties to substitute photographs for certain physical exhibits.

On October 15, 1991, the Commission issued notice of its decision to review the ID in its entirety and to recall the physical exhibits for which photographs had been substituted pursuant to ALJ Order No. 5.

Because the recalled physical exhibits have only recently become available to the Commission, and because of the extent of the review involved, the commission has determined to designate this investigation "more complicated."

This action is taken under the authority of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) and § 210.59(a) of the Commission's Interim Rules of Practice and Procedure (19 CFR 210.59(a)(1991)).

Issued: November 26, 1991.

By order of the Commission.

Kenneth R. Mason,

Secretary.

[FR Doc. 91-29082 Filed 12-3-91; 8:45 am]

BILLING CODE 7020-02-M

[Investigation No. 337-TA-329]

Certain Vacuum Cleaners; Commission Determination Not To Review an Initial Determination Terminating the Investigation on the Basis of a Settlement Agreement

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined not to review the presiding administrative law judge's (ALJ) initial determination (ID) (Order No. 7) in the above-captioned investigation terminating the investigation on the basis of a settlement agreement.

FOR FURTHER INFORMATION CONTACT: Robin L. Turner, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone 202-205-3103.

SUPPLEMENTARY INFORMATION: On October 1, 1991, complainants Amway Corporation and Bissell, Incorporated, and respondent Iona Appliances, Inc. filed a joint motion to terminate this investigation on the basis of a settlement agreement. The motion was supported by the Commission investigative attorney. On November 7, 1991, the presiding ALJ issued an ID (Order No. 7) terminating the investigation on the basis of the settlement agreement. No petitions for review, or government agency or public comments were filed.

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and § 210.53 of the Commission's Interim Rules of Practice and Procedure (19 CFR 210.53).

Copies of the nonconfidential version of the ID 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 202-205-2000. Hearing-impaired persons are advised that information on the matter can be obtained by contacting the Commission's TDD terminal on 202-205-1810.

Issued: November 26, 1991.

By order of the Commission.

Kenneth R. Mason,

Secretary.

[FR Doc. 91-29083 Filed 12-3-91; 8:45 am]

BILLING CODE 7020-02-M

NATIONAL INDIAN GAMING COMMISSION

Fee Rates

AGENCY: National Indian Gaming Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given, pursuant to 25 CFR 514.1 (a)(3), that the National Indian Gaming Commission has adopted a final annual fee rate of 1% for calendar year 1991. The rate shall apply to all assessable gross revenues (tier 1 and tier 2) from each class II gaming operation regulated by the Commission.

FOR FURTHER INFORMATION CONTACT: Fred W. Stuckwisch, National Indian Gaming Commission, 1850 M Street,

NW., suite 250, Washington, DC 20036; telephone 202/632-7003; fax 202/632-7066 (these are not toll-free numbers).

SUPPLEMENTARY INFORMATION: The Indian Gaming Regulatory Act established the National Indian Gaming Commission which is charged with, among other things, regulating Class II gaming on Indian lands.

The regulations of the Commission (25 CFR part 500) provide for a system of fee assessment and payment that is self-administered by the Class II gaming operations. Pursuant to those regulations, the Commission is required to adopt and communicate assessment rates; the gaming operations are required to apply those rates to their revenues, compute the fees to be paid, and report and remit the fees to the Commission on a quarterly basis.

The regulations of the Commission and this rate are effective for the second half of calendar year 1991. Therefore, all Class II gaming operations within the jurisdiction of the Commission are required to self-administer the provisions of these regulations and report and pay any fees that are due to the Commission before the end of the fourth quarter of 1991 (December 31).

Example: Where a gaming operation's 1990 assessable gross revenues were $5,000,000 and the operation has already remitted fees of $12,500, the amounts to be used and the computations to be made are as follows:

1990 assessable gross revenues	$5,000,000
Annual fee rate	1%
Annualized fees	50,000
Multiply by fraction of the year	1/2
Fees for 1991	25,000
Deduct amount already remitted	12,500
Amount to be remitted	$12,500

See 25 CFR 514.1 (**Federal Register** of August 15, 1991, 56 FR 40702).

Dated: November 27, 1991.

Anthony J. Hope,

Chairman, National Indian Gaming Commission.

[FR Doc. 91-29037 Filed 12-3-91; 8:45 am]

BILLING CODE 7565-01-M

NUCLEAR REGULATORY COMMISSION

ACNW Working Group on Concerns Related to Seismic and Faulting Investigations for Characterization of an HLW Site; Meeting

The ACNW Working Group on Concerns Related to Seismic and Faulting Investigations for Characterization of an HLW Site will hold a meeting on December 17, 1991, room P-110, 7920 Norfolk Avenue, Bethesda, Maryland. The entire meeting will be open to public attendance.

The agenda for the subject meeting shall be as follows: *Tuesday, December 17, 1991—8:30 a.m. until the conclusion of business.*

The working Group will hear the current thinking by DOE, the State of Nevada, American Society of Civil Engineers, and other interested parties regarding concerns related to seismic and faulting investigations of a high-level waste site. The NRC staff will present responses to comments from DOE, State of Nevada, and other interested parties on the staff's Technical Position on the "The Identification of Fault Displacement and Seismic Hazards at a Geologic Repository."

Oral statements may be presented by members of the public with the concurrence of the ACNW Working Group Chairman; written statements will be accepted and made available to the Working Group. Recordings will be permitted only during those sessions of the meeting when a transcript is being kept, and questions may be asked only by members of the ACNW Working Group, their consultants, and staff. Persons desiring to make oral statements should notify the ACNW staff member named below as far in advance as is practicable so that appropriate arrangements can be made.

During the initial portion of the meeting, the ACNW Working Group, along with any of their consultants who may be present, may exchange preliminary views regarding matters to be considered during the balance of the meeting.

Further information regarding the agenda for this meeting, whether the meeting has been cancelled or rescheduled, the Chairman's ruling on requests for the opportunity to present oral statements and the time allotted therefor can be obtained by a prepaid telephone call to the Designated Federal Official, Ms. Charlotte E. Abrams, ACNW (telephone 301/492-8371) between 8 a.m. and 5:30 p.m. Persons planning to attend this meeting are urged to contact the above named individual one or two days before the scheduled meeting to be advised of any changes in schedule, etc., that may have occurred.

Dated November 27, 1991.

R. K. Major,

Chief, Nuclear Waste Branch.

[FR Doc. 91-29095 Filed 12-3-91; 8:45 am]

BILLING CODE 7590-01-M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-29992; File Nos. SR-AMEX-91-14 and SR-CBOE-91-17]

Self-Regulatory Organizations; American Stock Exchange, Inc., and the Chicago Board Options Exchange, Inc.; Order Approving Proposed Rule Change and Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change Relating to Pilot Programs Involving Debit Put Spreads in Broad-Based Stock Index Options with European-Style Exercise

November 26, 1991.

I. Introduction

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"), 15 U.S.C. 78s(b)(1), and rule 19b-4 thereunder,[1] the Chicago Board Options Exchange, Inc. ("CBOE") and the American Stock Exchange, Inc. ("Amex") (collectively, "the Exchanges") filed with the Securities and Exchange Commission ("Commission") proposed rule changes to implement one-year pilot programs allowing approved public customers with qualified portfolios to effect and maintain in cash accounts debit put spread transactions in broad-based index options with European-style exercise. The Exchanges' proposals define a debit put spread as a long put position coupled with a short put position overlying the same broad-based index and having an equivalent underlying aggregate index value, where the short put(s) expires with the long put(s), and the strike price of the long put(s) equals or exceeds the strike price of the short put(s).

The CBOE proposal was published for comment in Securities Exchange Act Release No. 29268 (June 3, 1991), 56 FR 26702. No comments were received on the proposed rule change.[2]

[1] 17 CFR 240.19b-4 (1990).

[2] On July 29, 1991, the CBOE amended its proposal by adding language which provides that debit put spreads will be permitted only to the extent that the underlying value of the option position does not exceed the unhedged value of the "qualified portfolio." The unhedged value of the portfolio is calculated by subtracting from the total value of the net long positions for each of the stocks in the portfolio or their equivalents the value of (a) any opposite side of the market calls and puts in broadbased index options, (b) any opposite side of the market positions in stock index futures, and (c) any economically equivalent opposite side of the market positions in stock index options or options on stock index futures. The amendment also provides that calendar debit put spreads are not included within the pilot program. On August 15, 1991, the CBOE amended its filing again to provide that short stock positions can not be used as a basis for a "qualified portfolio" under the pilot program. *See* letter from Robert P. Ackermann, Vice President, Legal Services, CBOE, to Howard Kramer, Assistant Director, Division of Market Regulation ("Division"), SEC, dated August 9, 1991. On November 21, 1991, the CBOE amended its

Continued

On July 3, 1991, the Amex submitted an identical proposal to the Commission. The Commission today solicits comments on the Amex proposal from interested persons.[3]

II. Description of the Proposal

Currently, § 220.8 of Regulation T under the Act precludes customers from effecting spread transactions in cash accounts. Specifically, § 220.8(a)(3)(ii) of Regulation T includes in permissible cash account transactions a creditor's issue, endorsement or guarantee of a short put option for a customer if the creditor obtains cash in an amount equal to the exercise price of the option or holds in the account any of the following instruments with a current market value at least equal to the exercise price of the option and with one year or less to maturity: Securities issued or guaranteed by the United States or its agencies, negotiable bank certificates of deposit, or bankers acceptances issued by a banking institution in the United States and payable in the United States. Because offsetting long put options fail to satisfy these criteria, spreads are not included in permissible cash account transactions and, therefore, must be effected in margin accounts only.

The Exchanges represent, however, that several money managers have expressed an interest in effecting debit put spreads as a means to better hedge their long stock portfolios, but that they are currently constrained from doing so because they cannot effect spread transactions in a cash account. Many money managers are prohibited from maintaining a margin account with a broker-dealer. More specifically, the money managers represent that, rather than exclusively using long puts in conjunction with their covered index writing strategies (which can be done in a cash account), they also would like the option of using a debit put spread.[4]

Accordingly, the Exchanges have developed the proposed pilot programs which will allow investors to effect and maintain in cash accounts debit put spreads in broad-based stock index options with European-style exercise. Under the terms of the pilots, only public customers approved by the CBOE or the Amex will be permitted to participate in the pilot program.[5] To obtain an Exchange's approval, public customers will be required, among other things, to hold a "qualified" stock portfolio, or its equivalent, that is composed of net long positions in common stocks in at least four industry groups and that contains at least twenty stocks, none of which accounts for more than fifteen percent of the value of the portfolio. A portfolio must meet these standards at all times, regardless of trading activity in the stocks.

In addition, among other things, the debit put spread positions must be carried in an account with an Exchange member organization and the qualified portfolio must be maintained with either an Exchange member organization, another broker-dealer, a bank, or a securities depository. After the program has been in effect for nine months, the CBOE will provide the Commission with a report describing the types of public customers using the exemption, the specific index classes used, the size of positions taken, the margin account restrictions of exemption users, and expiration events. Finally, after nine months of operation, the CBOE and the Amex will each submit a written report to the Commission assessing the effectiveness of their respective pilot programs.

In conjunction with the creation of the pilot programs, the Commission staff also has issued no action letters to the Exchanges stating that the staff would not recommend enforcement action against the Exchanges or their members due to the operation of the pilot programs, namely the maintenance of spread positions in a cash account.[6] The staff of the Board of Governors of the Federal Reserve System ("Board") also informed the Commission staff that Board staff would not object if the Commission staff were to issue these no-action positions in connection with the pilot programs.[7]

III. Commission Findings

The Commission finds that the proposed rule changes are consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange, and, in particular, the requirements of section 6.[8] Specifically, the proposals will benefit public customers[9] who currently are prohibited or restricted in their use of margin accounts by facilitating their purchase of index option debit put spreads. Index option put spreads provide investors with an affordable means to hedge their portfolios against adverse market moves. In this regard, the cost of a debit put spread transaction is lower in comparison to the purchase of a put because the options premium received from selling the put is used to offset the purchase of the long put.[10]

In addition, to the extent that the pilot program increases index options transactions, the program will benefit all options investors by contributing to the depth and liquidity of the Exchanges' options markets. Specifically, the Commission notes that for a variety of reasons public customers generally are not "natural" writers of put options on stock indexes. First, among other

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proposal to provide that the pilot program will commence on the date of the Commission's order approving the pilot and will expire one year later. *See* letter from Nancy R. Crossman, General Counsel, CBOE, to Howard Kramer, Assistant Director, Division, SEC, dated November 21, 1991 ("November 21 Letter"). Because these amendments are technical in nature they have not been separately published for comment. In addition, the Commission today is soliciting comments on the Amex's proposal which is identical to the CBOE's as amended.

[3] On September 16, 1991, the Amex amended its filing so that it is identical to the CBOE's as amended. *See supra* note 2 for a description of the CBOE's amendments. On November 25, 1991, the Amex amended its proposal to define public customer for the purposes of the pilot program as "a customer who is not a member nor a non-member broker/dealer." *See* letter from Ellen T. Kander, Special Counsel, Options Division, Amex, to Thomas Gira, Branch Chief, Options Regulation, SEC, dated November 25, 1991.

[4] In an index covered write strategy, an investor owns a portfolio of stock and writes stock index call options against it. The short call option offsets declines in the value of the portfolio up to the value of the premium received for the call; however, the short call also limits the investor's upside profit potential if the market rises. With this position, however, the investor is still exposed to significant risk of loss if the value of the index decreases more than the value of the premium received for the short call. Accordingly, in order to offset this downside risk, investors will sometimes purchase a put option to protect themselves. Some money managers also believe that a debit put spread could provide an even better hedge. By using a debit put spread instead of a long put to hedge its market exposure, the investor is able to apply the premium received from the short put to offset the price of the long put.

[5] The CBOE amended its proposal to define a public customer as a customer whose orders are eligible to be placed on a CBOE limit order book under Exchange Rule 7.4(a). *See* November 21 Letter, *supra* note 2. Specifically, CBOE rule 7.4(a) provides that "No member shall place, or permit to be placed, an order with a Board Broker or Order Book Official for an account in which such member, any other member, any non-member joint venture participant, or any non-member broker/dealer has an interest."

[6] *See* letter from Howard L. Kramer, Assistant Director, Division of Market Regulation ("Division"), SEC, to Mary L. Bender, First Vice President, Division of Regulatory Services, CBOE, dated November 25, 1991, and letter from Howard L. Kramer, Assistant Director, Division, SEC, to James M. McNeil, Assistant Vice President, Chief Examiner, Amex, dated November 25, 1991.

[7] *See* letter from Laura Homer, Securities Credit Officer, Board, to Howard L. Kramer, Assistant Director, Division of Market Regulation, SEC, dated July 12, 1991.

[8] 15 U.S.C. 78f (1982).

[9] *See supra* notes 3 and 5 for a description of the term "public customer" for purposes of the debit put spread program.

[10] At the same time, the total amount of portfolio protection provided by a put spread is less than provided by a long put.

reasons, public customers generally hold long stock positions and, therefore, seek to hedge downward price movements. Accordingly, to obtain their hedges, public customers will either buy put options or sell call options. Second, to the extent that a public customer seeks to hedge against an upward price movement or establish a bullish speculative position, the public customer most likely would buy a call option rather than sell a put option because his participation in the upward movement of the market would be unlimited if he is long a call option, whereas it is limited to the value of the options premium received if he is short a put option. Third, short options positions expose investors to unlimited risks. Moreover, by facilitating the creation of hedged positions for public customers over a broad range of market movements, the pilot programs could reduce the need for public customers to liquidate positions during turbulent market conditions (further exacerbating the market's volatility).

In addition, the Commission believes that the economic characteristics of a debit put spread in broad-based stock index options with European-style exercise warrant different treatment than other debit put spreads. In the debit put spreads included within the pilot program, the long put entitles an investor to receive payment when the relevant stock index declines below the put option's strike price. Because the strike price of the long put must equal or exceed the strike price of the short put, the investor's right to receive payment under the long put at all times will offset any obligations he incurs from the sale of the short put. Similarly, because the short position must expire with the long position, the offset provided by the long put will last for the duration of the investor's obligation as a short put writer. In addition, there is no risk that the short put will be exercised prior to the long put because the exemption applies solely to European-style options, which may be exercised only on their expiration date.

Finally, the Commission notes that after the pilot programs have been in operation for nine months, the Exchanges each will submit to the Commission a written report assessing the effectiveness of their respective pilot program. The Commission expects that the reports will evaluate the effectiveness and usefulness of the program to public customers, the types of public customers participating in the pilot, the specific index classes used, the size of positions taken, and the margin account restrictions of pilot participants. In addition, the reports should address the ability of the Exchanges to monitor public customers' ongoing eligibility to participate in the programs. The Commission also expects that the reports will discuss any action taken by an Exchange as a result of a violation of a term of the pilot program, the market impact, if any, of the pilot program, particularly at expiration, as well as any other issue relating to the pilot program that the Exchanges deem appropriate.

The Commission finds good cause for approving the Amex's proposal prior to the thirtieth day after the date of publication of notice thereof in the Federal Register because the Amex's proposal is identical to the proposal submitted by the CBOE, which was subject to the full notice and comment period. The Commission received no comments regarding the CBOE's proposal. Therefore, the Commission believes that granting accelerated approval of the Amex's proposal is appropriate and consistent with section 6 of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the Amex's proposal. 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 Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of the filings will also be available for inspection and copying at the principal office of the above-mentioned self-regulatory organization. All submissions should refer to the file number in the caption above and should be submitted by December 26, 1991.

It Is Therefore Ordered, Pursuant to section 19(b)(2) of the Act,[11] that SR-CBOE-91-17 is approved and that SR-AMEX-91-14 is approved on an accelerated basis, and, therefore, that the debit put spread pilot programs are effective until November 25, 1992.

[11] 15 U.S.C. 78s(b)(2) (1982).

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[12]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 91-28988 Filed 12-3-91; 8:45 am]

BILLING CODE 8010-01-M

[12] 17 CFR 200.30-3(a)(12) (1990).

[Release No. 34-30006; File No. SR-Amex-91-12]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the American Stock Exchange, Inc., Relating to the Listing of Warrants Based on the S&P 500 Index

November 27, 1991.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"), 15 U.S.C. 78s(b)(1), notice is hereby given that on June 5, 1991, the American Stock Exchange, Inc. ("Amex" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II and III below, which Items have been prepared by the 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

The Amex proposes to approve for listing and trading under section 106 of the Amex Company Guide warrants based on the Standard & Poor's 500 Composite Stock Price Index ("S&P 500 Index" or "Index"), a broad-based, capitalization-weighted index containing a representative sample of 500 common stocks, constructed by industry groups, that trade on the New York Stock Exchange ("NYSE"), the Amex, or over-the-counter through the National Association of Securities Dealers' NASDAQ System. Additionally, the Amex proposes to amend Commentary .03 to Amex Rule 411 to require that warrants based on a domestic stock price index be sold only to options-approved accounts.

The text of the proposed rule is available at the Office of the Secretary, Amex, and at the Commission.

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 statutory 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 Section 106 (Currency and Index Warrants) of the Amex Company Guide, the Exchange may approve for listing index warrants based on established foreign and domestic indexes.

The Amex is proposing to list index warrants based on the S&P 500 Index, a broad-based, capitalization-weighted index of 500 stocks. The listing and trading of these Index warrants on the Amex, however, will be subject to the insurer receiving authorization from the Standard & Poor's Corporation to use the S&P 500 Index in connection with the warrants.

S&P 500 Index warrant issues will conform to the listing guidelines under section 106 of the Amex Company Guide which provide that (1) the issuer shall have assets in excess of $100,000,000 and otherwise substantially exceed the Exchange's size and earnings requirements; (2) the term of the warrants shall be for a period ranging from one to five years from date of issuance; and (3) the minimum public distribution of such issues shall be 1,000,000 warrants together with a minimum of 400 public holders, and have a minimum aggregate market value of $4,000,000.

S&P 500 Index warrants will be direct obligations of their issuer subject to cash-settlement during their term, and either exercisable throughout their life (*i.e.*, American style) or exercisable only on their expiration date (*ie.*, European style). Upon exercise, or at the warrant expiration date (if not exercisable prior to such date), the holder of a warrant structured as a "put" would receive payment to the extent that the S&P 500 Index settlement price has declined below a prestated strike price. Conversely, holders of a warrant structured as a "call" would, upon exercise or at expiration, receive payment to the extent that the S&P 500 Index settlement price has increased above the pre-stated strike price. If "out-of-the-money" at the time of expiration, the warrants would expire worthless.

The Amex has adopted suitability standards applicable to recommendations to customers of index warrants and transactions in customer accounts. Amex Rule 411, Commentary .02 applies the options suitability standard to recommendations regarding index warrants. Amex Rule 421, Commentary .02 requires a Senior Registered Options Principal or a Registered Options Principal to approve and initial a discretionary order in index warrants on the day the order is entered. In addition, the Exchange, prior to the commencement of trading, will distribute a circular to its membership calling attention to specific risks associated with warrants on the S&P 500 Index.

Additionally, the Amex proposes to add Commentary .03 to Rule 411 to provide that, notwithstanding the provision of Commentary .02, index warrants based on a domestic stock index that are listed under section 106 of the Amex's Company Guide shall be sold only to investors whose accounts have been approved for options trading pursuant to Exchange Rule 921.

The Exchange believes that the proposed rule change is consistent with section 6(b) of the Act, in general, and furthers the objectives of section 6(b)(5), in particular, in that it is designed to prevent fraudulent and manipulative acts and practices and to promote just and equitable principles of trade, and is not designed to permit unfair discrimination between customers, issuers, brokers or dealers.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Amex believes that the proposed rule change will impose no burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

The Exchange has neither solicited nor received comments with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(a) By order approve such proposed rule change, or

(b) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit 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 statement with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC. Copies of such filing will also be available for inspection and copying at the principal office of the above-mentioned self-regulatory organization. All submissions should refer to the file number in the caption above and should be submitted by December 26, 1991.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 91-29067 Filed 12-3-91; 8:45 am]

BILLING CODE 8010-01-M

[Release No. 34-30001; File No. SR-CBOE-90-06]

Self-Regulatory Organizations; Order Granting Approval of Proposed Rule Change by the Chicago Board Options Exchange, Inc., Relating to Delayed Trade Match Submission Fees

November 26, 1991.

I. Introduction

On June 27, 1990, the Chicago Board Options Exchange, Inc. ("CBOE" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), 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

[1] 15 U.S.C. 78s(b)(1) (1984).

[2] 17 CFR 240.19b-4 (1988).

charge fees for the delayed submission of trade data by members.[3] The proposed rule change was published for comment in Securities Exchange Act Release No. 28308 (August 3, 1990), 55 FR 32513. No comment letters were received on the proposed rule change.

On January 22, 1991, the Commission approved the proposal for a period of six months from January 22, 1991.[4] When approving the proposal the Commission determined that the proposal could not be permanently approved until the CBOE submitted and received approval for its intraday trade match system.

The CBOE proposed the delayed trade match submission fee in conjunction with its development of an intraday trade match process. Briefly, the CBOE's intraday trade match process compares trading data through computer runs during each trading day instead of starting the processing after the close of trading. Accordingly, in order to give the CBOE time to prepare and file the procedures for its intraday trade match system and the Commission time to review the proposal, while simultaneously allowing the CBOE to begin charging fees to improve the effectiveness of its intraday trade match system, the Commission approved the fee proposal for an initial six-month period. Subsequently, the Commission extended its approval of the proposal for an additional six months until January 22, 1992.[5] The CBOE has filed the procedures for its intraday trade match system with the Commission, and the Commission today is approving that proposal in a separate order.[6] Therefore, the Commission today also is granting permanent approval of the CBOE's proposal to institute a delayed trade match submission fee.

II. Description of the Proposal

The CBOE proposes to add several new Exchange Rules to charge fees for the delayed submission of trade information related to in-person market maker trades for trade match purposes. In general, under the proposal, market makers and their clearing firms will be charged an additional fee when they submit trade information for at least a certain specified percentage of their transactions two hours or more after the time of execution. The fee will apply only to market maker trades executed in person.[7]

III. Discussion

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange, and, in particular, the requirements of sections 6(b) (4) and (5) and section 17A(a)(1). Specifically, the Commission believes that the proposal will allocate to members submitting late trade information the extra processing costs incurred by the CBOE due to the late submission of trade information. In addition, the Commission believes that the proposal will encourage market markers and their clearing members to make timely submissions of trade information, which will foster more efficient clearing of options transactions.

Untimely submission of trade information by members causes higher costs to both the Exchange and its members and compromises the effectiveness of intraday trade matching by delaying the intraday trade matching process. The Exchange makes a comparison run of trade information several times a day. If the Exchange finds one side of a trade but not the other it will produce an outtrade report for that trade. The Exchange produces listings of outtrades several times during the day. When market makers and clearing members fail to submit a large percentage of trade data on a timely basis the outtrade reports become extensive and the information value of such reports diminishes.[8] In an effort to provide more meaningful data to the clearing firms, the Exchange now runs additional listings which are designed to exclude many of the outtrades which arise because one side has not submitted timely trade information. In addition, late trade information submission makes it more difficult for the Exchange to monitor clearing firm submissions to detect firms which may be experiencing problems.

The Commission believes that the proposal will result in a higher percentage of trade information submitted to the Exchange on a timely basis. In turn, this will help increase the effectiveness of the Exchange's intraday trade matching system by reducing the length of its outtrade reports and the need for additional reports which do not include those outtrades due to delayed submission of trade information. Timely submission of trade information also will produce other benefits to the Exchange and its members, such as the quicker resolution of outtrades, reducing the number of nighttime Exchange and member personnel, reducing the number of unmatched trades and increasing the integrity of the trade matching and clearing process. Finally, the Exchange will be able to monitor its members more effectively for any problems which might disrupt the clearance and settlement process.

The Commission believes that the proposed fee will be equitably allocated among Exchange members. The separate transaction and trade match fees that the Exchange currently charges for each contract bought or sold on the Exchange does not cover the additional effort and expense necessary to produce extra lengthy outtrade reports and additional outtrade reports that do not include outtrades due to one-sided trade information submissions. Nor does the fee account for the additional nighttime Exchange personnel that are needed to process the late submissions. The proposal will assess a fee on only those members who submit delayed trade information, which fees are directly related to the extra Exchange services and expenses that are devoted to incorporate such delayed information into the trade matching process. Members who meet the minimum timely submission percentages and who, therefore, are not the catalyst for additional Exchange services will not be charged the additional fee.[9]

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[3] The proposal was originally submitted under Section 19(b)(3)(A) of the Act for immediate effectiveness. On July 24, 1990, the CBOE filed a letter with the Commission requesting that the filing be considered under section 19(b)(2) of the Act, which provides for notice and comment of the proposal prior to Commission consideration. *See* letter to Howard L. Kramer, Assistant Director, Division of Market Regulation, Commission, from James E. Hopkinson, Associate General Counsel, CBOE, dated July 24, 1990.

[4] *See* Securities Exchange Act Release No. 28807 (January 22, 1991), 56 FR 3127) (Temporary Approval Order).

[5] *See* Securities Exchange Act Release No. 29341 (June 19, 1991), 56 FR 29293.

[6] *See* Securities Exchange Act Release No. 30000 (November 26, 1991), published elsewhere in this issue.

[7] For a detailed description of the proposal and the CBOE's basis for the proposal, see the Temporary Approval Order *supra* note 4, 56 FR at 3128.

[8] The purpose of an outtrade report is to inform members of trades in which the trade information submitted does not match or where only one side of a trade has submitted information. A member who receives an outtrade report then will compare the report to its own records to reconcile any difference in the trade information or to submit trade information that has not previously been submitted. The inclusion of outtrades that are caused solely by delayed submission of trade data greatly lengthens the outtrade report and makes it difficult to determine which outtrades are "true" outtrades.

[9] The Commission notes that the fee relates only to transactions executed in person by market makers and does not include floor brokers. The Exchange states that floor brokers, as a group, generally submit their transaction information on a timely basis so as not to lose customer business. Floor brokers, therefore, do not contribute significantly to the time and expense necessary to run the intraday trade match system. Accordingly, the Commission believes that the proposed fee will

Continued

The Commission believes that it is necessary for the Exchange to charge both the market maker and its clearing member for delayed submissions. If the Exchange were to only charge the market maker, the clearing member would be able to delay trade information submission and receive the additional Exchange services at the cost of the market makers for whom it clears. On the other hand), if the Exchange were to only charge the clearing member, market makers would have no cost-saving incentive to submit quickly trade information to their clearing members. Charging both market makers and their clearing members for the extra services gives each group a cost-based reason for submitting trade information on a timely basis.

Finally, although the fee is not a disciplinary sanction, the CBOE has still chosen to provide procedures for members assessed a fee to contest any fees imposed. In particular, a member may seek verification of fees charged by the Exchange. If the member is not satisfied with the verification of fees, he may make an appeal via a hearing before a panel of three or more directors of the Board of Directors, with an opportunity to cross-examine witnesses. A decision by the panel may be appealed to the Board of Directors of the Exchange. Although such formalized procedures are unusual for challenging fee assessments, they actually make the imposition of the fee fairer by allowing members to challenge erroneous fee charges. Moreover, these procedures are reasonably designed to afford a member assessed a fee the opportunity to challenge the veracity of the assessments.

The Commission believes that the fee, which has been in effect on a temporary basis since July 1991, already has been shown to be effective in increasing the percentage of trade information submitted to the Exchange on a timely basis. For example, in December 1990, when the intraday trade match system was in operation but no fee for delayed submission of trade information was in place, 55% of in-person market maker and 69% of Exchange-wide trade information were submitted within two hours after the time of execution. In September 1991, a month with comparable trade volume, these percentages had increased to 83% and 87%, respectively. In addition, the percentage of trades which remained unmatched after the 5 p.m. trade match cycle decreased from 9.1% to 7.1%.

be allocated to those members who cause the Exchange the greatest expense with respect to the intraday trade match system.

It Is Therefore Ordered, Pursuant to section 19(b)(2) of the Act,[10] that the proposed rule change (File No. SR-CBOE-90-06) is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 91-28989 Filed 12-3-91; 8:45 am]

BILLING CODE 8010-01-M

[Release No. 34-30000; File No. SR-CBOE-91-18]

Self-Regulatory Organizations; Order Granting Approval of Proposed Rule Change by the Chicago Board Options Exchange, Inc., Relating to the Exchange's Intraday Trade Match System.

November 26, 1991.

On May 13, 1991, the Chicago Board Options Exchange, Inc. ("CBOE" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), 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 establish procedures for its intraday trade match system. The proposed rule change was published for comment.[3] No comment letters were received on the proposed rule change.

The purpose of the proposed rule change is to provide procedures for the Exchange's intraday trade match system. Subsequent to the execution of a trade on the Exchange, the Exchange matches the trade information data recorded by the purchasing member with the information recorded by the selling member. Clearing members are advised of transactions for which matching buy and sell data has not been submitted. After allowing the relevant clearing members to submit corrections or changes, the matched transaction data is sent by the CBOE to the Options Clearing Corporation for clearance and settlement.

Traditionally, the trade matching process at the Exchange has been performed by making computer runs in the evening hours after trading for the day has ceased. In April 1990, however, the Exchange instituted an intraday trade matching service on an Exchange-wide basis. As a result, the Exchange is now making intraday trade match comparison computer runs, instead of starting the process after the close of trading.[4] The CBOE, in the present proposal, is requesting approval of the Exchange's procedures for its intraday trade match system.[5] A brief summary of the procedures is set forth below.[6]

Previously, the Exchange's trade match process began after the close of trading. Specifically, there were three timeframes during which trade input comparisons occurred. The first trade input comparison occurred no earlier than 6 p.m. Central Standard Time (all times noted in this order refer to Chicago Time). The second trade input comparison occurred at approximately 10 p.m. The third trade input comparison occurred at 12 noon the next trading day to resolve unmatched trades from the prior trading day.

The CBOE represents that the intraday trade match system currently in operation at the Exchange has greatly accelerated the timeframe in which trade information is compared. Trade input into the Exchange's trade match system now commences as soon as trading begins. The trade match process consists of three intraday trade match passes and two evening trade match passes. The three intraday trade match passes occur at 11 a.m., 1 p.m. and 3 p.m.

[10] 15 U.S.C. 78s (b)(2) (1982).

[1] 15 U.S.C. 78s(b)(1) (1984).

[2] 17 CFR 240.19b-4 (1988).

[3] Securities Exchange Act Release No. 29322 (June 17, 1991), 56 FR 29294 ("Intraday Trade Match Notice").

[4] Other exchanges also have accelerated their trade comparison process. For example, *see* Securities Exchange Act Release No. 28285 (July 30, 1990), 55 FR 31930.

[5] On January 22, 1991, the Commission approved a CBOE proposal establishing a fee for delayed trade match submissions for a period of six months from January 22, 1991 [*See* Securities Exchange Act Release No. 28807 (January 22, 1991), 56 FR 3127)]. The purpose of the fee is to encourage market-makers and market-maker clearing firms to submit trading data to the CBOE in a timely manner and to help offset the additional burden created by delayed submission in conjunction with the Exchange's implementation of its intraday trade match system. When approving the fee structure, however, the Commission determined that the proposal could not be permanently approved until the CBOE submitted and received approval for its intraday trade match system. Accordingly, in order to give the CBOE time to prepare and file the intraday trade match system and the Commission time to review the proposal, while simultaneously allowing the CBOE to begin charging fees to improve the effectiveness of its intraday trade match system, the Commission approved the fee proposal for an initial six-month period. Subsequently, the Commission extended its approval of the fee for delayed trade match submissions for an additional six months until January 22, 1992. [*See* Securities Exchange Act Release No. 29341 (June 19, 1991), 56 FR 29293]. Because this Order approves the CBOE's procedures for its intraday trade match system, the Commission today also is granting full approval to the CBOE's proposal establishing the fee for delayed trade match submissions. *See* Securities Exchange Act Release No. 30001 (November 26, 1991), published elsewhere in this issue.

[6] *See* note 2, *supra* Intraday Trade Match Notice, for a more detailed description of the intraday trade match system procedures and how members may submit trade data intraday is found.

After each pass, the Exchange produces and distributes matched and unmatched trade reports, which the member firms' representatives compare with the information contained in the firm's records. If errors are found, the members make corrections and resubmit the data to the CBOE electronically. In addition, at 2 p.m., member firm representatives meet at a face-to-face trade checking session to discuss unmatched trades and attempt to resolve them.

The first of the two evening trade match passes is performed as early as 5:30 p.m. Again, the Exchange produces and distributes matched and unmatched trade reports which member firm representatives review in an attempt to match all remaining outtrades. Once all corrections to the first evening pass are received by the Exchange, the final trade matching pass is performed. Generally, the final trade match pass occurs around 8:45 p.m. This pass produces a final electronic file of all compared, matched trades for submission to the Options Clearing Corporation for settlement. This file contains approximately 97.5% of the trading day's activity. The approximately 2.5% of the trades which remain unmatched are reconciled the next morning prior to the opening of trading.

The Exchange states that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder, in general, and the objectives of section 6(b)(5), in particular, in that it is designed to foster cooperation and coordination with persons engaged in clearing transactions in securities.

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange, and, in particular, the requirements of section 6(b)(5). Specifically, the Commission believes that the proposal will foster cooperation and coordination among Exchange member firms engaged in comparing and settling Exchange transactions and will help protect Exchange members and other persons that safeguard investors' funds and facilitate their transactions.

The Commission also believes that the proposal will make trade comparisons on the CBOE more efficient in terms of the time and expense involved in trade processing. Intraday trade matching reduces Exchange member expenses by decreasing the number of personnel that need to be available after the trading day has ended to match uncompared trades. In addition, the intraday trade match system will significantly reduce the number of day-old, unresolved trades because they can be resolved during the trading day when the personnel that are responsible for the trades are still present. Under the old system, a significant number of trades remained unmatched until the next morning because not all member firm personnel were available after the trading day had ended to match uncompared trades, requiring that those trades be resolved just before the next day's trading began.

Finally, the Commission believes the intraday trade match system will reduce the risk exposure to investors and Exchange member firms. Unresolved trades which sit overnight are subject to market price volatility and could cause a loss to a member firm or its customer in the event of a default or some other unexpected event. The intraday trade match system reduces the number of trades subject to this risk by matching a higher percentage of trades on the trade date and reducing the number of unmatched trades that are not resolved until the next trading day.

It Is Therefore Ordered, Pursuant to section 19(b)(2) of the Act,[7] that the proposed rule change (File No. SR-CBOE-91-18) is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 91-28990 Filed 12-3-91; 8:45 am]

BILLING CODE 8010-01-M

[Release No. 34-29998; File No. SR-NYSE-91-39]

Self Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the New York Stock Exchange, Inc., Relating to the Reduction of Selected Facility Fees Including the Restructuring and Reduction of Vendor Service Fees

November 26, 1991.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"), 15 U.S.C. 78s(b)(1), notice is hereby given that on November 18, 1991, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[7] 15 U.S.C. 78s(b)(2) (1982).

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The NYSE plans to implement, as of January 1, 1992, a rate decrease on selected facility fees, including a restructuring and reduction of charges for vendor services.[1]

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

1. Purpose

The purpose of the change is to provide a more equitable distribution of overall charges among exchange constituents and to respond to general market conditions by decreasing selected floor facility fees. Reductions are proposed to the following annual facility fees:

Type of fee	Current fee	Proposed fee
Telephone clerk tickets:		
Regular	$634.25	$600.00
Special	1,193.25	1,125.00
Specialist post privilege	5,900.00	5,575.00
Floor privilege	4,300.00	4,065.00
Equity specialist spaces	6,400.00	6,050.00
Cabinet space—Post 30	3,025.00	2,860.00
Equity booth spaces	1,602.00	1,515.00
	10,577.00	9,995.00
Order pad privilege	1,602.00	1,515.00
Order pad privilege—direct clearance	2,254.00	2,130.00
Equity and fixed income private line charge	1,601.75	1,515.00

The Exchange also proposes to restructure its vendor services fee in order to implement a new method of determining the fee imposed by the Exchange for providing third-party vendor services to floor members. The current Exchange fee for vendor services is based on a percentage mark-

[1] A complete list of Facility Fees is available at the office of Financial Planning and Analysis a the NYSE.

up imposed on the fees charged by the third-party vendor. As vendor services have become more sophisticated and costly, the percentage mark-up approach is no longer appropriate. Instead, the Exchange intends to impose on subscribing members a fixed terminal charge.[2] This charge will result in a fee reduction for most members who subscribe to third-party vendor services.

2. Statutory basis

The basis under the Act for the proposed rule change is the requirement under section 6(b)(4) that an Exchange have rules that provide for the equitable allocation of reasonable dues, fees and other charges among its members, issuers and other persons using its services.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange believes that the proposed fee change will not impose any burden on competition that is not necessary or appropriate in the 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

The Exchange has not solicited, and does not intend to solicit, comments regarding the proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change establishes or changes a due, fee, or other charge imposed by the Exchange and therefore has become effective pursuant to section 19(b)(3)(A) 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 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 Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing will also be available for inspection and copying at the principal office of the NYSE. All submissions should refer to File No. SR–NYSE–91–39 and should be submitted by December 26, 1991.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 91–29068 Filed 12–3–91; 8:45 am]

BILLING CODE 8010–01–M

[2] Thus, the NYSE proposes to impose a vendor services fee equal to the amount charged by the vendor for the service plus an annual terminal charge of $900.00. This fixed terminal charge will replace the current fee, which is based on a percentage of the vendor's fee.

[Release No. 34–30004; File No. SR-NYSE-91-35]

Self-Regulatory Organizations; New York Stock Exchange, Inc.; Order Approving Proposed Rule Change Relating to the Handling of Market-on-Close Orders

November 27, 1991.

I. Introduction

On September 19, 1991, the New York Stock Exchange, Inc. ("NYSE" 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 to (1) amend NYSE Rules 13, 116.40 and 123A.43 on a permanent basis; and (2) extend the pilot program permitting the entry and execution of matched market-on close ("MOC") orders. The Exchange also has submitted a report evaluating the effects of the MOC procedures.

The proposed rule change was noticed in Securities Exchange Act Release No. 29811 (October 10, 1991), 56 FR 52104 (October 17, 1991). No comments were received on the proposal.

[1] 15 U.S.C. 78s(b)(1) (1988).

[2] 17 CFR 240.19b–4 (1991).

II. Background

In June, 1990, the Commission approved, on a one-year pilot basis, the NYSE's proposed rule change to (1) provide that MOC orders are to be executed in their entirety at the closing price on the Exchange, and if not so executed, are to be cancelled; and (2) allow for the entry and execution of matched MOC orders. The Commission also granted an exemption from its short sale rule, Rule 10a–1,[3] for matched MOC orders that are part of a program trading strategy.[4]

In its original proposal, the Exchange noted that it had been advised by member firms that procedures allowing the execution of matched MOC buy and sell orders entered by the same firm were particularly necessary to meet regulatory requirements governing "Exchanges for Physicals" ("EFPs"), where a firm accommodates a customer who wishes to convert a futures position into a stock position by swapping futures for stock.[5] In its order approving the one-year pilot program, however, the Commission expressed concern that matched MOC orders would be executed without the opportunity for order exposure or interaction with the trading crowd. The Commission pointed out that the matched MOC order procedure was different from the auction market procedures normally used on the Exchange, and possibly could result in some customer orders in the trading crowd or on the limit book being by-passed. The Commission stated its belief that the purpose of the Exchange's matched MOC order proposal could be better accommodated long-term by the development of, among other possible alternatives, an after-hours trading system. The Commission further noted that, during the pilot period, the Exchange would be expected to develop criterial to evaluate the effects of the MOC procedures and to determine whether alternative measures such as an after-hours trading system

[3] Pursuant to Rule 10a–1 under the Act, 17 CFR 240.10a–1 (1991), and Exchange Rule 440B, a short sale on the Exchange may not be effected at a price either (1) below the last reported price or (2) at the last reported price unless that price is higher than the last reported price.

[4] See Securities Exchange Act Release No. 28167 (June 29, 1990), 55 FR 26117 (order granting temporary approval to File No. SR-NYSE–89–10), and letter from Richard G. Ketchum, Director, Division of Market Regulation, SEC, to James E. Buck, Senior Vice President and Secretary, NYSE, dated July 2, 1990, [1990 Decisions] Fed. Sec. L. Rep. (CCH—¶79,651.*supra*, for a fuller description of EFPs.

[5] See Securities Exchange Act Release No. 28167, note 4, *supra*, for a fuller description of EFPs.

should be adopted to handle these orders.

The original one-year pilot program was temporarily extended by the Commission for an additional six months, until September 30, 1991,[6] in order to give the Exchange the opportunity to contrast the use of matched MOC orders with certain program trading transactions effected in the Exchange's recently implemented Crossing Session II.[7] In its order extending the pilot program until September 20, 1991, the Commission again expressed concern as to the entry of matched MOC orders, but approved the extension in order to allow the Exchange additional time to assess the pilot program in light of the Exchange's development of an after-hours trading system.

Subsequently, the Commission granted accelerated approval to an Exchange proposal to extend the pilot period until November 30, 1991.[8] The extension until November 3, 1991 was intended to provide the Commission with the requisite time to analyze the Exchange's report evaluating the effects of the MOC procedures over the one-year pilot program,[9] and to determine whether to approve the proposal set forth herein.

III. Description of the Proposal

A. Guaranteed Executions Pursuant to Prescribed Pricing Procedures

The Exchange seeks to obtain permanent approval of the amendments to NYSE Rules 13, 116.40 and 123A.43 as such rules relate to the pricing and execution of MOC orders. Essentially, such amendments would make permanent that portion of the pilot program relating to the pricing procedures and guaranteed executions of MOC orders to provide that such orders are to be executed in their entirety at the closing price on the Exchange, and if not so executed, are to be cancelled.

In particular, the amendment to Rule 13 would provide that a market order with the instruction "at the close" is to be executed in its entirety at the closing price on the Exchange and, if the order cannot be so executed, it is to be treated as cancelled.[10] The amendment to Rule 123A.43 provides that a broker handling an order with the instruction "at the close" is to use due diligence to execute the order in its entirety at the closing price and, if the order is not so executed, the broker must cancel it.

The amendments to Rule 116.40 would provide that, where there is an imbalance of MOC orders, the imbalance must be executed against the prevailing bid or offer, as appropriate, and then the remaining MOC orders must be stopped against each other and executed at the price of the immediately preceding transaction just described. Where there is no imbalance of MOC orders, the amendments would provide that buy MOC orders must be paired off against sell MOC orders and executed at the last sale price on the Exchange in the subject security just prior to the close of trading on that day.[11]

In its report evaluating the effects of the use of the MOC guaranteed execution and pricing procedures over the initial one-year pilot period, the Exchange concluded that these procedures are working well in facilitating investor participation at a NYSE closing price that appropriately reflects the valance of supply and demand at the close. The Exchange also concluded that the procedures have not had any discernable negative effect on the quality of the Exchange's market. In particular, the Exchange concluded that the procedures have not resulted either in unusual volatility, or an increase in trading halts, at the close. The Exchange based its conclusion on its finding that 99.2% of closing transactions in the stocks sampled took place at a price change of ¼ point or less from the previous trade. The Exchange believes that this result compares favorably with the aggregate Exchange trade-to-trade price variation statistics, which show that, on an overall basis through the first six months of 1991, 99.6% of all trades on the Exchange were effected at a price change of ¼ point or less from the previous trade.[12]

B. Matched MOC Orders

In addition, the Exchange seeks to extend, until May 1993, the portion of the pilot program relating to the entry and execution of matched MOC orders, and the concurrent exemption from SEC Rule 10a–1 for the entry of a MOC order to sell short where (1) the member firm has also entered a MOC order to buy the same amount of stock; and (2) both MOC orders are part of a program trading strategy by the member firm, and the orders are identified as such.

As indicated above, the impetus behind the Exchange's proposal to allow matched MOC orders to be entered by member firms was the facilitation of member firms' EFP transactions. As stated in the Exchange's report evaluating the effects of the matched MOC order procedures, no transactions using paired MOC orders were effected on the Exchange during the initial one-year pilot period.[13]

In light of the Commission's expressed view that the NYSE should consider the development of an after-hours trading system that would permit the participation of other orders as an alternative to the use of matched MOC orders,[14] the Exchange also has reviewed EFP activity during the first two months of trading in Crossing Session II.[15] While no EFP transactions were effected using the matched MOC procedures during that period of time, 30.8% of EFP transactions effected on

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[6] See Securities Exchange Act Release Nos. 29393 (July 1, 1991), 56 FR 30954 (order granting temporary accelerated approval to File No. SR–NYSE–91–22).

[7] Crossing Session II, which occurs from 4 p.m. to 5:15 p.m. on every trading day, is an aggregate-price session that allows members to enter crosses of buy and sell program orders that include at least 15 NYSE-listed stocks having a total market value of $1,000,000 or more, and to effect their execution at an aggregate price. The pilot period for the Exchange's off-hours trading sessions, including Crossing Session II, is due to expire on May 24, 1993. See Securities Exchange Act Release No. 29237 (May 24, 1991), 56 FR 24853 (order approving File Nos. SR–NYSE–90–52 and SR–NYSE–90–53).

[8] See Securities Exchange Act Release No. 29761 (September 30, 1991), 56 FR 50743 (order granting temporary accelerated approval to File No. SR–NYSE–91–34).

[9] The Exchange's report originally was filed with the Commission on September 11, 1991. The Exchange subsequently added supplemental data to the report on October 10, 1991. See File No. SR–NYSE–91–35 and letter from Brian M. McNamara, Managing Director, Market Surveillance, NYSE, to Mary Revell, Branch Chief, Division of Market Regulation, SEC, dated October 10, 1991.

[10] In File No. SR–NYSE–89–10, the Exchange noted that it anticipated that the only orders would be cancelled would be when trading has halted in a security, or when there were special conditions to the order (*e.g.*, "buy minus" or "sell plus") that cannot be met. In addition, when the provisions of Rule 80A(c) are in effect, all MOC index arbitrage orders (except as noted) must contain the instruction "sell plus" or "buy minus," as appropriate. Furthermore, any MOC order index arbitrage order without the appropriate instruction entered before the provisions of Rule 80A(c) are put into effect must be cancelled and replaced with a MOC order containing the appropriate instruction. See NYSE Information Memo number 91–42, October 29, 1991.

[11] These procedures formerly had been codified in Rule 116.40 for use on expiration Fridays only. *See* Securities Exchange Act Release No. 29871 (October 28, 1991), 56 FR 56434 [order granting accelerated approval to the NYSE proposal (File No. SR–NYSE–91–31) to extend the effectiveness of auxiliary closing procedures on expiration Fridays for an additional year].

[12] For a fuller description of the Exchange's report, *see* File No. SR–NYSE–91–35.

[13] *Id.*

[14] The Commission also suggested that the Exchange consider an amendment to NYSE Rule 390 for after-hours trading. In general, NYSE rule 390 prohibits a member from effecting a transaction otherwise than on an exchange as principal or as an in-house agency cross in a security listed on the exchange before April 26, 1979.

[15] Crossing Session II is the Exchange's off-hours trading facility which was developed to facilitate member firms' program trading transactions. See note 7, *supra.*

the Exchange were effected in Crossing Session II of the Exchange's off-hours trading system. Thus, the Exchange has concluded that at present member firms find Crossing Session II a more viable alternative than the use of matched MOC orders for the effecting of EFP transactions on the Exchange. The Exchange believes, however, that it would be appropriate to extend the pilot program for the use of matched MOC orders to run concurrently with the Crossing Session II pilot program in order to allow member firms the choice of using either matched MOC orders or Crossing Session II and to allow the Exchange a reasonable, longer period of time to evaluate the overall viability and effectiveness of both approaches in meeting the needs of member firms and their customers.

Further, the Exchange states that during the proposed extension of the pilot program it will continue to monitor whether matched MOC orders are being used. If such orders are used, the Exchange will assess, and report to the Commission at the conclusion of the pilot program, the impact of matched MOC orders on overall market quality and on any possible displacement of orders on the specialist's book or in the crowd.

Finally, the Exchange requests that the exemption from SEC Rule 10a–1 be extended to run concurrently with the proposed extension of the matched MOC order pilot program. The Exchange continues to believe that the execution of a MOC order to sell short does not offer an opportunity for price manipulation when such order is both entered and executed against an offsetting MOC buy order and is part of a program trading strategy.

IV. Commission Findings

After careful consideration, the Commission finds that the NYSE's proposal to (1) permanently approve the portion of the NYSE's MOC pilot program allowing MOC orders to be executed in their entirety at the closing price on the Exchange and, if not so executed, to be cancelled; and (2) extend the pilot program for matched MOC orders to run concurrently with the Exchange's off-hours trading facility pilot program is consistent with Section 6(b) of the Act,[16] and the rules and regulations thereunder pertaining to a national securities exchange. In particular, for the reasons set forth below, the Commission believes that the proposal is consistent with the Section 6(b)(5) requirement that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

To begin, the Commission believes that the proposed pricing and guaranteed execution procedures should provide some certainty to member firms without causing any discernible negative effect on the quality of the Exchange's market, as witnessed by the data contained in the Exchange's report. Providing members with a guaranteed execution at the closing price or, if not obtainable, the automatic cancellation of such order in its entirety, should provide customers with additional flexibility in order execution without posing the potential for abuse. Upon a close analysis of the data supplied in the Exchange's report, it is clear that while imbalances have occurred from time to time at the close due to the entry of MOC orders, such imbalances have been much smaller in comparison to imbalances seen on Expiration Fridays. The NYSE data indicates that, with a few exceptions, the imbalances have not caused significant price changes nor interfered with the specialists' ability to maintain fair and orderly markets. The Commission believes, therefore, that the Exchange's proposal to make permanent the amendments to Rules 13, 116.40, and 123A.43 should be approved.

With regard to the extension of the pilot program concerning matched MOC orders, the Commission continues to harbor concerns. As discussed previously, the Commission was reluctant to approve this portion of the pilot program because of its concern that matched MOC orders would be executed without the opportunity for order exposure or interaction with the trading crowd. Because these procedures were in contravention of traditional auction market procedures, the Commission was concerned that customer orders on the limit order book or in the trading crowd could be by-passed. The Commission, however, approved these procedures for a pilot period, relying on the notion that these procedures would attract order flow being executed overseas back to the NYSE where Commission and Exchange oversight pursuant to the Act, trade reporting, and consolidated surveillance are mandatory.[17] Thus, the Commission believed that the individual investor would ultimately be better protected. In addition, the Commission realized that these procedures were similar to procedures already used by the Exchange on Expiration Fridays. Based on these reasons, the Commission agreed to approve the proposal for a one-year pilot period.

The Exchange now requests that the matched MOC order procedures be extended until May 24, 1993, the expiration date of the pilot program for the NYSE's off-hours trading facility. The Commission has decided to extend this portion of the pilot program, not because its original concerns regarding the possible displacement of customer orders have been alleviated, but because the Commission finds it reasonable to extend the pilot period in light of the NYSE's recently instituted after-hours trading system.[18].

As stated in the Exchange's report, no transactions have been effected on the Exchange using the matched MOC procedures. Given the here-to-date short existence of Crossing Sessions II, the Commission finds it reasonable to extend the pilot program for matched MOC orders in order to give the Exchange the necessary time to evaluate why its members have not used the matched MOC order procedures and have instead used Crossing Session II.

The Commission acknowledges the fact that the stock exchanges are continually developing new trading procedures and products in an attempt to facilitate the trading of portfolios of securities. The proposed matched MOC procedures herein and the NYSE's recently implemented off-hours trading

[16] 15 U.S.C. 78f(b) (1988).

[17] The NYSE believed that program trading strategies, such as EFPs, that employ MOC orders were being executed overseas because of a lack of pricing certainty. See File No. SR–NYSE–89–10.

[18] As previously noted, the Commission granted a limited exemption from Rule 10a–1 for a MOC order entered as part of a paired MOC order [see note 4, *supra* and note 6 in Securities Exchange Act Release No. 29393 (July 1, 1991), 56 FR 30954]. The effectiveness of this exemption terminates on November 30, 1991, concurrent with the expiration of the MOC pilot period. Pursuant to this order, the Commission is granting, until May 24, 1993, an extension of the relief from Rule 10a–1 regarding a MOC order to sell short that is entered by a member firm where (1) the member firm also has entered a MOC order to buy the same amount of stock, and (2) the MOC order is part of a program trading strategy by the member firm, and the orders are identified as such. As indicated in the order approving the MOC procedures for a one year pilot period (*see* note 4, *supra*), the Commission believes that matched MOC orders that are part of a program trading strategy do not raise the same concerns that are applicable to transactions in individual stocks, and that it is appropriate to exempt such transactions from the operation of the short sale rule.

facility are but two examples of such development. Thus, due to the NYSE's ongoing attempt to understand how trades of member firms and their customers could be most efficiently facilitated, the Commission believes that it is appropriate to allow the Exchange additional time to compare and contrast the matched MOC procedures with Crossing Session II. In addition, the Commission emphasizes that during the course of the pilot program the Exchange is under an obligation to inform the Commission of its members' use, if any, of the matched MOC procedures and to assess the impact of matched MOC orders on overall market quality and on any possible displacement of orders on the specialist's book or in the trading crowd.[19]

In conclusion, for the reasons set forth above, the Commission believes it is consistent with the Act to grant permanent approval to the proposed pricing and guaranteed execution portion of the NYSE's proposed rule change, and to extend the pilot period for the matched NOC order procedures to run concurrently with the Exchange's off-hours trading system pilot program.

It is therefore ordered, pursuant to section 19(b)(2) of the Act,[20] that the portion of the proposed rule change relating to the pricing procedures and guaranteed execution of MOC orders is permanently approved, and the remainder of the proposed rule change relating to the matched MOC order procedures is approved for a pilot period ending on May 24, 1993.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[21]

Margaret H. McFarland,

Deputy Secretary.

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[19] In this regard, the Commission expects the Exchange to file a report, no later than February 24, 1993, evaluating the effects of the matched MOC procedures over the pilot period. In assessing the effects of the MOC pilot procedures, the Exchange should utilize the criteria developed and followed in its previous report. In addition, at the same time it submits the report, if the Exchange decides it wants to seek either permanent approval of the matched MOC procedures or a further extension of the pilot program, then it should file a proposed rule change with the Commission at that time.

[20] 15 U.S.C. 78s(b)(2) (1988).

[21] 17 CFR 200.30-3(a)(12) (1991).

[Release No. 34-29994; File No. SR-PSE-90-14]

Self-Regulatory Organizations; Order Approving Proposed Rule Change by the Pacific Stock Exchange, Inc., and Granting Accelerated Approval to Amendment No. 1 to the Proposed Rule Change, Relating to the Trading of Options on the PSE's Technology Index

November 26, 1991.

I. Introduction

On April 4, 1990, the Pacific Stock Exchange ("PSE" or "Exchange") submitted to the Securities and Exchange Commission ("Commission"), 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 re-commence the trading of options on the PSE Technology Index ("Index") and have the Index re-classified as broad-based. The Technology Index is a price-weighted,[3] European-style [4] Index comprised of 100 stocks that are intended to represent a broad spectrum of companies principally engaged in manufacturing products and service-related products within advanced technology fields.

The proposed rule change was published for comment in Securities Exchange Act Release No. 29013 (March 14, 1991), 55 FR 20887 (May 21, 1990). No comments were received on the proposed rule change.[5]

II. Description of the Proposal

A. General

The Index was first established, and options on the Index were approved for trading by the Commission, in January 1984.[6] Trading in the Index occurred from its inception until October 1987, when the PSE determined to terminate trading options on the Index. In conjunction with this determination, the PSE filed with the Commission a proposal to delete from Exchange rules the one reference to the Index. Specifically, the reference appeared in Rule XXI, section 3(j), which stated, "[f]or the purposes of this Rule, the PSE Technology Index shall be considered a broadbased Index." [7]

After extensive research, the PSE believes that its members and the public have an interest in the re-commencement of trading options on the Index, and that there will be substantial trading volume in the Index options. In addition, the PSE believes that the re-commencement of trading may be accomplished without readopting the above language deleted in 1987.[8] Since the introduction to PSE Rule 7 states that the provisions of the Rule apply to the trading of index options in general, the Exchange believes that it is not necessary for the Rule to specifically reference the Index.

B. Composition of the Index

The PSE proposes to implement the trading of options on the Index in the exact manner in which it occurred prior to the termination of trading in 1987. During the time options on the Index were traded, the underlying securities comprising the Index were periodically revised by the Exchange to maintain the integrity and purpose of the Index, pursuant to PSE Rule 7.3(a). Any revision to the Index involved the replacement of a component security with a security from an identical field in the technology industry. Although the trading of options on the Index ceased in October 1987, the Index itself has remained active and has continued to be maintained and revised by the Exchange in the above manner. For instance, from October 1987 to the present, 21 replacements of underlying securities have been effected by the Exchange, each for the purpose of maintaining the integrity and purpose of the Index. In addition, the PSE intends to replace 20 more securities in the Index because the stock's prices, market capitalization, or number of shares traded daily do not meet proposed Exchange requirements

[1] 15 U.S.C. 78s(b)(1) (1988).

[2] 17 CFR 240.19b-4 (1990).

[3] The calculations for a price-weighted index involves adding the price of one share of each of the issues in the index, rather than trading the summations of the market capitalizations of each component security as in the case of capitalization-weighted indexes.

[4] A European-style option only can be exercised during a specified period before the option expires.

[5] The proposal was amended on August 26, 1991 and November 19, 1991, to add standards governing the composition of the Index which are necessary for the Index to be classified as broad-based. See infra note 18 and accompanying text for a discussion of these standards.

[6] Securities Exchange Act Release Nos. 20424 (November 29, 1983), 48 FR 54557 (December 5, 1983) ("Index Approval Order") and 20499 (December 16, 1983), 48 FR 56880 (December 23, 1983) (orders approving SR-PSE-83-10).

[7] This rule change was approved by the Commission in Securities Exchange Act Release No. 25052 (October 21, 1987) 52 FR 41521 (October 28, 1987). PSE Rule XXI, Section 3, currently appears in the PSE Rule Book as Rule 7.3.

[8] The current proposal provides for the Index to be classified as a broad-based Index. See infra note 17 and accompanying text for a description of the PSE's proposal to classify the Index as broad-based.

for classifying the Index as broad-based.[9]

Currently, 53 percent of the stocks in the Index are listed on either the New York Stock Exchange, Inc. ("NYSE") or the American Stock Exchange, Inc. ("Amex"), and 47 percent are traded over-the-counter ("OTC") through the National Association of Securities Dealers' ("NASD") NASDAQ system. All OTC stocks in the Index are designated as national market system securities by the NASD, meaning, among other things, that real-time last sale reports are available for these stocks.[10] The stocks of the listed companies in the Index comprise 46 percent of the value of the Index [11] and the OTC stocks in the Index comprise 54 percent of the value of the Index.[12] No one stock comprises more than 3.77 percent of the total index value, with the ten highest priced (and highest weighted) stocks comprising 26.43 percent of the Index.[13]

The price per share of the stocks in the Index ranges from a high of $108 to a low of $2.06, with the median and mean prices being $22.76 and $28.68, respectively. The total number of shares outstanding for the stocks in the Index ranges from a high of 572.6 million shares to a low of 3 million shares, with the median and mean being 31 million and 54 million shares, respectively. The market capitalization of the stocks in the Index ranges from a high of $59 billion to a low of $48 million, with the median and mean being $689.6 million and $2 billion, respectively. Finally, the trading volume of the stocks in the Index ranges from a high of 2 million average shares per day to a low of 23,000 average shares per day, with the median and mean being 212,000 and 370,000, respectively.[14]

Under the proposal, pursuant to Exchange Rule 7.3(a), the Exchange will continue to revise the Index from time to time to maintain the integrity and purpose of the Index. Further, proposed commentary .01 to Exchange Rule 7.3 requires that 75% of the Index value be derived from underlying securities that meet Exchange options listing requirements set forth in PSE Rule 3.6. The PSE states that the Index as presently comprised meets Exchange listing standards as set forth in Exchange Rule 7.3.[15]

C. Calculation of the Index and Contract Specifications

Because the Index is price-weighted, the Index value is calculated by adding the prices of one share of each of the companies in the Index and dividing that sum by a pre-established divisor.[16] The index value is then multiplied by the Index multiplier, which is 100, to reach the aggregate exercise value of the option contract. The Index options will be cashed-settled, so that the product of the Index multiplier and the difference between the closing Index value and the strike price of the option on the date of exercise will be the dollar amount a purchaser (seller) of an Index option will receive (deliver) upon exercise of an Index option.

The PSE proposes to use strike price interval of 5 points when the Index value is less than 400, and 10 points when the Index value is greater than 400. Since the Index value currently is 170.5, the PSE will use a strike price interval of 5 points. The Index would trade on a January-April-July-October exercise cycle.

D. Economic Utility of the Index

The Index consists of 100 different securities that are intended to represent a broad spectrum of companies principally engaged in manufacturing products and service-related products within the advanced technology fields. The PSE represents that the Index was designed, at least in part, to allow investors holding positions in some or all of the 100 underlying securities to hedge the risks associated with their portfolios. According to the PSE, the degree of investment risk in the advanced technology fields is substantial because of the rapidly changing nature of the products and processes of many manufacturing and service companies involved in advanced technology.

E. Classification of the Index as Broad-Based

The PSE has requested that the Index be classified as broad-based. In support of this request, the PSE states that the Index consists of 100 securities that represent fifteen industry groups within the high technology industry.[17] Further, to ensure that the Index remains representative of a broad spectrum of the high technology industry and that stocks with low trading volumes are not included in the Index, the PSE proposes to add new commentaries .01 and.02 to Exchange Rule 7.3 which require that the Index, in order to maintain its designation as a "broad-based" index, must meet the following requirements: (1) Each underlying security selected for inclusion in the Index must have an average daily trading volume of at least 40,000 shares in the preceding six months; (2) each underlying security included in the Index must maintain an average daily trading volume of at least 20,000 shares in the preceding six months; (3) no more than 20% of the total weighting of the Index shall be represented by underlying securities that each have an average daily trading volume of less than 75,000 shares in the preceding six months; (4) no underlying security shall represent more than 10% of the total weighting of the Index, unless such underlying security is exempted by the Exchange from this requirement; [18] the five most heavily

[9] See infra note 18 and accompanying text for a discussion of these requirements.

[10] Under the NASDAQ transaction reporting plan, transaction information must be submitted within 90 seconds of the trade. See Schedule D to the NASD By-Laws, Part XII, Section 2.

[11] All calculations made for purposes of this release are based upon the closing prices of the stocks on September 30, 1991.

[12] At the time the Index was first approved for trading, fifty-five percent of the stocks in the Index were listed on either the NYSE or the Amex, and forty-five percent were traded over NASDAQ. The stocks of the listed companies in the Index comprised 69 percent of the value of the Index and the OTC stocks in the Index comprised 31 percent.

[13] The ten highest priced (and highest weighted) stocks in the Index and their share of the total Index value are as follows: (1) NCR Corporation, 3.77%; (2) International Business Machine, Inc., 3.61%; (3) Microsoft Corporation, 3.10%; (4) Novo Nordisk, Association, 2.65%; (5) Medtronic, Inc., 2.46%; (6) Chiron Corporation, 2.45%; (7) Computer Sciences Corporation, 2.22%; (8) Xerox Corporation, 2.13%; (9) Motorola, Inc., 2.07%; (10) Digital Equipment Corporation, 1.97%.

[14] The average of shares traded per day is based on the number of shares traded during the period of time from May 1, 1991, to October 31, 1991. Although four of the securities currently included in the Index had an average daily trading volume below 20,000 shares, the PSE anticipates replacing these stocks before trading commences in the Index options. See letter to Monica Michelizzi, Staff Attorney, SEC, from Scott Stark, Senior Research Analyst, New Products, PSE, dated November 4, 1991.

[15] *See* Letter dated October 3, 1991 from Michael D. Pierson, Staff Attorney, PSE, to Thomas R. Gira, Esq., Branch Chief, Options Regulation, SEC.

[16] The PSE states that it will recalculate and disseminate the Index value at least once a minute and will ensure that the daily closing Index value is published in a national business periodical. See letter to Thomas R. Gira, Branch Chief, Options Regulation, SEC, from Michael D. Pierson, Staff Attorney, PSE, dated November 7, 1991.

[17] The represented industry groups are: (1) Semiconductor Capital Equipment Manufacturers; (2) Semiconductor Manufacturers; (3) Medical Technology; (4) Biotechnology; (5) Data Communications; (6) Test, Analysis and Instrumentation Equipment; (7) Data Storage and Processing Equipment; (8) Computer-Aided Design/Computer Assisted Modeling Equipment Manufacturers; (9) Office Automation Equipment Manufacturers; (10) Electronics Equipment; (11) Mini and Mainframe Computer Manufacturers; (12) Micro Computer Manufacturers; (13) Very Large Diversified Computer Manufacturers; (14) Computer Software Products; (15) Information Processing Services.

[18] Only underlying securities that are already included in the Index are eligible for the exemption.

Continued

weighted securities in the Index must not represent more than 25% of the total weighting of the Index; (6) the Index shall be comprised of at least ten industry sub-sectors representing a total of no less than eighty underlying securities; and (7) 75% of the total capitalization of the Index shall be represented by underlying securities that meet Exchange options listing requirements set forth in PSE Rule 3.6. The Exchange also proposes to conduct semi-annual reviews of the underlying securities included in the Index to assure that the Index continues to meet the standards set forth above.

F. Position and Exercise Limits, Margin Requirements, and Trading Halts

Consistent with classifying the Index as broad-based, the proposal provides that Exchange rules that are applicable to the trading of options on broad-based indexes will apply to the trading of options on the Index. Specifically, Exchange rules governing margin requirements,[19] position and exercise limits,[20] and trading halt procedures [21] that are applicable to the trading of broad-based index options will apply to options traded on the Index.

G. Surveillance

Finally, the PSE proposes to re-institute the same surveillance procedures as were present when options on the Index were previously being traded on the Exchange. These procedures include complete access to trading in the underlying securities and component trading activity. Further, the Intermarket Surveillance Agreement, dated July 14, 1983, as amended on January 29, 1990, will be applicable to the trading of the options on the Index.

III. Findings and Conclusions

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange, and, in particular, the requirements of section 6(b)(5).[22] The Commission finds that the trading of options on the Index will permit investors to participate in the price movements of the 100 securities on which the Index is based. The Commission also believes that the trading of options on the Index will allow investors holding positions in some or all of the underlying securities in the Index to hedge the risks associated with their portfolios more efficiently and effectively.

The Commission finds, as it did when it originally approved the trading of options on the Index, that the trading of these options does not raise any significant regulatory concerns. Specifically, the Commission does not believe that the fact that the Index is price-weighted instead of market-weighted results in the Index being readily susceptible to manipulation. Although the use of price-weighting could theoretically give added influence to securities with relatively small floats, the PSE has designed index composition and maintenance criteria that would reduce the possibility of this occurrence. For example, PSE rules provide that the Index can be designated as broad-based only if all securities in the Index have a weighting less than 10% of the Index. In addition, to remain broad-based, no more than 20% of the total weighting of the Index can be represented by securities that each have an average daily trading volume of less than 75,000 shares.

In addition, the Commission finds that classifying the Index as broad-based, and, thus, permitting Exchange rules that are applicable to the trading of options on broad-based indexes to apply to the trading of options on the Index, is appropriate.

Specifically, the Commission believes it is consistent with the Act to designate the Index as broad-based because the ten highest priced (the highest weighted) stocks only comprise 26.43% of the Index. Moreover, the median number of shares outstanding for the stocks in the Index is 31 million shares, while the median market capitalization of the stocks in the Index is $689.6 million. Moreover, the trading volume of the stocks in the Index ranges from a high of 2 million average shares per day to a low of 23 thousand average shares per day, with the median and mean being 212 thousand and 370 thousand, respectively.[23] These figures indicate that the stocks included in the index are, for the most part, large, actively traded companies. In addition, while the Index represents the high technology industry, the Index is composed of several very different industry groups, such as semiconductor manufacturers, biotechnology companies, office automation equipment manufacturers, and electronics manufacturers.[24] Accordingly, the Index represents a broad spectrum of companies across the manufacturing and research and development industry.

The Commission also believes that proposed Commentaries .01 and .02 will ensure that stocks with low capitalizations, small public float, and low trading volumes and prices are not included in the Index, that no individual or group of securities will comprise a large percentage of the Index's weighting, and that a broad spectrum of the high technology industry will continue to be represented in the Index.

Finally, the Commission notes that the Index currently meets the Designation Criteria for Futures Contract Involving Non-Diversified Stock Indexes ("Criteria").[25] First, the Index is composed of 100 issuers. Second, the aggregate capitalization of the Index is approximately $174 billion. Third, no single security in the Index has a weight in excess of 25% of the weight of all securities within the Index. NCR Corporation [26] and International

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Further, even if a security included in the Index is granted the exemption, that security may not represent more than 15% of the total weighting of the Index.

[19] *See* PSE Rule 7.16. The margin requirements for options contracts on a broad-based index are: (1) For each short options positions, 100% of the current market value of the options contract plus 15% of the underlying aggregate index value, less any out-of-the-money amount, with a minimum requirement of the options premium plus 10% of the underlying index value; and (2) for long options positions, 100% of the options premium paid.

[20] *See*, PSE Rules 7.6 and 7.7, respectively. The position and exercise limits for options on a broad-based index are 15,000 contracts.

[21] *See*, PSE Rule 7.11. The trading on the PSE of options on broad-based indexes is halted or suspended whenever trading in underlying securities whose weighted value represents more than 20% of the index value is halted or suspended.

[22] 15 U.S.C. 78f(b)(5) (1988).

[23] See *supra* note 14.

[24] See *supra* note 17 for a list of the industry groups represented in the Index.

[25] Securities and Exchange Commission and Commodity Futures Trading Commission Joint Statement of Policy, Release No. 20578 (January 18, 1984) 49 FR 2884 (January 24, 1984). For a non-capitalization index, the Criteria require that: (1) An index be composed of at least twenty-five issuers; (2) the aggregate capitalization of an index be at least $75 billion; (3) no single security in the index has a weight in excess of 25% of the weight of all securities within the Index; (4) if any single security has a weight of ten percent or more of the aggregate weight of all securities within the index, that security is not part of the index if its weighted percentage in the index exceeds three times its percentage weight of total index capitalization; (5) the aggregate weight of the three securities having the highest percentage weight of all securities within the index not exceed 45% of the aggregate weight of all securities within the index. Although meeting the standards set forth in the joint policy statement does not by itself ensure that an index will be classified as broad-based, it does provide the Commission with information that is useful in determining whether a particular index should be so classified.

[26] Although NCR Corporation has the highest weight in the Index, the PSE intends to replace it because of the recent buy out of NCR Corporation by American Telegraph and Telephone Company. See letter by Scott Stark, Senior Research Analyst, PSE, to Monica Michelizzi, Staff Attorney, SEC, date October 3, 1991.

Business Machines, Inc. have the highest and the second highest weight in the Index and each stock's weight is only 3.77% and 3.61%, respectively, of the Index. Fourth, no single security in the Index has a weight of 10% or more of the aggregate weight of all securities within the Index. Fifth, the aggregate weight of the three securities having the highest percentage weight of all the securities within the Index does not exceed 45% of the aggregate weight of all securities in the Index. In particular, the aggregate weight of the three securities having the highest percentage weight have a percentage weight of 10.48%.

The Commission finds good cause for approving amendment No. 1 to the proposed rule change prior to the thirtieth day after the date of publication of notice of filing thereof in the Federal Register. The Commission finds that the modifications to the proposal effected by this amendment are consistent with the classification of the Index as broad-based and do not raise new issues. For example, amendment No. 1 requires that the stocks included in the Index continue to meet minimum levels of capitalization, public float, and trading volume, that no stocks or groups of stocks increase their weighings within the Index above specified levels, and that the stocks included in the Index continue to represent a broad spectrum of the technology field. These requirements do not add additional burdens to the trading of options on the Index, but merely ensure that the Index will continue to meet standards which permitted the Commission to classify it as broad-based. Accordingly, the Commission believes it is consistent with section 6(b)(5) of the Act to approve amendment No. 1 to the PSE's proposal on an accelerated basis.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning amendment No. 1 to the proposed rule change. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street NW., Washington, DC. Copies of such filing will also be available for inspection and copying at the principal office of the above-mentioned self-regulatory organization. All submissions should refer to the file number in the caption above and should be submitted by December 26, 1991.

It is therefore ordered, pursuant to section 19(b)(2) of the Act [27] that the proposed rule change (SR–PSE–90–14) is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[28]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 91–29070 Filed 12–3–91; 8:45 am]

BILLING CODE 8010–01–M

[Release No. 34–30007; File No. SR–PSE–91–34]

Self-Regulatory Organizations; Pacific Stock Exchange, Inc.; Notice of Filing and Order Granting Temporary Accelerated Approval of a Proposed Rule Change Relating to Alternate Specialist Pilot Program

November 27, 1991.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act") [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 18, 1991, the Pacific Stock Exchange, Inc. ("PSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission" or "SEC") 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

At this time, the PSE is submitting to the Commission a rule filing proposing to extend several policy statements relating to the PSE's alternate specialist program.[3] The Exchange requests that these policies be extended for one year in order to allow the PSE an opportunity to continue to evaluate the effectiveness of these proposals.

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 place 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

In its original submission to the Commission in September 1989, the PSE proposed the adoption, on a six-month pilot basis, of several policy statements relating to the operation of the Exchange's alternate specialist system. These proposals were approved by the Commission [4] and incorporated into PSE Rule 5.36(d).[5] This pilot was extended first in June, 1990, with amendments,[6] and again in November, 1990.[7]

In its November, 1990 approval order, the Commission requested that, during the extended pilot period, the PSE continue to develop criteria to evaluate the effects of its policy statements on the activities of alternate specialists and

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[27] 15 U.S.C. 78s(b) (1988).

[28] 17CFR 200.30–3(a)(12) (1990).

[1] 15 U.S.C. 78s(b)(1) (1988).

[2] 17 CFR 240.19b–4 (1991).

[3] The text of the policies was attached to the rule filing as Exhibit A and is available at the PSE and the Commission at the address noted in Item III below.

[4] *See* Securities Exchange Release No. 27493 (December 1, 1989), 54 FR 50833 (approving File No. SR–PSE–89–25 on a pilot basis ending June 1, 1990).

[5] These policies, embodied in Rule 5.36(d), Commentaries .02 through .05, provide: (1) A clarification of the duty of alternate specialists to clear both primary specialist posts on each of the PSE's two equity trading floors prior to entering into a trade; (2) sanctions for alternate specialists if their specialist evaluation ranking falls in the bottom 10% of their trading floor; (3) a 500-share minimum requirement for alternate specialists participating in certain pre-opening orders when requested to do so by a specialist; and (4) that the names of the alternate specialist and designated stocks be displayed at each specialist post in alphabetical order.

[6] *See* Securities Exchange Act Release No. 28112 (June 13, 1990), 55 FR 24953 (approving File No. SR–PSE–90–24, extending the pilot program for an additional six months ending December 1, 1990 and amending Rule 5.36(d), Commentary .02 to exempt the alternate specialist from clearing both posts when a primary specialist has requested the alternate specialist's participation in the transaction).

[7] *See* Securities Exchange Act Release No. 28661 (November 30, 1990), 55 FR 50434 (approving File No. SR–PSE–90–42).

to determine, for example, whether implementation of these policy statements is increasing the performance and effectiveness of alternate specialists within the specialist system. Specifically, the Commission requested that the PSE submit a report to the Commission describing how the implementation of commentaries .02, .03, and.04 to Rule 5.36(d) are improving the effectiveness of the PSE's alternate specialist system.

In response to the Commission's request, the PSE submitted a letter which indicated that the Exchange believes that the policies regarding the activities of alternate specialists set forth in the pilot program have proven to be beneficial to the alternate specialist program.[8] In particular, the Exchange stated that these policy statements are serving as an effective tool for adding depth to the marketplace as a result of the increased activity of the alternate specialists, who have facilitated many large orders. In addition, the PSE states that there have been no complaints or disciplinary actions against any alternate specialists for failing to properly clear both posts.[9] Nevertheless, the Exchange believes that the existence of this requirement ensures that PSE quotations are effectively monitored and considered before the alternate specialist seeks an execution, which promotes the auction mechanism of the market, thereby encouraging better customer executions.

The PSE also reports its experience with regard to Commentary .03, which provides that a specialist whose specialist evaluation ranking falls in the bottom 10% of his or her trading floor is precluded from acting as an alternate specialist until his or her ranking rises above the bottom 10%. The Exchange reported that since the fourth quarter of 1990, out of the 32 specialists who fell into the bottom 10%, 13 were also alternate specialists. Pursuant to Commentary .03, these specialists became subject to the sanctions of this rule in that they would be precluded from acting as alternate specialists until their specialist ranking rose above the bottom 10%, unless the Exchange Equity Allocation Committee ("Committee") determined that mitigating circumstances existed that excused or relieved a specialist from the policy restrictions. During this period, two of these specialists were relieved from the sanctions of this rule due to mitigating circumstances: their total evaluation scores were above 80%. Based on poor performance, the remaining specialists were precluded from acting as alternate specialists in the quarter following their poor performance. These specialists will not be allowed to resume alternate specialist activities until their performance rankings rise above the bottom 10%. The Exchange believes that this sanction has prove to be effective in encouraging specialists to improve their evaluation scores. For example, out of the 13 specialists in the bottom 10% since the last quarter of 1990, only two ranked in that position for two consecutive quarters, and one of those specialists nevertheless had total scores above 80%.

Because the alternate specialist pilot program is due to expire on December 1, 1991, the PSE is now requesting that the Commission approve the current pilot for an additional one-year period, through December 1, 1992, in order to allow the Exchange the opportunity to continue its evaluation of the effectiveness of these proposals.

The proposed rule change is consistent with section 6(b) of the Act in general, and section 6(b)(5) in particular, in that it will act to facilitate transactions in securities and will help to perfect the mechanism of a free and open market in Exchange listed securities, by furthering the effectiveness of the alternate specialist within the trading system.

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change imposes no burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

Comments on the proposed rule change were neither solicited nor received by the Exchange.

III. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Person 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 at the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing will also be available for inspection and copying at the principal office of the PSE. All submissions should refer to File No. SR-PSE-91-34 and should be submitted by December 26, 1991.

IV. Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change

The Commission finds that the PSE's proposal to extend its alternate specialist pilot program is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange, and, in particular, the requirements of section 6 of the Act.[10] The Commission notes that the extension of the pilot furthers the protection of investors and the public interest because it allows the Exchange additional time to evaluate the effectiveness of the pilot program.

The Commission notes that the preliminary reports submitted by the PSE indicate that the pilot program has been effective in helping the Exchange to evaluate the performance of specialists who are acting as alternate specialists. For instance, the Exchange has indicated that since the fourth quarter of 1990, 11 specialists were precluded from acting as alternate specialists because of poor performance and will not be permitted to resume alternate specialist activities on the Exchange until his or her performance ranking rises above the bottom 10%. The Commission therefore agrees with the PSE's conclusions that precluding specialists from acting as alternate specialists in accordance with this rule should act as an effective incentive in encouraging specialists with poor performance to improve their scores. This improved performance by specialists should enhance competition among specialists and alternate specialists on the Exchange floor and strengthen the PSE specialist system. Moreover, this enhanced performance by alternate specialists should make them more effective in aiding primary

[8] See letter from Kenneth J. Marcus, Director, Equity Compliance/Surveillance, PSE, to Elizabeth Pucciarelli, Attorney, Branch of Exchange Regulation, Division of Market Regulation, SEC, dated November 15, 1991.

[9] Commentary .02 provides that an alternate specialist shall clear both posts prior to effecting a transaction on the equity trading floors or over the Inter-market Trading System ("ITS"), except when the alternate specialist has been called upon by a registered primary specialist to participate in a transaction.

[10] 15 U.S.C. 78f (1988).

specialists in creating a more effective and competitive market.

During the extended pilot period, the Commission expects the Exchange to continue to develop criteria to evaluate the effects of its policy statements on the activities of alternate specialists and to determine, for example, whether implementation of these policy statements is increasing the performance and effectiveness of alternate specialists within the specialist system. In particular, the Commission expects the Exchange to submit a report to the Commission by September 1, 1992, describing how the implementation of commentaries .02, .03, and .04 to PSE Rule 5.36(d) has improved the effectiveness of the PSE's alternate specialist system. In its report, the Commission requests that the PSE address, among other things, the following issues: Whether there have been any complaints or any disciplinary actions against alternate specialists for violating the policies in the pilot program; whether requiring alternate specialists to clear the posts on the Exchange's two trading floors has helped in ensuring that public customers obtain the best possible executions of their securities orders; whether any specialists have been precluded from acting as alternate specialists on the Exchange based on their performance rankings; and whether implementation of a 500-share participation requirement for alternate specialists on certain pre-opening orders has added depth to the PSE market. Finally, the Commission expects the PSE to file a proposed rule change by September 1, 1992, requesting one of the following: (1) An extension of the pilot, if further time is needed for evaluation; (2) permanent approval of the alternate specialist system policy statements; or (3) termination of the pilot program.

The Commission finds good cause for approving the proposed extension of the pilot prior to the thirtieth day after the date of publication of notice hereof in the **Federal Register.** The Commission believes it is necessary to extend the pilot program's operation so as to afford both the Exchange and the Commission an opportunity to evaluate the pilot's operation on an uninterrupted basis. In addition, the reports submitted by the PSE indicate that the pilot program has been effective in evaluating the performance of alternate specialists and in encouraging alternate specialists to improve their performance. As stated previously, the Commission believes that improved performance by alternate specialists should strengthen the overall effectiveness and competitiveness of the PSE's specialist system. Further, the substance of the proposal has been noticed previously in the **Federal Register** for the full statutory period and the Commission did not receive any comments on it. The Commission believes, therefore, that accelerated effectiveness of the proposal for an additional one-year period is appropriate.

It is therefore ordered, Pursuant to section 19(b)(2) of the Act [11] that the proposed rule change (SR–PSE–91–34) is hereby approved for a period ending on December 1, 1992.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[12]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 91–29071 Filed 12–3–91; 8:45 am]

BILLING CODE 8010–01–M

[Release No. 34–29997; File No. SR–Phlx–91–42]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Philadelphia Stock Exchange, Inc. Relating to Fees and Charges on Cross-Rate Foreign Currency Options Transactions

November 26, 1991.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"), 15 U.S.C. 78s(b)(1), notice is hereby given that on November 19, 1991, the Philadelphia Stock Exchange ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the 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

The Phlx proposes to amend the Phlx's Schedule of Fees and Charges with respect to fees for the transaction of business in its cross-rate foreign currency options. The proposed rate schedule is set forth as Exhibit A.

[11] 15 U.S.C. 78s(b)(2) (1988).

[12] 17 CFR 200.30–3(a)(12) (1991).

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

The purpose of the proposed rule change is to amend the Phlx Schedule of Fees and Charges. These revisions reflect the imposition of Exchange transaction and floor broker charges to the introduction of trading in three cross rate currency options contracts scheduled to commence trading at the opening of business on November 22, 1991 on the Phlx. The proposed transaction and floor brokerage fees represent an increase in Exchange imposed charges per contract in cross rate currency options due to these contracts' relative larger size in comparison to other Phlx foreign currency options contracts. Additionally, cross rate currency options contracts volume will be aggregated with other currency options contracts volume for the determination of volume discounts to be provided at current discount levels. This amendment to the Exchange's Fee Schedule was determined by the Phlx Board of Governors to competitively align service charges associated with the Phlx's Cross Rate Currency Options Program relative to other markets for similar products.

The Exchange believes that the proposed rule change is consistent with section 6(b)(4) of the Act in that it provides for the equitable allocation of reasonable dues, fees and other charges among its members and other persons using its facilities.

(B) Self-Regulatory Organization's Statement on Burden on Competition

The Exchange believes that the proposed rule change will not impose any inappropriate burden on competition.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

Written comments on the proposed rule change were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing proposal institutes fees and other charges imposed by the Phlx with respect to cross-rate foreign currency options. Accordingly, the proposal has become effective pursuant to section 19(b)(3)(A) of the Act and subparagraph (e) of Rule 19b–4 thereunder. At any time within 60 days of the date of filing of this 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 submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC. Copies of such filing will also be available for inspection and copying at the principal office of the above-mentioned self-regulatory organization. All submissions should refer to the file number in the caption above and should be submitted by December 26, 1991.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[1]

Margaret H. McFarland,

Deputy Secretary.

[1] 17 CFR 200.30–3(a)(12) (1990).

All text is new

Exhibit A

PHLX Schedule of Dues, Fees and Charges Summary of Cross Rate Foreign Currency Option Charges

Transaction Charge

Customer—$2.50 per contract
Firm—$1.75 per contract
Registered Trader—$1.00 per contract
Specialist—$0.50 per contract
Cross Rate Option Floor Brokerage Assessment:
5% of net floor brokerage income
Cross Rate Option Floor Broker Transaction Fee:
$.35 per contract, for floor brokers executing transactions for their own member firms

Volume discounts will be available for cross rate currency options trading activity which will be aggregated with Customer and Firm activity per billing period with all other foreign currency option transaction activity eligible for discounts. The discount methodology will be the same as provided for other foreign currency option contracts and will not be adjusted for relative differences in contract sizes.

[FR Doc. 91–29072 Filed 12–3–91; 8:45 am]

BILLING CODE 8010–01–M

[Release No. 34–30002; File No. SR–PHLX–91–27]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the Philadelphia Stock Exchange, Inc., Relating to the Introduction of a Narrow-Based Index Option Based on an Index of Bank Stocks

November 26, 1991.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"), 15 U.S.C. 78s(b)(1), notice is hereby given that the Philadelphia Stock Exchange, Inc. ("PHLX" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), on October 23, 1991, 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

The Exchange, pursuant to Rule 19b–4 of the Act, proposes to introduce an index option based on the Keefe, Bruyette & Woods, Inc. Index ("KBWI") of 24 select Federal Deposit Insurance Corporation ("FDIC") insured, geographically representative U.S. commercial bank stocks ("Index," "Bank Index" or "PHLX/KBW Bank Index"). A description of the proposal is set forth in section II.A. below.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, 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

The purpose of the proposed rule change is to establish a European-style index option comprised of the 24 select FDIC insured, geographically representative U.S. commercial bank stocks contained in the KBWI. A list of the specific stocks, along with their market value and weight in the Index as of October 16, 1991, is available at the PHLX and the Commission.

In furtherance of developing the Bank Index, the PHLX has executed a license agreement with KBW. Pursuant to this agreement, the PHLX has received permission from KBW to compute the KBWI as a capitalization-weighted index rather than a price-weighted index. The agreement assures that KBW will work with PHLX on an ongoing basis to service the Index.

Options on the Bank Index will be traded pursuant to the Exchange rules governing the trading of index options.[1] The proposed Index's contract specifications are as follows:

Ticker Symbol: BKX.
Underlying Index: The Bank Index is a capitalization-weighted index composed of the 24 select FDIC-insured, geographically representative U.S. commercial banks currently represented in the KBWI. To calculate the Bank Index the following formula is used:

[1] *See* PHLX Rules 1000A–1103A.

$$\text{Index Value Today} = \text{Index Value Yesterday} \times \frac{\text{(sum of market values today)}}{\text{(sum of market values yesterday)}}$$

The sum of market values ("MV") is derived by multiplying the price by the number of shares. The Index value was set at a starting value of 250 on October 21, 1991.

The divisor which will be henceforth used to adjust the Index from its initial value of 250 is derived as follows:

$$\text{Divisor} = \frac{\text{(sum of market values yesterday)}}{\text{(index value yesterday)}}$$

The Bank Index value will be updated dynamically at least every minute during the trading day. Bridge Data, Inc. will compute the necessary data, including any Index composition adjustments and Index maintenance. Pursuant to PHLX Rule 1100A, updated Index values will be derived by means of primary market prints reported by the Consolidated Tape Association ("CTA") for listed stocks and by the National Association of Securities Dealers, Inc.'s ("NASD") last sale reporting system for NASDAQ-National Market System Securities. The Index value, last sale and quotation information for the option will be disseminated through the facilities of the Options Price Reporting Authority ("OPRA"). Under the direction of PHLX, Bridge Data, Inc. will compute any changes or replacements in the Index resulting from mergers, acquisitions, or other activity affecting the Index's capitalization.

Principal Amount: Each options contract will represent the Index multiplier ($100) times the Index value. For example, an Index value of 250 will result in a dollar contract value of $25,000 ($100 × 250).

Exercise Price: Exercise prices will be set at five point intervals. Additional exercise prices will be added in accordance with PHLX Rule 1012(a)(iii).

Aggregate Exercise Price: The aggregate exercise price is found by multiplying the Index multiplier ($100) by the exercise price.

Expiration Cycles: The PHLX will trade consecutive and cycle month series pursuant to PHLX Rule 1101A.

Premium Quotations: Premiums will be expressed in terms of dollars and fractions of dollars pursuant to PHLX Rule 1033A. For example, a bid or offer of 1½ will represent a premium per options contract of $150 (1½ × 100).

Position and Exercise Limits: The PHLX will employ position and exercise limits, applicable to narrow-based stock indexes, pursuant to PHLX Rules 1001A(b)(1) and 1002A, respectively.

Replacement of Stocks in Index: A bank will be replaced only when it ceases to exist (through merger or acquisition) or declares bankruptcy or if it should alter its character so substantially that it no longer operates as a commercial bank. On such a replacement event, EBW will substitute another FDIC insured, geographically representative U.S. commercial bank. KBW's replacement decisions are based on a variety of factors, including the size, capitalization, earnings performance, liquidity, capitalization ratios, asset quality and profitability of potential replacement banks. The replacement process consists of a rigorous multifaceted evaluation of potential replacement banks managed by the KBW research and development division and overseen by KBW executive management.

Adjustments to Stocks in Index: When a stock pays an ordinary cash dividend, no Index adjustment will be made. Neither stock splits nor stock dividends affect the Index value directly. The Exchange anticipates that a stock split or stock dividend will result in a proportional reduction in the price per share of the stock.[2] When it becomes necessary to change a component stock, the new issue will be added to the Index by incorporating its market value into the total market value during the after-the-market close adjustment procedure, so the Index is unchanged. Similarly, the market value of an issue just deleted from the Index will be removed when determining adjusted market value.

Given the recent developments in the banking industry, including merger activity and legislative reforms, the Exchange believes that the proposed product will provide professional traders as well as public investors with a highly desirable trading vehicle and a valuable hedging instrument. The underlying banks will represent desirable profitability levels, adequacy of capitalization, asset quality and market performance. The market-capitalization based Bank Index will be different than the currently existing KBW Index which is an unweighted price-based index. Options investors often look to market capitalization rather price as an indicator of growth and profitability.

The Exchange also believes the Index will not be susceptible to market manipulation. The Exchange's Market Surveillance will ensure that existing Exchange rules regarding index options trading will be enforced and any unusual trading in the Bank Index options will be promptly identified and investigated.

The proposed rule change is consistent with section 6(b)(5) of the Act which provides in part that the rules of the Exchange be designed to prevent fraudulent and manipulative acts and practices, to facilitate transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market.

Self-Regulatory Organization's Statement on Burden on Competition

The PHLX does not believe that the proposed rule change will impose any burden on competition.

[2] After the close of trading on the day prior to the ex-dividend date, a theoretical adjusted price for the stock paying a stock dividend will be calculated. The theoretical adjusted price is calculated only to determine the anticipated price and will not affect the level of the Index.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

The proposed rule change was discussed with and approved by the Options and Executive Committees of the PHLX.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve the proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing will also be available for inspection and copying at the principal office of the above-mentioned self-regulatory organization. All submissions should refer to File No. SR–PHLX–91–27 and should be submitted by December 26, 1991.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 91–28991 Filed 12–3–91; 8:45 am]

BILLING CODE 8010–01–M

[Rel. No. IC–18420; No. 811–4991]

Thomson McKinnon Accumulation Plan Trust

November 26, 1991.

AGENCY: Securities and Exchange Commission ("SEC").

ACTION: Notice of application for an order under the Investment Company Act of 1940 (the "1940 Act").

APPLICANT: Thomson McKinnon Accumulation Plan Trust.

RELEVANT 1940 ACT SECTION: Order requested under section 8(f).

SUMMARY OF APPLICATION: Applicant seeks an order declaring that it has ceased to be an investment company as defined by the 1940 Act.

FILING DATE: The application was filed on July 30, 1991 and amended on October 24, 1991.

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 December 23, 1991. Request a hearing in writing, giving the nature of your interest, the reason for the request and the issues you contest. Serve the Applicant with the request, either personally or by mail, and also send it to the Secretary of the SEC, along with proof of service by affidavit, or, for lawyers, by certificate. Request notification of the date of a hearing by writing to the Secretary of the SEC.

ADDRESSES: Secretary, SEC, 450 Fifth Street, NW., Washington, DC 20549. Applicant, One State Street Plaza, New York, New York 10004.

FOR FURTHER INFORMATION CONTACT: Thomas Bisset, Attorney (202) 272–2058, or Heidi Stam, Assistant Chief (202) 272–2060, Office of Insurance Products (Division of Investment Management).

SUPPLEMENTARY INFORMATION: Following is a summary of the application; the complete application is available for a fee from the SEC's Public Reference Branch.

Applicants' Representations

1. Pursuant to section 8(a) of the 1940 Act, a Notification of Registration on Form N–8A was filed with the SEC on behalf of Applicant on January 27, 1987. Pursuant to section 8(b) of the 1940 Act, a registration statement on Form N–1A was filed with the SEC on behalf of Applicant (under the name "Thomson McKinnon Investment Annuity Trust") on December 29, 1986.

2. The registration statement was also filed pursuant to the Securities Act of 1933. The registration statement was declared effective on June 2, 1987. On July 1, 1987, Applicant commenced the continuous offering of shares, which were available for purchase exclusively by the Thomson McKinnon Separate Account (the "Account"), a separate account of Hartford Life Insurance Company ("Hartford").

3. Applicant is a voluntary association under a declaration of trust with transferable units of beneficial interest, organized and existing under and by virtue of the laws of the Commonwealth of Massachusetts.

4. Applicant served as the underlying investment vehicle for certain variable annuity insurance contracts issued by Hartford through the Account. In the first quarter of 1991, Hartford offered to each holder of such variable annuity contracts a tax-free exchange for other variable annuity contracts issued by Hartford for which Applicant did not serve as an investment vehicle. On May 30, 1991, the Account, as sole shareholder of each series of Applicant, tendered all outstanding shares of each series for redemption and on May 31, 1991 Applicant paid the Account an amount of cash equal to the net asset value of each of the series of Applicant. By June 1, 1991, Applicant had no net assets and had suspended all of its operations.

5. As of June 30, 1991, the Applicant's assets consisted of $102,180.23 in cash, which will be used solely to satisfy accrued liabilities of the Applicant. These assets are not and will not be invested in securities.

6. As of June 30, 1991, the Applicant has $102,180.23 in liabilities, consisting of estimated legal and accounting expenses and estimated expenses in connection with the preparation and filing of Applicant's tax returns.

7. There were no expenses incurred in connection with the liquidation of Applicant other than brokerage charges and certain expenses associated with the proceedings to deregister Applicant as an investment company and to file Applicant's tax returns, which will be paid out of the assets of Applicant described in item 5 above (to the extent that Applicant's assets are insufficient, such expenses will be paid by Thomson Advisory Group L.P., Applicant's investment adviser).

8. Applicant, to the best of its knowledge, is not a party to any litigation or administrative proceedings. Applicant is not now engaged, nor does it propose to engage, in any business activities other than those necessary for

the winding-up of its affairs. Applicant will file an amendment to its Agreement and Declaration of Trust to terminate Applicant's existence as a Massachusetts business trust. Applicant has no security holders as of the date of its application. There are no security holders of Applicant to whom disbursements in complete liquidation of their interests in Applicant have not been made.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 91-28992 Filed 12-3-91; 8:45 am]

BILLING CODE 8010-01-M

DEPARTMENT OF STATE

[Public Notice 1528]

Advisory Committee on International Communications and Information Policy, Subcommittee on Industrialized Country Policy; Meeting

The Department of State announces that the Subcommittee on Industrialized Country Policy of the Committee on International Communications and Information Policy will hold an open meeting on Friday, December 13, 1991, from 10 a.m. to 12 noon in room 6824, Department of State, 2201 "C" Street, NW., Washington, DC 20520.

At the meeting, there will be a report from the U.S. Delegation to the Committee for Information, Computer and Communications Policy (ICCP) of the Organization for Economic Cooperation and Development (OECD) on issues currently before the ICCP and its various working parties and experts groups, highlighting the telecommunications activities of the OECD's Centre for Cooperation Among European Economies in Transition dealing with the emerging democracies of Central and Eastern Europe. Also, ideas will be solicited on developing U.S. project proposals for the 1993 work program to be discussed at the March, 1992 ICCP Meeting.

Mr. Kenneth Leeson and Ms. Cathy Slesinger, co-chairs of the Subcommittee, will chair the meeting. Mr. Richard C. Beaird, Deputy U.S. Coordinator and Deputy Director, Bureau of International Communications and Information Policy, U.S. Department of State, and Chairman of the ICCP, will participate in the meeting.

Members of the general public may attend the meeting and join in the discussion, subject to the instructions of the co-chairs. Admittance of public members will be limited to seating available. In that regard, entrance to the Department of State building is controlled and individual passes are required for each attendee. Entry will be facilitated if arrangements are made in advance of the meeting.

Prior to the meeting, persons who plan to attend should so advise the office of Mr. Timothy C. Finton, Department of State, Washington, DC; telephone (202) 647-5230. They must provide Mr. Finton with their name, title, company name, social security number, and date of birth. All attendees must use the "C" Street entrance to the building.

Dated: November 19, 1991.

Timothy C. Finton,

Chairman, U.S. Delegation to the ICCP.

[FR Doc. 91-29053 Filed 12-3-91; 8:45 am]

BILLING CODE 4710-07-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Aviation Rulemaking Advisory Committee; Rotorcraft Subcommittee; Occupant Restraint Working Group

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of establishment of Occupant Restraint Working Group.

SUMMARY: Notice is given of the establishment of an Occupant Restraint Working Group by the Rotorcraft Subcommittee. This notice informs the public of the activities of the Rotorcraft Subcommittee of the Aviation Rulemaking Advisory Committee.

FOR FURTHER INFORMATION CONTACT: Mr. William J. (Joe) Sullivan, Executive Director, Rotorcraft Subcommittee, Aircraft Certifications Service (AIR-3), 800 Independence Avenue, SW., Washington, DC 20591, Telephone: (202) 267-9554; FAX: (202) 267-9562.

SUPPLEMENTARY INFORMATION: The Federal Aviation Administration (FAA) established an Aviation Rulemaking Advisory Committee (56 FR 2190, January 22, 1991) which held its first meeting on May 23, 1991 (56 FR 20492, May 3, 1991). The Rotorcraft Subcommittee was established at that meeting to provide advice and recommendations to the Director, Aircraft Certification Service, FAA, regarding the airworthiness standards for normal and transport category rotorcraft in parts 27 and 29 of the Federal Aviation Regulations. At its first meeting on September 25, 1991 (56 FR 33484, July 22, 1991), the subcommittee established the Occupant Restraint Working Group.

Specifically, the working group's task is the following:

Task: The Occupant Restraint Working Group is charged with making a recommendation to the Rotorcraft Subcommittee concerning whether new or revised standards are appropriate for rotorcraft occupant restraints, as follows:

1. Should the design load factors be increased for items of mass located above and behind, above, or behind the passenger compartment?

2. Should §§ 27.785(f)(2) and 29.785(f)(2) be clarified to specify the 1.33 fitting factor for seats also applies to berths and litters?

In completing this task, the working group should review comments received on FAA Notice 87-4 which recommended these changes.

Reports: The Working Group will develop any combination of the following as it deems appropriate:

1. A draft Notice of Proposed Rulemaking proposing new standards, supporting economic and other required analysis, with any other collateral documents the Working Group determines to be needed; or

2. A report stating the rationale for recommending against the adoption of new standards.

The working group will first develop a time line(s) for completion of this effort, and present it to the Subcommittee for approval at the next meeting. The working group Chair or an alternate will make a status report at each meeting of the Rotorcraft Subcommittee.

The Occupant Restraint Working Group will be comprised of experts from those organizations having an interest in the task assigned to it. A working group member need not necessarily be a representative of one of the organizations of the parent Rotorcraft Subcommittee or of the full Aviation Rulemaking Advisory Committee. An individual who has expertise in the subject matter and wishes to become a member of the working group should write the person listed under the caption **"FOR FURTHER INFORMATION CONTACT"** expressing that desire, describing his or her interest in the task, and the expertise he or she would bring to the working group. The request will be reviewed with the subcommittee chair and working group leader, and the individual advised whether or not the request can be accommodated.

The Secretary of Transportation has determined that the information and use of the Aviation Rulemaking Advisory Committee and its subcommittees are

necessary in the public interest in connection with the performance of duties imposed on the FAA by law. Meetings of the full committee and any subcommittees will be open to the public except as authorized by section 10(d) of the Federal Advisory Committee Act. Meetings of the Occupant Restraint Working Group will not be open to the public, except to the extent that individuals with an interest and expertise are selected to participate. No public announcement of working group meetings will be made.

Issued in Washington, DC, on November 27, 1991.

William J. Sullivan,

Executive Director, Rotorcraft Subcommittee, Aviation Rulemaking Advisory Committee.

[FR Doc. 91-29034 Filed 12-3-91; 8:45 am]

BILLING CODE 4910-13-M

Aviation Rulemaking Advisory Committee; Rotorcraft Subcommittee; External Load Working Group

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of establishment of External Loal Working Group.

SUMMARY: Notice is given of the establishment of an External Load Working Group by the Rotorcraft Subcommittee. This notice informs the public of the activities of the Rotocraft Subcommittee of the Aviation Rulemaking Advisory Committee.

FOR FURTHER INFORMATION CONTACT: Mr. William J. (Joe) Sullivan, Executive Director, Rotorcraft Subcommittee, Aircraft Certification Service (AIR-3), 800 Independence Avenue, SW., Washington, DC 20591, Telephone: (202) 267-9554; FAX: (202) 267-9562.

SUPPLEMENTARY INFORMATION: The Federal Aviation Administration (FAA) established an Aviation Rulemaking Advisory Committee (56 FR 2190, January 22, 1991) which held its first meeting on May 23, 1991 (56 FR 20492, May 3, 1991). The Rotorcraft Subcommittee was established at that meeting to provide advice and recommendations to the Director, Aircraft Certification Service, FAA, regarding the airworthiness standards for normal and transport category rotorcraft in parts 27 and 29 of the Federal Aviation Regulations. At its first meeting on September 25, 1991 (56 FR 33484, July 22, 1991), the subcommittee established the Occupant Restraint Working Group.

Specifically, the working group's task is the following:

Task: The External Load Working Group is charged with making a recommendation to the Rotorcraft Subcommittee concerning whether new or revised airworthiness standards are appropriate for Class D rotorcraft external loads, as follows; Should parts 27 or 29 be amended to incorporate Class D external load attaching means, to complement Amendment 133-9, which authorizes the transport of passengers external to the rotorcraft, which certain conditions and limitations.

Reports: The Working Group will develop any combination of the following as it deems appropriate:

1. A draft Notice of Proposed Rulemaking proposing new standards, supporting economic and other required analysis, with any other collateral documents the Working Group determines to be needed; or

2. A report stating the rationale for recommending against the adoption of new standards.

The working group will first develop a time line(s) for completion of this effort, and present it to the Subcommittee for approval at the next meeting. The working group chair or an alternate will make a status report at each meeting of the Rotorcraft Subcommittee.

The External Load Working Group will be comprised of experts from those organizations having an interest in the task assigned to it. A working group member need not necessarily be a representative of one of the organizations of the parent Rotorcraft Subcommittee or of the full Avaiation Rulemaking Advisory Committee. An individual who has expertise in the subject matter and wishes to become a member of the working group should write the person listed under the caption "**FOR FURTHER INFORMATION CONTACT**" expressing that desire, describing his or her interest in the task, and the expertise he or she would bring to the working group. The request will be reviewed with the subcommittee chair and working group leader, and the individual advised whether or not the request can be accommodated.

The Secretary of Transportation has determined that the information and use of the Aviation Rulemaking Advisory Committee and its subcommittees are necessary in the public interest in connection with the performace of duties imposed on the FAA by law. Meetings of the full committee and any subcommittees will be open to the public except as authorized by section 10(d) of the Federal Advisory Committee Act. Meetings of the External Load Working Group will not be open to the public, except to the extent that individuals with an interest and expertise are selected to participate. No public announcement of working group meetings will be made.

Issued in Washington, DC on November 27, 1991.

William J. Sullivan,

Executive Director, Rotocraft Subcommittee, Aviation Rulemaking Advisory Committee.

[FR Doc. 91-29035 Filed 12-3-91; 8:45 am]

BILLING CODE 4910-13-M

National Highway Traffic Safety Administration

[Docket No. 91-51; Notice 1]

The Clarity Group, Inc.; Receipt of Petition for Temporary Exemption From Nine Federal Motor Vehicle Safety Standards

The Clarity Group, Inc., of Glendale, Arizona, dba Electric Transportation Applications, has applied for a temporary exemption from nine Federal motor vehicle safety standards for passenger cars and trucks that it converts to electric power. The basis of the petition is that an exemption will facilitate the development and field evaluation of low-emission motor vehicles.

Notice of receipt of the petition is published in accordance with agency regulations on the subject (49 CFR part 555), and does not represent any judgment of the agency on the merits of the petition.

Petitioner intends to convert 1992 model Ford Escort LX station wagons, and Chevrolet S10/GMC S15 pickup trucks to electric power. Petition is therefore made on the basis that a temporary exemption would facilitate the development and field evaluation of a low-emission motor vehicle, as provided by 49 CFR 555.6(c).

The vehicles to be converted have been certified by their original manufacturers to conform to all applicable Federal motor vehicle safety standards. However, petitioner has determined that the vehicles may not conform with all or part of nine Federal motor vehicle safety standards after their modification. The standards and sections for which exemptions are requested are discussed more fully below.

1. Standard No. 101, Control and Displays.

(a) S5.1: displays for fuel, engine coolant temperature, oil, and electrical charge.

(b) S5.3: illumination of controls and displays.

In the petitioner's view, these exemptions would not unreasonably

degrade the safety of the vehicle because "the simplicity of the electric vehicle minimizes the safety impact of the instrumentation specific to the vehicle operation not meeting the standard."

2. Standard No. 102, Transmission Shift Lever Sequence, Starter Interlock, and Transmission Braking Effect.

(a) S3.1.2 Transmission braking effect.

(b) S3.1.3 Starter interlock.

Petitioner argues that these requirements do not apply to electric vehicles, and thus "there is no safety impact from the electric vehicle not meeting the standard."

3. Standard No. 103, Windshield Defrosting and Defogging Systems.

Petitioner states that the test criteria of this standard are inapplicable to an electric vehicle. "The engine coolant heater core is replaced with an electrical resistance heating element to provide a heat source. Other portions of the system are left essentially unchanged, minimizing the safety impact of the electric vehicle not meeting the standard."

4. Standard No. 105, Hydraulic Brake Systems.

(a) S5.1 Service brake system.

(b) S5.2 Parking brake systems.

(c) S6 Test conditions.

(d) S7 Test conditions.

Petitioner's modifications are such that "the electric vehicle weight and proportioning between axles is different that that used in the certification testing of the original vehicle. However, the original vehicle's braking system is not modified minimizing the impact of the electric vehicle not meeting the standard."

5. Standard No. 124, Accelerator Control System.

The petitioner requests exemption from the entire standard, "as a result of criteria inapplicable to an electric vehicle. The accelerator in the electric vehicle operates electronic components rather than a throttle assembly as with an internal combustion system. Therefore, the impact of the electric vehicle not meeting the standard is minimal."

6. Standard No. 208, Occupant Crash Protection.

(a) S5 Occupant crash protection requirements.

7. Standard No. 212, Windshield Mounting.

8. Standard No. 219, Windshield Zone Intrusion.

Exemption is requested from these three standards on the basis that modifications to the original vehicle, such as the addition of battery packs, invalidates the testing upon which the original certification was based.

Petitioner argues that the safety effect of these modifications may be minimal. Ten years ago, the petitioner conducted 30-mph frontal barrier testing of a 1981 Ford Escort liftback sedan that it had converted to electric power. The windshield retained 92% of its periphery, far exceeding the minimum of 75% imposed by Standard No. 212. There was no intrusion of the windshield into the protected zone established by Standard No. 219. The petitioner states that, therefore, the effect upon the occupant protection requirements of Standard No. 208 should be minimal.

9. Standard No. 301, Fuel System Integrity.

The petitioner represents that "no tanks are provided for on board storage of any fuels." Thus, the standard does not apply to electric vehicles, and no safety impact results.

According to the petitioner, an exemption would facilitate the development and field evaluation of a low-emission motor vehicle by enabling the petitioner to advance "the state of the art in electric vehicle traction systems through the application of electric vehicles in actual commercial uses", and deriving data from such uses. Developmental changes are frequent, "making testing for conformance to the standards impractical."

Further, argues the petitioner, granting the exemption would be in the public interest and consistent with the National Traffic and Motor Vehicle Safety Act by reducing air pollution in urban areas and the use of oil products for transportation.

Interested persons are invited to submit comments on the petition described above. Comments should refer to the docket number and be submitted to: Docket Section, National Highway Traffic Safety Administration, room 5109, 400 Seventh Street, SW., Washington, DC 20590. It is requested but not required that 10 copies be submitted.

All comments received before the close of business on the closing date indicated above will be considered and will be available for examination in the docket at the above address both before and after that date. To the extent possible, comments filed after the closing date will also be considered. Notice of final action on the petition will be published in the **Federal Register** pursuant to the authority indicated below.

Comment closing date: January 3, 1992.

(15 U.S.C. 1410; delegations of authority at 49 CFR 1.50, and 501.8)

Issued on November 27, 1991.

Barry Felrice,

Associate Administrator for Rulemaking.

[FR Doc. 91-28998 Filed 12-3-91; 8:45 am]

BILLING CODE 4910-59-M

DEPARTMENT OF THE TREASURY

Public Information Collection Requirements Submitted to OMB for Review

November 25, 1991.

The Department of Treasury has made revisions and resubmitted the following public information requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1980, Public Law 96-511. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, room 3171 Treasury Annex, 1500 Pennsylvania Avenue, NW., Washington, DC 20220.

Internal Revenue Service

OMB Number: 1545-0805.

Form Number: IRS form 5472.

Type of Review: Resubmission.

Title: Information Return of a 25% Foreign-Owned U.S. Corporation or Foreign Corporation Engaged in U.S. Trade or Business.

Description: Form 5472 is used by U.S. corporations that are 25% foreign owned and by foreign corporations that are engaged in a U.S. trade or business to report transactions between themselves and any related foreign party. IRS uses form 5472 to determine if inventory or other costs deducted by the U.S. or foreign corporation are correct.

Respondents: Businesses or other for-profit.

Estimated Number of Respondents/Recordkeepers: 75,000.

Estimated Burden Hours Per Respondent/Recordkeeper:

Recordkeeping—17 hours, 28 minutes

Learning about the law or the form—1 hour, 41 minutes

Preparing and sending the form to IRS—2 hours, 3 minutes

Frequency of Response: Annually.

Estimated Total Reporting/Recordkeeping Burden: 1,589,250 hours.

Clearance Officer: Garrick Shear (202) 535-4297, Internal Revenue Service, room 5571, 1111 Constitution Avenue, NW., Washington, DC 20224.

OMB Reviewer: Milo Sunderhauf (202) 395–6880, Office of Management and Budget, room 3001, New Executive Office Building, Washington, DC 20503.

Lois K. Holland,

Departmental Reports Management Officer.

[FR Doc. 91–29002 Filed 12–3–91; 8:45 am]

BILLING CODE 4830–01–M

UNITED STATES INFORMATION AGENCY

U.S. Advisory Commission on Public Diplomacy Meeting

AGENCY: United States Information Agency.

ACTION: Notice.

SUMMARY: A meeting of the U.S. Advisory Commission on Public Diplomacy will be held on December 11 in room 600, 301 4th Street, SW., Washington DC from 10 a.m. to 12:30 p.m.

At 10 a.m. the Commission will meet with Mr. Stan Zuckerman, Director, Office of American Republics Affairs, for an overview of public diplomacy programs in Latin America; at 10:45 a.m. it will meet with Mr. McKinney Russell, Counselor, USIA, on USIA's response to the Commission's 1991 report, new directions in Soviet programs, and China broadcasting; and at 11:30 a.m. it will meet with The Honorable Chase Untermeyer, Associate Director, Bureau of Broadcasting and Director, Voice of America for an update on Broadcasting to Asia and the Israel transmitter project.

FOR FURTHER INFORMATION: Please call Gloria Kalamets, (202) 619–4468, if you are interested in attending the meeting since space is limited and entrance to the building is controlled.

Dated: November 29, 1991.

Rose Royal,

Management Analyst, Federal Register Liaison.

[FR Doc. 91–29074 Filed 12–3–91; 8:45 am]

BILLING CODE 8230–01–M

DEPARTMENT OF VETERANS AFFAIRS

Medical Care Reimbursement Rates for FY 92

AGENCY: Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In accordance with provisions of OMB Circular A–11 section 13.5(a), revised reimbursement rates have been established by the Department of Veterans Affairs for inpatient and outpatient medical care furnished to beneficiaries of other Federal agencies during FY 1992. These rates will be charged for such medical care provided at health care facilities under the direct jurisdiction of the Secretary on and after December 1, 1991.

FOR FURTHER INFORMATION CONTACT: Mr. Walter J. Besecker, Director, Medical Care Cost Recovery (165), Veterans Affairs Central Office, 810 Vermont Avenue NW., Washington, DC 20420, (202) 233–2180.

SUPPLEMENTARY INFORMATION: The Interagency billing rates for FY 1992 are as follows:

Medicine	$609
Surgery	871
Spinal Cord Injury	583
Neurology	516
Blind Rehabilitation	469
Psychiatry	261
Intermediate Medicine	220
Rehabilitation Medicine	419
Alcohol and Drug	214
Nursing Home	180
Prescription—Refill	19
Outpatient *	131
Dental Outpatient	83

*Rate includes Dialysis Treatment.

Prescription refill charges in lieu of the outpatient visit rate will be charged when the patient receives no service other than the Pharmacy outpatient service. These charges apply if the patient receives the prescription refills in person or by mail.

When medical services for beneficiaries of other Federal agencies are obtained by the Department of Veterans Affairs from private sources, the charges to the other Federal agencies will be the actual amounts paid by the Department of Veterans Affairs for such medical services.

Inpatient charges to other Federal agencies will be at the current interagency per diem rate for the type of bed section or discrete treatment unit providing the care.

Dated: November 22, 1991.

Edward J. Derwinski,

Secretary.

[FR Doc. 91–29023 Filed 12–3–91; 8:45 am]

BILLING CODE 8320–01–M

Sunshine Act Meetings

Federal Register
Vol. 56, No. 233
Wednesday, December 4, 1991

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

FEDERAL ENERGY REGULATORY COMMISSION

Notice

(November 26, 1991)

The following notice of meeting is published pursuant to Section 3(a) of the Government in the Sunshine Act (Pub. L. No. 94–409), 5 U.S.C. 552b:

DATE AND TIME: December 11, 1991, 9:00 a.m.

PLACE: 825 North Capitol Street, NE., Room 9306, Washington, DC 20426.

STATUS: Open.

MATTERS TO BE CONSIDERED: FERC and State Public Utility Commissioners will discuss issues concerning Clean Air Act Implementation.

CONTACT PERSON FOR MORE INFORMATION: Patrick O. Goss, Division of Public and Intergovernmental Affairs, Telephone (202) 208–1088.

Lois D. Cashell,

Secretary.

[FR Doc. 91–29120 Filed 11–29–91; 4:35 pm]

BILLING CODE 6717–01–M

DEPARTMENT OF JUSTICE

UNITED STATES PAROLE COMMISSION

An additional item to be added to the agenda of the open meeting to be held on Tuesday, December 3, 1991, at 5550 Friendship Boulevard, Chevy Chase, Maryland 20815; Correction

AGENCY: United States Parole Commission.

ACTION: Notice of Correction of previous published agenda.

SUMMARY: This notice corrects the agenda previously published in the **Federal Register** on Friday, November 29, 1991, 56FR 61093 by adding an additional item to be discussed at the open meeting of the Commission to be held in Chevy Chase, Maryland. The following item has been added to the agenda: Proposal to move a few states from the Eastern Regional Office, Southern Division to the North Central Regional Office for the purpose of redistributing the current workload. (This does not constitute the major realignment study proposed in the 1992 Budget.)

Dated: on Friday, November 29, 1991, 56FR 61093

Sharon Gervasoni,

U.S. Parole Commission.

[FR Doc. 91–29208 Filed 12–2–91; 2:56 am]

BILLING CODE 4410–01–M

Corrections

Federal Register
Vol. 56, No. 233
Wednesday, December 4, 1991

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

Animal and Plant Health Inspection Service

7 CFR Part 301

[Docket No. 86-328]

Imported Fire Ant

Correction

In proposed rule document 91-26085 beginning on page 55830 in the issue of Wednesday, October 30, 1991, make the following corrections:

1. On page 55830, in the third column, under **Quarantined Areas**, in 2. *Regulated area*, in the fourth line, "§ 301.2a" should read "§ 301.81-2a".

2. On page 55831, in the first column, in second line from the top, "§ 301.82-2(a)" should read "§ 301.81-2(a)".

§ 301.81-2 [Corrected]

3. On page 55834, in the third column, the heading "§ 301.82-2 Regulated articles." should read "§ 301.81-2 Regulated articles.".

§ 301.81-3 [Corrected]

4. On page 55835, in the second column, in § 301.81-3(e), under **Arkansas**, "*Quachita County*" should read "*Ouachita County*".

5. On page 55837, in the 2d column, in § 301.81-3(e), under **North Carolina**, under *Pitt County*, in the 14th line, after "then" insert "west".

6. On page 55838, in the third column, in § 301.81-3(e), under **Texas**, under *Kimble County*, in the seventh line from the bottom, insert "county" after "this".

Appendix to Subpart [Corrected]

7. On page 55840, in the third column, in the table, in the second column, under the fourth entry, "(100 gallons)" should appear in the next column under the fourth entry.

8. On page 55842, in the first column, in the second full paragraph, in the eighth line from the bottom, "container" should read "consider".

BILLING CODE 1505-01-D

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 301

[Docket No. 91-155]

Mediterranean Fruit Fly

Correction

In rule document 91-27273 beginning on page 57573 in the issue of Wednesday, November 13, 1991, make the following corrections:

§ 301.78-1 [Corrected]

1. On page 57576, in the third column, in § 301.78-1, in the definition for *Interstate*, after "From" insert "any".

§ 301.78-3 [Corrected]

2. On page 57577, in the third column, in § 301.78-3(c), under **California**, in the seventh line, after "intersection" insert "with Olympic Boulevard; then southeast along Olympic Boulevard to its intersection".

§ 301.78-10 [Corrected]

3. On page 57579, in the second column, in § 301.78-10 introductory text, in the first line, "§ 301.1" should read "§ 300.1".

BILLING CODE 1505-01-D

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. 91-148]

Availability of Environmental Assessments and Findings of No Significant Impact Relative to Issuance of Permits To Field Test Genetically Engineered Organisms

Correction

In notice document 91-27105 beginning on page 57511 in the issue of Tuesday, November 12, 1991, make the following correction:

On page 57512, in the table, in the first column (Permit No.), the first entry " 91-151-0" should read "91-151-01".

BILLING CODE 1505-01-D

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 685

[Docket No. 910800-1251]

RIN 0648-AD99

Pelagic Fisheries of the Western Pacific Region

Correction

In rule document 91-24795 beginning on page 51849 in the issue of Wednesday, October 16, 1991, make the following correction:

§ 685.15 [Corrected]

On page 51852, in the third column, § 685.15(c)(6), in the third line, "is" should read "in".

BILLING CODE 1505-01-D

CONSUMER PRODUCT SAFETY COMMISSION

Correction

In sunshine document 91-921 appearing on page 1441 in the issue of Monday, January 14, 1991, in the second column, in the final line at the end of the document, "FR Doc. 91-920" should read "FR Doc. 91-921 ".

BILLING CODE 1505-01-D

DEPARTMENT OF THE INTERIOR

Minerals Management Service

Outer Continential Shelf Beaufort Sea Oil and Gas Lease Sale 124

Correction

In notice document 91-12383 beginning on page 23966, in the issue of Friday, May 24, 1991, make the following correction:

On page 23978, in the second column, in the file line at the end of the document, "FR Doc. 91-12838" should read "FR Doc. 91-12383".

BILLING CODE 1505-01-D

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[CO-18-91]

RIN 1545-AP79

Proposed Amendments to Temporary Regulations Under Section 382 of the Internal Revenue Code of 1986; Limitations on Corporate Net Operating Loss Carryforwards

Correction

In proposed rule document 91-25910 beginning on page 55858 in the issue of Wednesday, October 30, 1991, make the following corrections:

1. On page 55858:

a. In the second column, under **SUPPLEMENTARY INFORMATION**, in the first full paragraph, in the sixth line, "paperwork" should read "Paperwork".

b. In the third column, under **Background**, in the second paragraph, in the fourth line, "purposed" should read "proposed".

c. In the same column, under **Explanation**, in the first paragraph, in the second line, "If" should read "if"; and in the fourth line "392(k)(1)" should read "382(k)(1)".

2. On page 55859, in the second column, under **Special Analyses**, in the last line, "Administratively" should read "Administrative".

BILLING CODE 1505-01-D

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Part 59

[Docket No. 91-9]

Uniform Rules of Practice and Procedure

Correction

In rule document 91-18864 beginning on page 38024, in the issue of Friday, August 9, 1991, and corrected in the issue of Thursday, August 22, 1991 on page 41726, in the third column, in correction number 2, make the following correction:

§ 19.6 [Corrected]

On page 38030, in the third column, in § 19.6(a)(3), in the third line, "OCC, file" should read "OCC, shall file".

BILLING CODE 1505-01-D

Federal Register

Wednesday
December 4, 1991

Part II

Department of Health and Human Services

Food and Drug Administration

21 CFR Parts 310 and 358

Dandruff, Seborrheic Dermatitis, and Psoriasis Drug Products for Over-the-Counter Human Use; Final Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 310 and 358

[Docket No. 82N-0214]

RIN 0905-AA06

Dandruff, Seborrheic Dermatitis, and Psoriasis Drug Products for Over-the-Counter Human Use; Final Monograph

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is issuing a final rule in the form of a final monograph establishing conditions under which over-the-counter (OTC) dandruff, seborrheic dermatitis, and psoriasis drug products are generally recognized as safe and effective and not misbranded. FDA is issuing this final rule after considering public comments on the agency's proposed regulation, which was issued in the form of a tentative final monograph, and all new data and information on dandruff, seborrheic dermatitis, and psoriasis drug products that have come to the agency's attention. This final monograph is part of the ongoing review of OTC drug products conducted by FDA.

EFFECTIVE DATE: December 4, 1992.

FOR FURTHER INFORMATION CONTACT: William E. Gilbertson, Center for Drug Evaluation and Research (HFD-210), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-295-8000.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of December 3, 1982 (47 FR 54646), FDA published, under § 330.10(a)(6) (21 CFR 330.10(a)(6)), an advance notice of proposed rulemaking to establish a monograph for OTC dandruff, seborrheic dermatitis, and psoriasis drug products, together with the recommendations of the Advisory Review Panel on OTC Miscellaneous External Drug Products (Miscellaneous External Panel), which was the advisory review panel responsible for evaluating data on the active ingredients in these drug classes. Interested persons were invited to submit comments by March 3, 1983. Reply comments in response to comments filed in the initial comment period could be submitted by April 4, 1983.

In the **Federal Register** of February 8, 1983 (48 FR 5761), the agency advised that it had extended the comment period until April 4, 1983, and the reply comment period to May 4, 1983, on the advance notice of proposed rulemaking for OTC dandruff, seborrheic dermatitis, and psoriasis drug products to allow for consideration of additional data and information.

In accordance with § 330.10(a)(10), the data and information considered by the Panel, after deletion of a small amount of trade secret information, were placed on display in the Dockets Management Branch (HFA-305), Food and Drug Administration, currently located in rm. 1-23, 12420 Parklawn Drive, Rockville, MD 20857.

The agency's proposed regulation, in the form of a tentative final monograph, for OTC dandruff, seborrheic dermatitis, and psoriasis drug products was published in the **Federal Register** of July 30, 1986 (51 FR 27346). Interested persons were invited to file by September 29, 1986, written comments, objections, or requests for oral hearing before the Commissioner of Food and Drugs regarding the proposal. Interested persons were invited to file comments on the agency's economic impact determination by November 28, 1986. New data could have been submitted until July 30, 1987, and comments on the new data until September 30, 1987.

In the **Federal Register** of October 1, 1986 (51 FR 35003), the agency advised that it had extended the comment period until October 29, 1986, on the proposed rulemaking, to allow for greater participation by interested persons. Final agency action occurs with the publication of this final monograph, which is a final rule establishing a monograph for OTC dandruff, seborrheic dermatitis, and psoriasis drug products.

The OTC drug procedural regulations (21 CFR 330.10) provide that any testing necessary to resolve the safety or effectiveness issues that formerly resulted in a Category III classification, and submission to FDA of the results of that testing or any other data, must be done during the OTC drug rulemaking process before the establishment of a final monograph. Accordingly, FDA is no longer using the terms "Category I" (generally recognized as safe and effective and not misbranded), "Category II" (not generally recognized as safe and effective or misbranded), and "Category III" (available data are insufficient to classify as safe and effective, and further testing is required) at the final monograph stage, but is using instead the terms "monograph conditions" (old Category I) and "nonmonograph conditions" (old Categories II and III).

In the proposed regulation for OTC dandruff, seborrheic dermatitis, and psoriasis drug products (51 FR 27346), the agency advised that the conditions under which the drug products that are subject to this monograph will be generally recognized as safe and effective and not misbranded (monograph conditions) will be effective 12 months after the date of publication in the **Federal Register**. Therefore, on or after December 4, 1992, no OTC drug product that is subject to the monograph and that contains a nonmonograph condition, i.e., a condition that would cause the drug to be not generally recognized as safe and effective or to be misbranded, may be initially introduced or initially delivered for introduction into interstate commerce unless it is the subject of an approved application. Further, any OTC drug product subject to this monograph that is repackaged or relabeled after the effective date of the monograph must be in compliance with the monograph regardless of the date the product was initially introduced or initially delivered for introduction into interstate commerce. Manufacturers are encouraged to comply voluntarily with the monograph at the earliest possible date.

In response to the proposed rule on OTC dandruff, seborrheic dermatitis, and psoriasis drug products, six manufacturers, two trade associations, one medical association, and one health care professional submitted comments. Copies of the comments received are on public display in the Dockets Management Branch (address above). Any additional information that has come to the agency's attention since publication of the proposed rule is also on public display in the Dockets Management Branch.

All "OTC Volumes" cited throughout this document refer to the submissions made by interested persons pursuant to the call-for-data notices published in the **Federal Register** of November 16, 1973 (38 FR 31697) and August 27, 1975 (40 FR 38179) or to additional information that has come to the agency's attention since publication of the notice of proposed rulemaking. The volumes are on public display in the Dockets Management Branch.

I. The Agency's Conclusions on the Comments

A. General Comments

1. One comment contended that OTC drug monographs are interpretive, as opposed to substantive, regulations. The comment referred to statements on this issue submitted earlier to other OTC drug rulemaking proceedings.

The agency addressed this issue in paragraphs 85 through 91 of the

preamble to the procedures for classification of OTC drug products, published in the **Federal Register** of May 11, 1972 (37 FR 9464 at 9471 to 9472); in paragraph 3 of the preamble to the tentative final monograph for OTC antacid drug products, published in the **Federal Register** of November 12, 1973 (38 FR 31260); and in paragraph 1 of the preamble to the tentative final monograph in the present proceeding (51 FR 27346 at 27347). FDA reaffirms the conclusions stated in those documents. Court decisions have confirmed the agency's authority to issue substantive regulations by informal rulemaking. (See, e.g., *National Nutritional Foods Association* v. *Weinberger,* 512 F.2d 688, 696–698 (2d Cir. 1975) and *National Association of Pharmaceutical Manufacturers* v. *FDA,* 487 F. Supp. 412 (S.D.N.Y. 1980), *aff'd,* 637 F.2d 887 (2d Cir. 1981).)

2. One comment recommended that any use of the word "dandruff" in labeling be limited only to drug products and not be allowed for cosmetic products. The comment contended that the description "remove(s) loose flakes of dandruff" will create an impression in the mind of the consumer that the product being used is designed to mitigate or treat a disease, and thus is a drug. Two other comments contended that references to dandruff, if allowed, on cosmetic shampoos can lead to consumer confusion. The comments disagreed with the following statement in the proposed rule:

> * * * The product's intended use, therefore, determines whether it is a "drug," a "cosmetic," or both. This intended use may be inferred from the product's labeling, promotional material, advertising, and any other relevant factor. * * * When the use of the term "dandruff" deals only with appearance and not with the treatment or prevention of the underlying disease condition, as in the context that a product removes loose flakes of dandruff or cleans the hair of dandruff flakes or scales, the product is cosmetic in nature. (See 51 FR 27346 at 27347.)

The comments requested the agency to reconsider its position "that the mere use of the word 'dandruff' does not automatically render a shampoo a drug." In support of their requests, the comments provided the results of a survey (Ref. 1) that assessed 100 consumers' interpretations of the statement "Shampoo X removes loose flakes of dandruff and clears the hair of dandruff flakes or scales." The target audience was an equal number of men and women, aged 18 to 54 years, who used a dandruff shampoo for the control of dandruff in the past year. Based on the question asked, 71 percent of the responders stated that the product "is an antidandruff shampoo," 72 percent considered it to be "a dandruff treatment," and 76 percent stated it "controls dandruff." On the negative side, 52 percent felt that the product would not "prevent dandruff." The comments contended that the results of the survey showed that consumers overwhelmingly interpreted the removal of dandruff flakes as synonymous with "antidandruff," "dandruff control shampoo," and "dandruff treatment." The comments concluded that the survey shows that the type of claims being allowed for "cosmetic shampoos" actually describe antidandruff OTC drug products.

A fourth comment argued that the results of the consumer survey do not support the argument that claims referring solely to a product's effectiveness in cleaning the hair, a traditional cosmetic claim, are also claims that the product is effective for drug purposes. The comment argued that a consumer survey may provide some evidence of how consumers interpret a particular advertising or labeling claim, but it is not determinative of the regulatory status of the product making that claim.

The comment contended that the consumer survey had a number of defects and, thus, its results are unreliable. The comment described in detail the purported defects in the study. The comment also stated that the claim presented to the consumers was that the shampoo "cleared the hair," not "cleaned the hair," of dandruff flakes. The comment argued that the word "clear" suggests a more permanent and more drug-like effect and that the researcher's choice of terminology may have skewed the results. The comment concluded that the survey did not show that consumers perceive the shampoo to have clear-cut therapeutic effects that treat a pathologic condition, because the survey never asked that precise question.

Another comment raised issues about the validity of the methodology of the survey. These issues included whether "control" questions should have been used to screen out certain respondents, whether screening questions were neutral, whether terms should have been defined for the respondents, whether any effort should have been made to ascertain the consumers' understanding of certain terms, and whether the researcher's choice of terminology may have influenced the results.

In the tentative final monograph, the agency stated that when the use of the term "dandruff" deals only with appearance and not with the treatment or prevention of the underlying disease condition, such as a statement that a product removes loose flakes of dandruff or cleans the hair of dandruff flakes or scales, the product is a cosmetic (51 FR 27346 at 27348). In the survey mentioned above, consumers were asked to interpret the statement "Shampoo X removes loose flakes of dandruff and clears the hair of dandruff flakes or scales." The agency considers each clause of this statement to be a cosmetic claim, because removal of loose flakes and clearing the hair are actions of cleansing, beautifying, or promoting attractiveness within the definition of cosmetic in section 201(i) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 321(i)). As stated in the tentative final monograph, any use of the term dandruff that would make or imply a claim for the prevention, control, or treatment of dandruff beyond the simple mechanical removal of flakes and scales would render the product a drug (51 FR 27346 at 27348). As discussed in comment 3 below, dandruff removal products can be drugs, cosmetics, or both.

References

(1) Shampoo Product Statement Study, Kornhauser and Calene, Inc., October 1986, in Comment C00031, Docket No. 82N–0214, Dockets Management Branch.

3. One comment disagreed with the agency's position of prohibiting cosmetic claims from appearing in any portion of the labeling that is required by the monograph. The comment stated that so long as the labeling is truthful and not misleading, the joint placement of information about both the cosmetic and drug claims of a product should be permitted anywhere on the labeling. The comment contended that although dandruff, seborrheic dermatitis, and psoriasis are medical conditions treated with drug products, these products may also have important cosmetic functions. For example, a dandruff shampoo may have a cleansing or shampoo (cosmetic) function, and a relief of itching, flaking and scaling (drug) function. The comment argued that consumers need both kinds of information and urged the agency to expressly allow the joint placement of drug and cosmetic claims in a dandruff, seborrheic dermatitis, and psoriasis product used both as a drug and as a cosmetic. The comment contended that if this information were to appear on entirely different portions of the label, consumers could be confused and misled as to what the product will do. The comment requested that the following language be added to all relevant final regulations: "The

agency emphasizes that OTC drug monographs do not pertain to cosmetic terminology contained on such products and do not preclude in any way the use of truthful and nonmisleading cosmetic terminology in the labeling of cosmetic/drug products."

A final OTC drug monograph covers only the drug use of the active ingredients listed therein. The concentration range limitations, statements of identity, indications, warnings, and directions established for these ingredients in the monograph do not apply to the use of the same ingredients in products intended solely as cosmetics. However, if a product is intended for both drug and cosmetic use, it must conform to the requirements of the final OTC drug monograph as well as applicable cosmetic labeling requirements.

In addition to the indications allowed for OTC dandruff, seborrheic dermatitis, and psoriasis drug products, such products may also bear appropriate labeling for cosmetic uses, in conformity with section 602 of the act (21 U.S.C. 362) and the provisions of 21 CFR part 701. In accordance with the revised labeling requirements for OTC drug products (21 CFR 330.1(c)(2)), it is the agency's position that cosmetic claims may not appear within the boxed area designated "APPROVED USES." As discussed at 51 FR 16264 (paragraph 14), cosmetic terminology is not reviewed and approved by FDA in the OTC drug monographs and therefore could not be placed in the box. Cosmetic claims may appear elsewhere in the labeling, but not in the box, should manufacturers choose the labeling alternative provided in § 330.1(c)(2)(i) or 2(iii) for labeling cosmetic/drug products.

The agency does not disagree with the comment's statement that consumers need both drug and cosmetic information about these products. However, the agency does not agree that if the drug and cosmetic information appears in different places in the labeling consumers would necessarily be confused or misled. The agency believes the manner in which the information is presented, as well as its location, is important to consumer understanding.

Although the agency does not specifically prohibit commingled drug and cosmetic labeling (other than in the Indications section), the agency believes that information about the product's claims should be appropriately described so that consumers will be readily able to differentiate the drug and cosmetic aspects of the labeling. If commingled drug and cosmetic labeling claims are confusing or misleading, the product's labeling may be misleading within the meaning of the act and the product misbranded under sections 502(a) or 602(a) of the act. This position is consistent with that stated in the final rule for OTC topical acne drug products published in the **Federal Register** of August 16, 1991 (56 FR 41008 at 41017). Accordingly, the agency is not adding the comment's suggested language to this final monograph.

4. One comment stated that the Miscellaneous External Panel limited its review of OTC dandruff, seborrheic dermatitis, and psoriasis drug products to determining which ingredients are safe and effective for "controlling" these conditions and ignored the symptomatic relief that may or may not be related to treatment of the condition. The comment interpreted the definitions for OTC drug products that "control" dandruff, seborrheic dermatitis, and psoriasis to include those having only symptomatic relief and/or those having curative action.

The Panel stated (47 FR 54646 at 54653), and the agency agrees, that OTC drugs for dandruff, seborrheic dermatitis, and psoriasis do not cure, but with regular use at best can only control or relieve the symptoms of these conditions. The indications for the use of these products in § 358.750(b) of this final monograph clearly establish that they are used to "control" or "relieve the symptoms of" dandruff, seborrheic dermatitis, and psoriasis. The terms "relief" or "control" are used synonymously to describe the action of the products. The indications state that the product's action is on the symptoms of the condition or describe the symptoms as itching, irritation, redness, flaking, and scaling associated with dandruff, seborrheic dermatitis, and psoriasis.

5. One comment suggested that the monograph provide for the use of emollients and/or lubricants in the treatment of psoriasis. In support of its position, the comment cited statements from a reference discussing treatment of psoriasis: "The simplest forms of treatment—lubricants * * * should be tried first * * *" and "Lubricating creams, hydrogenated vegetable (cooking) oils, or white petrolatum are applied * * * while the skin is still damp after bathing" (Ref. 1). The comment added that these materials are classified as emollients in another textbook and are described as fats or oils used for their local action on the skin (Ref. 2). Stating that the use of such ingredients is widely regarded as a safe, effective, economical means of treating psoriasis, the comment complained that none of those types of ingredients have been included in the tentative final monograph. The comment further contended that because of demonstrated problems and expense of one or more "active" ingredients listed in the tentative final monograph, the public is poorly served by the omission of emollients from the monograph.

The agency has no basis on which to grant the comment's request. No data were submitted with the textbook statements in support of the use of an emollient and/or lubricant in the treatment of psoriasis. If adequate supporting data are submitted to the agency in the form of a petition to amend the final monograph, the monograph could be amended to include emollients and/or lubricants.

References

(1) Berkow, R., editor, "The Merck Manual of Diagnosis and Therapy," 14th ed., Merck Sharp and Dohme Research Laboratories, Rahway, NJ, p. 2054, 1982.

(2) Swinyard, E. A., "Surface-Acting Drugs," in "The Pharmacologic Basis of Therapeutics," 5th ed., edited by L. S. Goodman and A. Gilman, MacMillan Publishing Co., New York, p. 947, 1975.

B. Comments on Active Ingredients

6. One comment suggested that any product containing boric acid or its salt approved for OTC use be labeled "not for use in children," "not for use on broken or severely irritated skin," and/or "for topical use only." The comment stated that boric acid poisoning has been reported after accidental ingestion or from absorption through the skin (Ref. 1).

The Panel concluded that borate preparations are not safe, and data were lacking to permit their final classification as effective for OTC topical use for controlling dandruff or seborrheic dermatitis (47 FR 54646 at 54667). In response to the Panel's report, one comment requested a reevaluation of the Panel's conclusions, and called attention to a 2-year feeding study on rats and dogs that was not considered by the Panel. The agency reviewed all available data on borates, including the reports of other panels. Based upon that reevaluation, the agency concluded in the tentative final monograph that there was ample evidence to support the safety of up to 1 percent borates for OTC topical use in dandruff and seborrheic dermatitis preparations, but that the effectiveness of borates for the treatment of those conditions has not been demonstrated (51 FR 27346 at 27351). No additional effectiveness studies were submitted. Accordingly, boric acid and sodium borate were included in a final rule published in the

Federal Register of November 7, 1990 (55 FR 46914 at 46917) that listed certain OTC active ingredients that are not generally recognized as safe and effective. (See 21 CFR 310.545(a)(7).) Thus, there is no need at the present time to further consider inclusion of the comment's requested labeling in this monograph.

Reference

(1) Rubenstein, A. D., and D. M. Musher, "Epidemic Boric Acid Poisoning Simulating Staphylococcal Toxic Epidermal Necrolysis of the Newborn Infant: Ritters Disease," The Journal of Pediatrics, 77:884–887, 1970.

7. One comment inquired whether there is any evidence that chloroxylenol is effective as a topical antifungal agent. Referring to a discussion in the tentative final monograph (51 FR 27346 at 27351) that the Advisory Review Panel on Antimicrobial II Drug Products had concluded that chloroxylenol is safe for OTC use as a topical antifungal, the comment noted that there was no discussion of effectiveness.

The issue raised in the tentative final monograph for OTC dandruff, seborrheic dermatitis, and psoriasis drug products only concerned the safety of chloroxylenol. In another OTC drug rulemaking, the Advisory Review Panel on Antimicrobial II Drug Products concluded that there were insufficient data available to permit final classification of the effectiveness of chloroxylenol for OTC topical antifungal use (47 FR 12480 at 12533). A study submitted in response to the Panel's report on topical antifungal drug products was inadequate to show effectiveness, and in the tentative final monograph for OTC antifungal drug products, chloroxylenol remained in Category III for effectiveness (54 FR 51136 at 51139).

The Miscellaneous External Panel evaluated chloroxylenol for controlling dandruff and seborrheic dermatitis (47 FR 54646 at 54672 to 54673). The Panel recognized one theory that dandruff is caused by *Pityrosporum ovale* (a yeast-like fungus resident to the scalp) (47 FR 54651 and 54653). However, based on the submitted studies, the Panel stated that chloroxylenol was shown to have an antimicrobial effect on selected bacteria, but it had little or no effect on fungi and yeast (47 FR 54673). The Panel concluded, therefore, that additional data are needed to demonstrate the effectiveness of chloroxylenol for controlling dandruff and seborrheic dermatitis. The agency did not receive any submissions of effectiveness data on chloroxylenol in response to the Panel's report or the tentative final monograph. Therefore, chloroxylenol was also included with those OTC drug active ingredients not generally recognized as safe and effective in 21 CFR 310.545(a)(7). (See comment 6 above).

8. One comment agreed with the definition and concentration limits proposed for coal tar in § 358.703(a) of the tentative final monograph, i.e., the concentration of the coal tar portion of the final product should be in a relative concentration range of 0.5 to 5 percent coal tar. Noting that a variety of coal tar solutions and fractions are used in OTC dandruff, seborrheic dermatitis, and psoriasis drug products, the comment contended there should be a labeling requirement to state the actual coal tar equivalent concentration contained in any coal tar solution, derivative, or fraction. As an example, the comment stated that a preparation containing a 10-percent solution of coal tar U.S.P. would be listed as "10 percent LCD (2 percent Coal Tar U.S.P. equivalent)." The comment concluded that this approach would allow consumers to compare "apples with apples" when comparing two coal tar-containing preparations.

The agency agrees with the comment that information concerning the coal tar equivalent concentration is useful and would allow consumers to be able to evaluate the comparative strengths of coal tar-containing drug products. Although section 502(e) of the act requires statement of the active ingredient in the labeling of OTC drug products, it only requires labeling of quantitative information for a number of named ingredients and their derivatives, alcohol, and prescription drugs. Agency regulations in 21 CFR 1.21(a)(1) provide that labeling of a drug shall be deemed misleading if it fails to reveal facts that are "material in light of other representations made or suggested by statement, word, design, device or any combination thereof." Other agency regulations in 21 CFR 201.10(c) state that "the labeling of a drug may be misleading by reason (among other reasons) of: * * * (2) Failure to reveal the proportion of, or other fact with respect to, an ingredient present in such drug, when such proportion or other fact is material in the light of the representation that such ingredient is present in such drug."

In the case of coal tar, the agency believes that, without the equivalent concentration of coal tar appearing in the product's labeling, the labeling could be misleading. Accordingly, the agency is requiring in this final monograph that the labeling of OTC drug products for the control of dandruff, seborrheic dermatitis, and psoriasis state the equivalent concentration of coal tar contained in any coal tar solution, derivative, or fraction used as the source of the coal tar in the product. The concentration for coal tar in this final monograph will now read as follows in § 358.710(a)(1), (b)(1) and (c)(1): "Coal tar, 0.5 to 5 percent. When a coal tar solution, derivative, or fraction is used as the source of the coal tar, the labeling shall specify the identity and concentration of the coal tar source used and the concentration of the coal tar present in the final product."

The comment described a product named LCD. LCD is an abbreviation for Liquor Carbonis Detergens, which is Coal Tar Topical Solution, U.S.P. (Ref. 1). This solution is a 20-percent solution of coal tar in alcohol. The product described by the comment would be labeled as follows: "Contains 10 percent of coal tar topical solution, equivalent to 2 percent coal tar." The determination of the coal tar concentration in the final product is made as follows: When 10 percent of a final product constitutes Coal Tar Topical Solution, U.S.P., that means that the final product contains 10 percent of the U.S.P. solution (20% coal tar), or 2 percent coal tar. The coal tar topical solution appears in the labeling as the actual active ingredient used in the product, while the equivalent coal tar percentage tells the user of the product the actual amount of coal tar that is present.

Reference

(1) "The United States Pharmacopeia XXII—The National Formulary XVII," The United States Pharmacopeial Convention Inc., Rockville, MD, p. 341, 1989.

9. One comment strongly recommended that hydrocortisone in OTC drug products not be increased above 0.5 percent. The comment stated that as a manufacturer of hydrocortisone creams it was aware that dermatologists are reporting seeing many patients who could have "run into trouble" from use of 0.5 percent hydrocortisone. The comment contended that increasing the strength of OTC hydrocortisone above 0.5 percent would create an even greater safety problem. Another comment also recommended that 1 percent hydrocortisone not be included in OTC drug products in any form.

In the **Federal Register** of July 30, 1986 (51 FR 27360), the agency deferred hydrocortisone from the rulemaking for OTC dandruff, seborrheic dermatitis, and psoriasis drug products to the rulemaking for OTC external analgesic drug products. At that time, the agency amended the tentative final monograph for OTC external analgesic drug

products to add seborrheic dermatitis and psoriasis to the list of conditions for which hydrocortisone is safe and effective in providing symptomatic relief rather than to include hydrocortisone as an ingredient in the tentative final monograph for OTC dandruff, seborrheic dermatitis, and psoriasis drug products (51 FR 27363). Since the comments were submitted, the agency published another amendment of the tentative final monograph on OTC external analgesic drug products on February 27, 1990 (55 FR 6932), in which it proposed to increase the concentrations for OTC hydrocortisone and hydrocortisone acetate from the current levels of 0.25 to 0.5 percent to from 0.25 to 1 percent. The agency's proposal to switch above 0.5 to 1 percent hydrocortisone to OTC marketing status was based on an extensive review of safety data. The comments did not present any evidence that 0.25 to 1 percent concentrations were potentially unsafe. The one comment did not provide any specific information about the types of problems with hydrocortisone that are being reported by dermatologists. However, the agency has received numerous comments to the proposal that was published in the **Federal Register** of February 27, 1990. After these comments have been evaluated, the agency's final determination on OTC use of hydrocortisone above 0.5 up to 1 percent will be stated in a future issue of the **Federal Register**, as part of the rulemaking for OTC external analgesic drug products.

10. One comment noted that the Panel classified povidone-iodine in Category I for safety but in Category III for effectiveness (47 FR 54646 at 54679), and the agency proposed the same classification in the tentative final monograph for OTC dandruff, seborrheic dermatitis, and psoriasis drug products because no comments on povidone-iodine were received in response to the Panel's recommendation (51 FR 27346 at 27357). The comment contended that manufacturers did not conduct research on povidone-iodine in support of its effectiveness in the treatment of dandruff, seborrheic dermatitis, and psoriasis because of business reasons and not because other available evidence suggested that povidone-iodine would be ineffective for such use.

The comment was concerned that povidone-iodine's nonmonograph status in this rulemaking could be interpreted as an indication of its general ineffectiveness for other indications. The comment requested that, if povidone-iodine remains nonmonograph at the final rule stage because no data were submitted in support of its effectiveness, the preamble should state that povidone-iodine was not included in the final monograph because no effectiveness data were submitted, and that such data could be submitted with a petition to amend the final monograph pursuant to 21 CFR 330.10(a)(12).

The agency notes that no data on the effectiveness of povidone-iodine for use in OTC dandruff, seborrheic dermatitis, and psoriasis drug products were submitted following publication of the tentative final monograph. Accordingly, povidone-iodine was also included with those OTC drug active ingredients not generally recognized as safe and effective in 21 CFR 310.545(a)(7). (See comment 6 above.) As the comment noted, new data on the ingredient's effectiveness for this use may be submitted in the form of a petition to amend the final monograph.

The agency is unable to state why manufacturers did not submit data on this ingredient in the present rulemaking. The nonmonograph status of povidone-iodine for dandruff, seborrheic dermatitis, and psoriasis uses has no bearing on its status in other OTC drug monographs.

11. One comment requested that the final monograph include 0.3 percent pyrithione zinc in a rinse-off product for the control of dandruff. The comment included summaries of five double-blind, placebo-controlled clinical studies (Ref. 1) previously submitted in a new drug application to support the efficacy of 0.3 percent pyrithione zinc in a rinse-off conditioner for the control of dandruff. Studies DA–134, DA–137, and DA–157 were conducted using the "original" formulation of the rinse-off product, and studies DA–186 and DA–187 were conducted using a reformulated vehicle for the product.

Study DA–134 was a double-blind, parallel group trial involving 430 female subjects having dandruff in at least one of eight designated areas of the scalp. Subjects with seborrheic dermatitis or atopic dermatitis were excluded. Subjects were stratified according to age and initial dandruff grade, and were randomly assigned to one of the following treatment regimens: placebo lotion shampoo followed by 0.3 percent pyrithione zinc conditioner, 1.0 percent pyrithione zinc lotion shampoo followed by placebo conditioner, 1.0 percent pyrithione zinc lotion shampoo followed by 1.0 percent conditioner, or placebo lotion shampoo followed by placebo conditioner. Subjects used their assigned products ad libitum for 6 weeks, and were evaluated for amount of adherent dandruff at 3 and 6 weeks after initiation of treatment. Statistical analysis of the results showed that all three active treatment regimens were significantly more effective than the placebo regimen ($p=0.05$), but were not significantly different from each other. Irritation was reported by two subjects on the 1.0 percent pyrithione zinc shampoo plus 1.0 percent pyrithione zinc conditioner regimen.

Study DA–137 was a double-blind, parallel group trial involving 600 female subjects having dandruff in at least 1 of 8 designated areas of the scalp. Subjects with seborrheic dermatitis or atopic dermatitis were excluded. Subjects were stratified according to age and initial dandruff severity, and were randomly assigned to one of the following treatment regimens: 2.0 percent pyrithione zinc lotion shampoo followed by placebo conditioner, placebo shampoo followed by 1.5 percent pyrithione zinc conditioner, placebo shampoo followed by 1.0 percent pyrithione zinc conditioner, placebo shampoo followed by 0.3 percent pyrithione zinc conditioner, or placebo shampoo followed by placebo conditioner. Subjects used their assigned products ad libitum for 6 weeks, and were evaluated for amount of adherent dandruff at 3 and 6 weeks after initiation of treatment. Statistical analysis of the results showed that all active treatment regimens were significantly more effective than the placebo regimen ($p=0.05$). The regimen of placebo shampoo followed by 1.0 percent pyrithione zinc conditioner was significantly more effective than 2.0 percent pyrithione zinc lotion shampoo followed by placebo conditioner. The results from using the three conditioners did not differ significantly from each other. Irritation was reported by nine subjects, but only one of these was in the group using placebo shampoo plus 0.3 percent pyrithione zinc conditioner.

Study DA–157 was a double-blind, parallel group trial involving 660 male and female subjects having dandruff in at least one of eight designated areas of the scalp. Subjects with seborrheic dermatitis or atopic dermatitis were excluded. Subjects were stratified according to age, sex, shampoo frequency, and dandruff severity, and were randomly assigned to one of the following treatment regimens: 1.0 percent pyrithione zinc lotion shampoo followed by 0.3 percent pyrithione zinc conditioner, 1.0 percent pyrithione zinc lotion shampoo followed by placebo conditioner, placebo lotion shampoo followed by 0.3 percent pyrithione zinc

conditioner, placebo lotion shampoo followed by placebo conditioner, 1.0 percent selenium sulfide shampoo followed by 0.3 percent pyrithione zinc conditioner, or 1.0 percent selenium sulfide shampoo followed by placebo conditioner. Subjects used their assigned product ad libitum for 6 weeks, and were evaluated at 3 and 6 weeks after initiation of treatment. Statistical analysis of the results showed that all active treatment regimens were significantly more effective than placebo ($p=0.05$). The combination of 1.0 percent selenium sulfide shampoo plus 0.3 percent pyrithione zinc conditioner was significantly more effective than the other treatment regimens ($p=0.05$). The results from the remaining regimens did not differ significantly from each other. Irritation was reported by seven subjects on various regimens. One of these was in the group using 1.0 percent selenium sulfide shampoo plus 0.3 percent pyrithione zinc conditioner, while none were in the group using placebo shampoo plus 0.3 percent pyrithione zinc conditioner.

Study DA–186 was a randomized double-blind, parallel group trial involving 345 male and female subjects having a total dandruff score of eight or higher on a scale of 0 to 80. For grading, the scalp was divided into eight sections, and each section was graded for dandruff on a scale of 0 to 10. Subjects with eczema, seborrheic dermatitis, or psoriasis were excluded. Subjects were randomly assigned to one of the following treatment groups: placebo shampoo with placebo conditioner, placebo shampoo with the reformulated vehicle 0.3 percent pyrithione zinc conditioner, or placebo shampoo with the approved vehicle 0.3 percent pyrithione zinc conditioner. Subjects used their assigned products ad libitum, but at least twice a week for 6 weeks, after which they were again graded for dandruff severity. There were no significant differences among the three treatment groups in the initial mean dandruff scores. The final mean dandruff scores did not differ significantly between the group using the reformulated conditioner and the group using the approved conditioner. Scores in both groups were significantly lower than in the group using placebo conditioner ($p=0.05$). No adverse reactions were reported with the reformulated conditioner.

Study DA–187 was a double-blind, parallel group trial involving 500 male and female subjects having a total dandruff score of eight or higher as evaluated by the procedure described above for study DA–186. Subjects were randomly assigned to one of the following treatment groups: Placebo shampoo with placebo conditioner, pyrithione zinc shampoo with placebo conditioner, or pyrithione zinc shampoo with the reformulated vehicle 0.3 percent pyrithione zinc conditioner. Subjects used their assigned products at least twice a week for 6 weeks, after which they were again graded for dandruff severity. There were no significant differences among the three treatment groups in the initial mean dandruff scores. The final mean dandruff scores did not differ significantly between the group using the active shampoo with reformulated 0.3 percent pyrithione zinc conditioner and the group using the active shampoo with placebo conditioner. Scores in both groups were significantly lower than in the group using placebo shampoo with placebo conditioner ($p=0.05$). Adverse reactions were reported by two subjects using the active shampoo/reformulated conditioner regimen. These were itchy scalp in one, and a patchy rash on the face and neck in the other. Both reactions cleared by one week after discontinuance. One subject on the active shampoo/placebo conditioner regimen also developed a rash on the neck, which resolved by 1 week after discontinuance.

Based upon the above studies, the agency concludes that 0.3 percent pyrithione zinc as a rinse-off product is safe and effective for OTC use in the control of dandruff. In the tentative final monograph, the agency proposed pyrithione zinc as Category I for the relief of the symptoms of dandruff when formulated at 0.95 to 2 percent to be applied and then washed off after brief exposure (51 FR 27346 at 27359). In this final monograph, the agency is revising the lower limit for pyrithione zinc in a rinse-off product for the control of dandruff to 0.3 percent. (The lower limit for pyrithione zinc in rinse-off products for the control of seborrheic dermatitis remains at 0.95 percent.) The agency's detailed comments and evaluation of the above studies are on file in the Dockets Management Branch (Ref. 2).

References

(1) Comment No. RPT2, Docket No. 82N–0214, Dockets Management Branch.

(2) Letter from W. E. Gilbertson, FDA, to F. L. Spadini, The Procter and Gamble Co., coded LET9, Docket No. 82N–0214, Dockets Management Branch.

12. One comment requested the inclusion of a micronized form of selenium sulfide at a concentration of 0.6 percent in § 358.710 (a) and (b) of the final monograph for OTC dandruff, seborrheic dermatitis, and psoriasis drug products. The comment provided data from five studies (Ref. 1) intended to demonstrate safety and effectiveness of 0.6 percent micronized selenium sulfide in the control of dandruff and seborrheic dermatitis. The comment stated that the selenium sulfide used in the studies met the USP XXI specifications (Ref. 2) and has an additional particle size specification of not less than 90 percent under 7 microns and an average particle size of not more than 2 microns.

The agency has reviewed the comment and other information and determined that the data are insufficient to establish the effectiveness of 0.6 percent micronized selenium sulfide in the treatment of dandruff and seborrheic dermatitis. The five clinical studies submitted by the comment include the following:

(a) *Protocol CP–CA83.* This study was a double-blind comparison of the efficacy of 0.6 percent micronized selenium sulfide, 1 percent nonmicronized selenium sulfide, and shampoo vehicle in treating dandruff symptoms. Each subject was instructed to use a nonantidandruff shampoo during a wash-out period for 2 weeks in order to eliminate the effect of previously used antidandruff shampoos. One hundred sixteen subjects with a total dandruff score of 21 or higher (maximum of 40, minimum of zero) were admitted to the study. One hundred fourteen subjects, 15 Caucasian males and 99 Caucasian females, completed the study. Of these 114 subjects, several were excluded from the efficacy analysis as their total dandruff scores were considered unevaluable.

Subjects were instructed to shampoo twice weekly throughout the study; they were blinded as to which shampoo they received during the treatment period. Dandruff was assessed (prior to shampooing once every other week) by an investigator who, presumably, had no knowledge of the treatment assigned.

Baseline comparability of treatment groups for categorical variables (i.e., sex, hair length, and scalp condition) was evaluated in this study using a chi-square test. In addition, baseline comparability of treatment groups for continuous variables (i.e., age and total baseline dandruff score) was evaluated with a one-way analysis of variance. The agency considers the statistical evaluation submitted to be acceptable for the type of data collected.

The baseline comparability tests showed that the treatment groups were demographically highly compatible to one another. The mean scores within each treatment group appeared to be independent of sex for the baseline and

for the three treatment weeks, although the issue of sex effect within group remained statistically inconclusive because of the small sample size.

On the basis of the data provided, the mean reduction of total dandruff scores from baseline was statistically significantly greater (at the 10 percent level or less) in the subjects using 0.6 percent micronized selenium sulfide than in the placebo following 2, 4, and 6 weeks of their treatment ($p=0.023$, $p=0.062$, $p<0.001$, respectively).

A statistically significant difference in mean reduction scores between 1 percent nonmicronized selenium sulfide and shampoo vehicle was also noted following 2, 4, and 6 weeks of treatment ($p=0.023$, $p=0.017$, and $p<0.001$, respectively). There was no significant difference in the mean reduction score between 0.6-percent micronized selenium sulfide and 1-percent nonmicronized selenium sulfide following 2, 4, and 6 weeks of treatment ($p=0.958$, $p=0.550$, and $p=0.832$, respectively).

Both the 0.6-percent micronized and the 1-percent nonmicronized selenium sulfide showed statistically significantly more rapid improvement than the shampoo vehicle ($p=0.002$ and $p=0.004$, respectively). There was no significant difference between improvement rates of 0.6 percent micronized and 1 percent nonmicronized selenium sulfide ($p=0.832$). The sample size appeared to be adequate for each treatment group involved.

These data and the protocol design indicate that the 0.6 percent micronized selenium sulfide is statistically more effective than the shampoo vehicle and is statistically as effective as the active control (1 percent nonmicronized selenium sulfide). The study is a well-controlled clinical trial that has used the proper tests for statistical analysis.

(b) *Protocol 84–050.* This study was a comparison of the antidandruff efficacy of a shampoo containing 1 percent nonmicronized selenium sulfide with a shampoo containing either 0.6 percent or 1 percent micronized selenium sulfide.

One hundred sixty-one subjects who met the minimum dandruff score criterion described in the previous study were selected for admission to this study. The subjects, mostly Caucasians, were randomized into the three treatment groups after having used a nonantidandruff shampoo for 2 weeks and were instructed to shampoo twice weekly for 4 weeks. An assessment of the subjects' dandruff condition was made weekly.

The analytical procedures used in this study were generally similar to those employed in the previous study (Protocol CP–CA83). There were no statistical indications that the three treatment groups differed in age, sex, race, hair length, or scalp condition. At the end of the 4-week treatment period, about 30 percent of the subjects using each formulation in the study were found to have a dandruff score of 0 (no measurable dandruff). There was no significant difference in the mean reduction of dandruff scores from baseline between any two treatment groups ($p>0.15$), nor was there any significant difference in the mean improvement rates between any two treatment groups ($p>0.82$). All three treatments were found to be statistically equally effective. The sample size appeared to be adequate for each treatment group involved.

Although FDA regulations allow the use of active controls as a comparison group, the agency does not consider this study to be a well-controlled clinical trial for the following reasons: (1) There appears to be no acceptable explanation for the substantial difference in the effect of treatment time (2 weeks vs. 6 weeks) between this and the previous study (Protocol CP–CA83) for treatment with 0.6 percent micronized selenium sulfide, when the product used in each study was manufactured by the same company; (2) placebos were not included in the test; and (3) there appear to be no ethical reasons why placebos should not have been included in the study. Had the study shown that the treatment with 0.6 percent micronized selenium sulfide was statistically more effective than the other two treatments instead of equally effective, the design bias would have been less. The agency considers that the use of an active control alone in this situation violates the principle of having a double-blind study, because, in theory, all the investigator has to do is to deliberately, as well as indiscriminately, give lower dandruff scores to each subject gradually over time to yield favorable results.

(c) *Protocol CP–CA70.* This study was a double-blind comparison of the antidandruff efficacy of a shampoo containing 0.6 percent micronized selenium sulfide to a shampoo containing 1-percent nonmicronized selenium sulfide and to a shampoo vehicle.

Both the mean dandruff reduction scores and the mean improvement rate obtained from this study for 0.6 percent micronized selenium sulfide were highly consistent with those found in the study using Protocol CP–CA83 but not with those in the study using Protocol 84–050, especially when the observations from the study using Protocol CP–CA83 were confined to the first four weeks of treatment only. However, the results indicate that all three treatments (including the shampoo vehicle) were statistically equally ineffective in treating dandruff symptoms ($p>0.24$). This study was a well-designed controlled clinical trial which apparently did not distinguish the efficacy of 0.6 percent micronized selenium sulfide from that of the shampoo vehicle.

(d) *Protocol 82–028.* This study on 103 subjects compared antidandruff efficacy of shampoos containing 0.2 percent micronized selenium sulfide, 0.4 percent micronized selenium sulfide, 0.6 percent micronized selenium sulfide, and 0.2 percent micronized selenium sulfide plus 0.5 percent polyethyleneimine.

This study was, by design, a dose-searching type clinical trial which included neither a placebo nor an FDA-approved active control. For this reason, this study cannot be considered a well-designed controlled trial.

(e) *Protocol 81–013.* This study compared, under randomized and, presumably, double-blind conditions, the antidandruff efficacy of a shampoo containing 0.2 percent micronized selenium sulfide with a shampoo containing 1 percent nonmicronized selenium sulfide. Based on the design, the agency finds this study irrelevant because it did not involve the testing of 0.6 percent micronized selenium sulfide.

In summary, only two of the studies (Protocol CP–CA83 and Protocol CP–CA70) can be regarded as well-designed controlled clinical trials. Of these two, the latter study failed to demonstrate that 0.6 percent micronized selenium sulfide was statistically more effective than the shampoo base.

Although the study using Protocol 84–050 was able to show that the 0.6-percent micronized formulation was statistically equal in effectiveness in reducing dandruff as the 1-percent nonmicronized formulation, it was not a well-controlled trial by design for several reasons: this study yielded noticeably lower dandruff scores (and hence higher improvement rates as well) than those obtained by other investigators; this study did not include a placebo; and the active control used was a product manufactured by the same company, which was not demonstrated to be less effective than 0.6 percent micronized selenium sulfide. Although this study appears to show efficacy of the drug, its result cannot outweigh the uncertainty produced by the diverse results from the two vehicle-controlled studies.

In the study using Protocol CP-CA83, there were fewer assessments made on the treatments than statistically desired. In addition, the effect of treatment time for micronized or nonmicronized selenium sulfide was found to be substantially different from (worse than) that observed in the study using Protocol 84-050, the latter study including neither a placebo nor a more convincing active control. For the above reasons, at least one additional well-controlled study of adequate sample size is needed to support the efficacy of 0.6 percent micronized selenium sulfide. The additional study should include a placebo and have more frequent dandruff assessments made over an established followup period.

No data were submitted to demonstrate efficacy of 0.6 percent micronized selenium sulfide in treating seborrheic dermatitis. Data from separate studies are needed.

Regarding specifications for micronized selenium sulfide, there should be a particle size specification for the selenium sulfide active ingredient which includes both a lower and an upper limit. For example, 90 percent of particles should be less than 10 microns; 99 percent should be less than 20 microns; no particles should be greater than 20 microns.

On the basis of the submitted data, the agency is unable to propose at this time that 0.6 percent micronized selenium sulfide be Category I for the treatment of dandruff and seborrheic dermatitis.

The agency's detailed comments and evaluation of the above studies are on file in the Dockets Management Branch (Ref. 3).

References

(1) Comment No. LET007, Docket No. 82N-0214, Dockets Management Branch.

(2) "United States Pharmacopeia XXI—National Formulary XVI," United States Pharmacopeial Convention, Inc., Rockville, MD, p. 958, 1984.

(3) Letter from W. E. Gilbertson, FDA, to M. Haney, Ross Laboratories, Coded ANS001, Docket No. 82N-0214, Dockets Management Branch.

C. Comments on Combinations

13. Several comments contended that, in addition to the permitted combination proposed in § 358.720, there are a number of dandruff, seborrheic dermatitis, and psoriasis active ingredients that could be rationally combined with other active ingredients to treat the same condition or different concomitant symptoms. Two of the comments referred to the general regulations for OTC drug combination products in 21 CFR 330.10(a)(4)(iv), which state:

> An OTC drug may combine two or more safe and effective active ingredients and may be generally recognized as safe and effective when each active ingredient makes a contribution to the claimed effect(s); when combining of the active ingredients does not decrease the safety or effectiveness of any of the individual active ingredients; and when the combination, when used under adequate directions for use and warnings against unsafe use, provides rational concurrent therapy for a significant proportion of the target population.

Two comments mentioned the agency's statement in the tentative final monograph for OTC dandruff, seborrheic dermatitis, and psoriasis drug products (51 FR 27346 at 27356) that it is rational and consistent with the General Guidelines for OTC Drug Combination Products (Ref. 1) to allow ingredients from different therapeutic categories to be combined to treat different concomitant symptoms.

The comments suggested adding a section to the final monograph that would read as follows:

> Any active ingredient identified in §§ 358.712 and 358.720 may be combined with one or more active ingredients from §§ 352.10 and 352.20 [sunscreen], §§ 347.10 and 347.20 [skin protectant], and §§ 348.10 and 348.20 [external analgesic] drug monographs; provided that: (1) Each active ingredient is present in full therapeutic doses, or subtherapeutic doses where a subtherapeutic dose is appropriate; (2) the product is safe and is effective individually for each of the indications intended from the combination; and (3) the product contains adequate statements of identity, indications, directions for use, and warnings consistent with each therapeutic category represented by an active ingredient in the combinations, or, in the case in which a particular therapeutic use is limited in dose or duration of treatment, to prominently display only the most conservative limitations, e.g., not to be used for more than 7 days.

The comments urged the agency to consider possible rational OTC combinations available with dandruff, seborrheic dermatitis, and psoriasis products, and to add language specifically addressing such potential combinations. One comment noted that the manufacturer of the product would be responsible for demonstrating that its individual combination is both safe and effective for each indication prior to distribution, as stated in 21 CFR 330.10(a)(4)(iv).

Stating that combinations from different therapeutic categories that are effective for the same conditions should be allowed, two comments suggested that menthol (antipruritic) and coal tar (antidandruff) could be combined to treat different concomitant symptoms (itching and dandruff). The comments contended that menthol provides immediate relief of itching, while coal tar may also incidentally relieve itching in conjunction with its slower-acting antidandruff effect. Thus, the comments suggested that the combination, while relieving one of the same symptoms, acts by different mechanisms and at different time intervals. One of the comments submitted data to show the antipruritic effect of menthol when combined with a shampoo containing coal tar. (See comment 14 below.)

One of the comments contended that dandruff, seborrheic dermatitis, and psoriasis are disease states that form a continuum and that they share the symptoms of flaking and hyperproliferation. Noting that the agency proposed salicylic acid and sulfur as a Category I combination drug product for the control of dandruff, the comment urged that the indications for that combination be extended to include seborrheic dermatitis and psoriasis of the scalp.

The comment also contended that by proposing to amend the tentative final monograph for OTC external analgesic drug products to include claims for hydrocortisone-containing external analgesics for the relief of itching of seborrheic dermatitis and psoriasis (51 FR 27360 at 27363), the agency has recognized this type of product as safe and effective for this use. The comment claimed that "other external analgesic active ingredients, either alone or in combination with active ingredients of this monograph, are also of value in the treatment or control of dandruff, seborrheic dermatitis, or psoriasis, since itching is a common symptom associated with these conditions." The comment claimed that the Panel's consideration of only the antidandruff action of specific ingredients led to the omission of recommendations for rational combinations. The comment maintained that for this category of drug products, there are a number of rational combinations with other active ingredients which should be allowed by FDA under 21 CFR 330.10(a)(4)(iv). The comment requested monograph status for the following combinations:

(a) Sunscreen and dandruff, seborrheic dermatitis, or psoriasis ingredient.

(b) Skin protectant or external analgesic and keratolytic ingredient (e.g., salicylic acid and/or coal tar).

(c) External analgesic (e.g., menthol, benzocaine, and others) and dandruff ingredient.

(d) External analgesic (e.g., menthol, benzocaine, and others) and psoriasis ingredient.

(e) Keratolytic (e.g., salicylic acid) and psoriasis ingredient.

(f) Keratolytic (e.g., salicylic acid), external analgesic (e.g., menthol, benzocaine, and others), and psoriasis or dandruff ingredient.

(g) Sun protectant, keratolytic, and dandruff, psoriasis, or seborrheic dermatitis ingredient.

(h) Skin protectant, external analgesic (e.g., menthol, benzocaine, and others), and psoriasis or seborrheic dermatitis ingredient.

(i) Skin protectant, sun protectant, and psoriasis ingredient.

(j) Skin protectant and psoriasis ingredient.

Another comment claimed that coal tar, salicylic acid, and benzocaine should be placed in Category I for the treatment of psoriasis without further testing. The comment explained that coal tar reduces the number and size of epidermal cells, decreasing epidermal proliferation and dermal infiltration; salicylic acid loosens the scales enabling them to be washed off; and benzocaine acts immediately to prevent itching, thus helping to prevent scratching. This combination, the comment contended, is a rational combination of ingredients from different therapeutic categories to treat different concomitant symptoms.

One comment requested that the agency provide for combinations of any analgesic, anesthetic, and antipruritic active ingredient for relief of itching in § 348.10 and any active ingredient for the control of dandruff or seborrheic dermatitis in § 358.710 (a) and (b). The comment requested, in the event that the agency does not allow such combinations, that the tentative final monograph specifically be changed to provide for the combination of selenium sulfide 1 percent identified in § 358.710(a)(5) and menthol 0.1 to 1 percent identified in § 348.10(b)(6) for the treatment of the symptoms listed in the respective tentative final monographs relative to control of dandruff, seborrheic dermatitis, and itching. The comment stated that selenium sulfide 1 percent is not known to have inherent antipruritic properties but that clinical studies previously submitted to the Panel demonstrate that relief of itching appears to be related to alleviating the underlying condition. The comment further stated that menthol's antipruritic action is based on its ability to depress cutaneous sensory receptors, which is independent and unrelated to selenium sulfide's ability to relieve itching by alleviating the underlying medical condition.

One comment claimed the agency has recognized a role for "rational concurrent therapy" by requiring a warning in § 358.750(c)(2)(i) for products containing coal tar, which reads: "Use caution in exposing skin to sunlight after applying this product. It may increase your tendency to sunburn for up to 24 hours after application." The comment stated that a Category I combination product containing sunscreen and antidandruff, seborrheic dermatitis, or psoriasis ingredients would provide that need.

The agency agrees that there are instances where it would be rational and consistent with the General Guidelines for OTC Drug Combination Products (Ref. 1) to have ingredients from different therapeutic categories combined to treat different concomitant symptoms. The comments identified numerous combinations that they considered rational and potentially beneficial to consumers. For example, it is possible that certain sunscreen ingredients could be combined with certain dandruff, seborrheic dermatitis, and psoriasis ingredients, e.g., to counteract the photosensitivity effect of coal tar, but the agency is not aware of any products being marketed for such use. There might also be benefit in combining an external analgesic ingredient (e.g., menthol or benzocaine) with certain dandruff, seborrheic dermatitis, and psoriasis ingredients, such as coal tar or selenium sulfide. However, no supportive data were submitted for any of the combinations requested except for menthol and coal tar. (See comment 14 below.) Although some of the combinations requested seem feasible, the agency has no data to determine which combinations are supportable and actually provide a concomitant benefit. As discussed in the tentative final monograph for this rulemaking (51 FR 27346 at 27356), combination OTC drug products must conform to the requirements of the general OTC drug regulations, specifically 21 CFR 330.10(a)(4)(iv), which requires that each active ingredient makes a contribution to the claimed effect. In the absence of data establishing that this contribution is made, these combinations are considered nonmonograph in this final rule. However, if adequate data are submitted to the agency in the form of a citizen petition to amend the final monograph (see 21 CFR 330.10(a)(12)), specific combinations could be included in the final monograph at a later date.

Reference

(1) "General Guidelines for OTC Drug Combination Products," September 1978, Docket No. 78D–0322, Dockets Management Branch.

14. One comment contended that the combination of coal tar and menthol for the treatment of dandruff, seborrheic dermatitis, and psoriasis is a rational combination. The comment claimed menthol acts by quickly increasing the blood supply to the scalp and thus provides an almost immediate anti-itch effect, while coal tar has a slower-acting antidandruff effect. The comment pointed out that menthol and coal tar belong to different therapeutic categories (antipruritic and antidandruff, respectively) and are treating concomitant symptoms (itching and dandruff). The comment mentioned that antidandruff ingredients only incidentally relieve itching. The comment stated that the ingredients, while relieving the same symptoms, act by different mechanisms at different time intervals. The comment concluded that the combination should be placed in Category I without further testing. Subsequently, the comment submitted data (Ref. 1) in support of the effectiveness of a shampoo drug product for OTC use containing a combination of 9 percent coal tar and 1.5 percent menthol for relieving scalp itching associated with dandruff.

The agency has reviewed the submission and determined that the data do not demonstrate that the combination product offers any advantage over the single ingredients alone. Thus, the agency finds that the data are inadequate to support the inclusion of the combination product in the final monograph for OTC drug products for the control of dandruff, seborrheic dermatitis, and psoriasis.

The clinical study conducted was designed to demonstrate the antipruritic action of a shampoo containing a combination of 9 percent coal tar and 1.5 percent menthol as compared to a shampoo containing 9 percent coal tar. In the tentative final monograph (51 FR 27346 at 27356; July 30, 1986), the agency stated that combination drugs with ingredients capable of relieving the same symptoms (itching, in this case) would need to demonstrate that "the combination is somehow better than the individual ingredient used alone, e.g., the symptoms are relieved sooner, or the combination provides greater relief in reducing the severity of the symptoms."

The clinical study was randomized and double-blind with parallel groups using either a single-dose of 9 percent coal tar solution with 1.5 percent

menthol or 9 percent coal tar solution. After a 4-day wash-out period (no shampoo permitted), subjects with (1) a diagnosis of dandruff with moderate to very severe scaling rated by a dermatologist; and (2) an associated degree of itching of at least moderate intensity (>50 on a 100 millimeter (mm) analog scale) rated by the subject were randomly allocated into one of the two treatment groups. Eighty-two subjects were enrolled but two of them were excluded from the efficacy analysis for violation of inclusion criteria (insufficient baseline scalp itch). At 5, 15, 30, and 60 minutes after treatment, the subjects were asked to evaluate antipruritic efficacy using a Control of Itching 100-mm visual analog scale by placing a line on the scale between "not at all" and "very much" in response to the question "How much did the shampoo help to control your scalp itching?" The subjects were also asked to rate relief of itching on a 6-point scale: 0=no relief, 1=slight relief, 2=mild relief, 3=moderate relief, 4=considerable relief, 5=complete relief.

The agency found that the study had a number of major defects:

The comparison of the combination product to coal tar results in an efficacy evaluation of the effect of menthol only. No rationale was offered for the failure to compare the combination product with 1.5 percent menthol. Thus, the contribution of coal tar to the combination product was not assessed.

With only one dose being administered to the subject, the antipruritic effect of regular use of the combination product by the general population having dandruff cannot be assessed.

The comment claimed that the two study medications were identical in aroma. However, menthol is a substance with a peppermint-like odor and at a concentration of 1.5 percent is considered a topical counterirritant in § 348.12(b) of the tentative final monograph for OTC external analgesic drug products (48 FR 5852 at 5868; February 8, 1983). Menthol is listed as an irritant that produces a cooling sensation. As the Topical Analgesic Panel noted in its evaluation of menthol as a counterirritant, when applied topically menthol produces a preliminary feeling of coolness followed by a sensation of warmth (44 FR 69768 at 69828). The comment did not say how the peppermint-like odor and the cooling sensation were blinded. Further, in § 348.10(b)(6) of the tentative final monograph for OTC external analgesic drug products, the analgesic, anesthetic, and antipruritic concentration of menthol is listed as 0.1 to 1 percent, while the concentration in the study submitted was 1.5 percent.

There are several indications that the protocol was not followed carefully. The protocol planned to include 40 males and 40 females in the study, but actual distribution was 31 males and 49 females.

There was an inconsistency in the protocol and the actual conduct of the study with respect to the efficacy evaluation. The protocol itself was inconsistent as to what outcome variable should be measured. Three types of measurement were to be assessed by subjects during the study as follows:

(a) Degree of itching—subjects would be asked to rate the degree of itching they are experiencing by placing a mark on a 100 mm analog scale whose ends represented:

Doesn't itch _____
Itches a lot _____

(b) Control of itching—subjects would be asked to respond to the question "How much did the shampoo help to control your scalp itching?" by designating a position on a 100 mm analog scale between:

Not at all _____
Very much _____

(c) Relief of itching—subjects would be asked to rate their relief by circling the phrase that best describes their relief at that moment:

Complete relief
Considerable relief
Moderate relief
Mild relief
Slight relief
No relief

According to the protocol, the degree of itching was to be evaluated both prior to treatment and immediately after treatment and also at 5, 15, 30, and 60 minutes after treatment. Control of itching was to be evaluated immediately after treatment. Relief of itching was to be evaluated at each time point. In the actual conduct of the study, no evaluation was made immediately after treatment for any of the three types of measurements, and no evaluation was made after treatment for the degree of itching. Furthermore, at 5, 15, 30, and 60 minutes after treatment, ratings of control of itching and relief of itching were made. The statistical methodology section of the protocol stated that itching would be evaluated as the difference and percent difference from baseline of itching at each time point. It is evident from this statement that the degree of itching, not control of itching, was intended for efficacy evaluation. Because the degree of itching was not evaluated after treatment, no efficacy evaluation of this parameter could be made.

The comment's analyst used analysis of variance techniques for both control of itching (analog scale) and relief of itching (categorical scale) at each time point and as the sums weighted by the time intervals between observations. Because the ordered responses of relief of itching are discrete and may not be normally distributed, FDA performed nonparametric techniques for this outcome variable. The p-values that FDA determined by Wilcoxon Rank Sum tests are presented in the third column of the table below whereas p-values as determined by the comment's analyst are listed in the second column.

RESULTS FOR RELIEF OF ITCHING (CATEGORICAL RESPONSES)

Time	p-value (ANOVA)	p-value (Wilcoxon Rank Sum)
	(Comment)	(FDA)
5 minutes	0.04	0.08
15 minutes	0.02	0.04
30 minutes	0.01	0.01
60 minutes	0.12	0.14
Overall sum of relief	0.04	0.06

It is FDA's view that for the relief of itching the nonparametric methods are preferred to ANOVA tests because the normality assumption may not apply to an outcome variable with limited integer ranges. FDA determined that the overall sum of relief using Wilcoxon Rank Sum test has a p-value of 0.06 compared to the p-value of 0.04 from the ANOVA tests done by the comment's analyst. The p-value for overall sum of control of itching is 0.08.

In comparing the comment's results for control of itching and FDA's analysis of those results using the Wilcoxon Rank Sum tests (see table above), only at 30 minutes does the comment's result for control of itching ($p = 0.04$) and FDA's analysis of relief of itching ($p = 0.01$) indicate a significant difference at the 5-percent level. At all other time intervals and for the overall sum, either the comment's results, FDA's analyses, or both do not show a significant difference at the 5-percent level. The results at 60 minutes (the comment's control of itching $p = 0.20$ and FDA's analysis of relief of itching $p = 0.14$) are particularly unimpressive.

The agency concludes that the study results do not demonstrate that the combination of coal tar and menthol is better than coal tar used alone for relief of scalp itch associated with dandruff. Two items raise specific questions about the clinical relevance of the reduction in itching:

(1) The time course of product use when compared to the study design; and

(2) The finding that any effect found tended to weaken by 60 minutes.

Based on the above, the combination of coal tar and menthol is not being included in this final rule for OTC dandruff, seborrheic dermatitis, and psoriasis drug products. The agency's detailed comments are on file in the Dockets Management Branch (Ref. 2). After publication of this final rule, an appropriate citizen petition with any additional data on the combination of coal tar and menthol may be filed requesting an amendment to the final rule (see 21 CFR 10.30).

References

(1) Comment No. RPT, Docket No. 82N–0214, Dockets Management Branch.

(2) Letter from W.E. Gilbertson, FDA, to J.R. Jacobs, Whitehall Laboratories, coded LET010, Docket No. 80N–0214, Dockets Management Branch.

15. One comment contended that salicylic acid in combination with coal tar should be recognized as Category I, stating that the mechanism of action for the two ingredients is different and therefore the ingredients complement each other. The comment explained that salicylic acid (a keratolytic) is "exfoliative, loosening the scales and removing the scurf," while coal tar is not exfoliative, does not aid in the removal of crusted scurf, and is antipruritic and antiseptic, thus preventing the return of dandruff. The comment concluded that a combination of the two ingredients provides a valuable product in the treatment of any itching and scaling condition such as dandruff, seborrheic dermatitis, and psoriasis.

Another comment submitted a proposed clinical protocol to evaluate the effectiveness of a combination of 2 percent coal tar and 2 percent salicylic acid in the treatment and control of scalp psoriasis (Ref. 1). The comment noted that in the advance notice of proposed rulemaking for these products, the Panel stated that for this combination, as well as other combinations listed, "appropriately designed studies must demonstrate that each of the active ingredients contributes to the claimed effect" (47 FR 54646 at 54682).

Neither comment provided data to support the effectiveness of the combination product. The proposed clinical protocol describes a 6-week, randomized, multicenter, double-blind, parallel-group comparison of 2 percent coal tar, 2 percent salicylic acid, and a combination containing 2 percent coal tar and 2 percent salicylic acid in the treatment of scalp psoriasis. The agency recommended that a four-arm study, which includes the vehicle, would be preferable to the three-arm study proposed by the comment. The agency's comments and evaluation of the protocol are on file in the Dockets Management Branch (Ref. 2).

The agency has not received any results from the clinical study described above nor any other data to support the effectiveness of the combination of 2 percent coal tar and 2 percent salicylic acid. Accordingly, this combination is not included in this final monograph. Publication of this final monograph, however, does not preclude future testing. Data in support of the above combination may be submitted via a citizen petition requesting an amendment of the monograph. (See 21 CFR 330.10(a)(12).)

References

(1) Comment No. 00035, Docket No. 82N–0214, Dockets Management Branch.

(2) Letter from W.E. Gilbertson, FDA, to M.S. Wortzman, Neutrogena Corporation, coded LET 006, Docket No. 82N–0214, Dockets Management Branch.

D. Comments on Labeling

16. One comment maintained that the large number of monograph warning and direction statements plus other general information required for OTC drugs (e.g., the statement of identity, general overdose warnings, net weight declarations, and lists of inactive ingredients) could impact adversely on the size of OTC drug packages and could significantly diminish the important and intended purpose of advice to the consumer on the safe and effective use of the products.

The agency concludes that all of the warnings and directions included in this final monograph are essential to ensure consumers' proper and safe use of OTC dandruff, seborrheic dermatitis, and psoriasis drug products. This information needs to appear on these OTC drug products regardless of the size of the container. In those instances where an OTC dandruf, seborrheic dermatitis, or psoriasis drug product is packaged in a container that is too small or otherwise unable to include all the required labeling, the product can be enclosed in a carton or be accompanied by a package insert that contains the information complying with the monograph. The labeling provisions in Part 201 (e.g., §§ 201.10(i), 201.15, 201.60, 201.61, and 201.62) address various requirements for labeling drugs including drugs packaged in containers too small to accommodate a label with sufficient space to bear all the information required for compliance with various regulations. In those instances where an OTC dandruff, seborrheic dermatitis, or psoriasis drug product is packaged in a container that is too small to include all of the required labeling, the product can be enclosed in a carton or be accompanied by a package insert that contains the information complying with the monograph. Manufacturers are also encouraged to print a statement on the product container label, carton, or package insert suggesting that the consumer retain the carton or package insert for complete information about the use of the product when all the required labeling does not appear on the product label.

The Nonprescription Drug Manufacturers Association has recently promulgated guidelines for industry to consider when examining product labels for readability and legibility. (Ref. 1) These guidelines are designed to assist manufacturers in making the labels of OTC drug products as legible as possible. The agency commends this voluntary effort and urges all OTC drug manufacturers to examine their product labels for legibility.

Reference

(1) "Label Readability Guidelines." The Nonprescription Drug Manufacturers Association, Washington, copy included in OTC Volume 06ATFM. Docket No. 78N–0038, Dockets Management Branch.

17. One comment claimed that the agency's proposed warning statements and label directions for dandruff, seborrheic dermatitis, and psoriasis drug products in § 358.750(c) and (d) are redundant, inapplicable, and often

contradictory. The comment contended that this information would confuse consumers rather than aid safe use of these products.

As an example, the comment cited the general warning statement for all products in § 358.750(c)(1)(iii), "If condition worsens or does not improve after regular use of this product as directed, consult a doctor," and argued that it does not include an acceptable duration of use before a consumer should obtain professional advice. The comment contended that this general warning statement was redundant when used with the proposed warning for products containing coal tar in § 358.750(c)(2)(ii) that states: "Do not use for prolonged periods without consulting a doctor."

The agency disagrees with the comment's general statement that the proposed warnings and label directions are redundant, inapplicable, and often contradictory in nature. The agency further disagrees that the warnings and directions information would confuse consumers and would not aid in the safe use of these products. The warnings and directions information was developed after an extensive review by the Panel and an extensive agency evaluation of the Panel's recommendations and the public comments submitted thereto.

Regarding the warning for all OTC dandruff, seborrheic dermatitis, and psoriasis drug products in § 358.750(c)(1)(iii), the agency concludes that it is appropriate to advise consumers to consult a doctor if the condition worsens or does not improve after using the product as directed. A warning of this type is used for many different types of OTC drug products. It is intended to ensure that more severe dermatologic conditions that do not respond to treatment with OTC drug products are treated by a doctor.

As discussed in comment 19 below, the agency is aware that coal tar has been associated with skin cancer but is not aware of any well-defined, long-term studies that show specifically how long coal tar products can be used without significant side effects. Although the agency has no basis to specify a definite time period for consumers to use coal tar products before consulting a doctor, the warning about prolonged use of coal tar products in § 358.750(c)(2)(ii) is not redundant with the general warning in paragraph (c)(1)(iii). Accordingly, the agency is including both warnings in this final monograph.

18. Referring to the warning proposed in § 358.750(c)(1)(ii), one comment contended that the statement, "Avoid contact with the eyes—if this happens, rinse thoroughly with water," is poorly worded both grammatically and stylistically. The comment suggested the following alternative: "Avoid contact with the eyes. If any gets into the eyes, rinse thoroughly with warm water."

The agency agrees that a slight change in wording similar to the comment's suggestion would improve the language style. The agency notes that the comment has included the word "warm" in the warning to describe the type of water that should be used to rinse the eyes. However, the comment did not provide any reason for this change. The agency is not aware of any reason to specify that "warm" water must be used. Therefore, the agency is not including the word warm in this warning which will appear in § 358.750(c)(1)(ii) of this final monograph as follows: "Avoid contact with the eyes. If contact occurs, rinse eyes thoroughly with water."

19. One comment stated that the warnings proposed in § 358.750(c)(1)(iii) (general warning for all products) and (c)(2)(ii) (specific warning for products containing coal tar) are too vague and leave the manufacturers of these products open to liability suits. The warnings state "If condition worsens or does not improve after regular use of this product as directed, consult a doctor," and "Do not use for prolonged periods without consulting a doctor." The comment requested that the agency include specific time periods in these warnings.

The agency recognizes that the warnings referred to by the comment are nonspecific as to how long the consumer may use OTC drug products for control of dandruff, seborrheic dermatitis, and psoriasis before consulting a doctor. However, the agency believes that the warnings, as stated, adequately alert the consumer of the precautions necessary when using these products. As discussed in the tentative final monograph for these products (51 FR 27346 at 27348 and 27349), two long-term studies using coal tar for the treatment of psoriasis showed no significant difference in development of skin cancer in the test group when compared to the expected incidence in selected populations of the United States. The length of time for use of coal tar products after initial treatment, in one of these studies, varied from no use up to as much as 26 years. The agency is not aware of any well defined, long-term studies that show specifically how long these products can be used without significant side effects. Therefore, the agency has no basis to specify a definite time period over which to use these products before consulting a doctor. The comment did not provide any information or data to indicate a specific time limit is necessary nor did it explain how these warnings leave manufacturers open to liability suits. Accordingly, the warnings proposed in § 358.750(c)(1)(iii) and (c)(2)(ii) are being included in this final monograph without revision.

20. One comment contended that the proposed warning statements in § 358.750(c)(1)(iii), "If condition worsens or does not improve after regular use of this product as directed, consult a doctor," and in § 358.750(c)(2)(ii), "Do not use for prolonged periods without consulting a doctor," are contradictory to several proposed directions. The comment cited the following directions in § 358.750: (d)(1) applicable to washoff products (e.g., shampoos, pre- and postshampoo rinses): "For best results use at least twice a week or as directed by a doctor;" (d)(2) applicable to leave-on products (e.g., creams, ointments, lotions, hairgrooms): "Apply to affected areas one to four times daily or as directed by a doctor;" and (d)(3) applicable to soap products for control of seborrheic dermatitis or psoriasis of the skin: "Use on affected area in place of your regular soap."

The agency disagrees with the comment's contention that the two warnings are contradictory to the directions in § 358.750(d)(1), (d)(2), and (d)(3). The directions instruct the consumer on the proper use of the products, while the warnings state precautions to be taken by those using the products. The directions in § 358.750(d)(1) and (d)(2) instruct the consumer on the frequency of using the product, and the direction in § 358.750(d)(3) instructs the consumer to use the OTC drug product in place of regular soap to assure that the active ingredient is re-applied regularly rather than intermittently with regular soap. The warning in § 358.750(c)(1)(iii) for all OTC dandruff, seborrheic dermatitis, and psoriasis drug products, on the other hand, is necessary to alert the consumer to seek professional help when warranted. An individual's sensitivity or allergic reaction to an OTC drug product could result in the condition worsening, and a misdiagnosed or unusually severe case of dandruff, seborrheic dermatitis, or psoriasis could result in no improvement after self-treatment. In these situations, it is important for the consumer to seek professional help. Further, the warning in § 358.750(c)(2)(ii) for coal tar containing products is important because the condition may not be amenable to self-treatment, and prolonged use of coal tar containing substances may not be entirely risk-free

due to the possible carcinogenic effects that may result after prolonged use. (See comment 19 above.)

21. One comment noted that the warning regarding the use of dandruff products on children under 2 years of age, which was recommended by the Panel in § 358.750(c)(1)(iv), was not included in the tentative final monograph. Noting that the warning has value, the comment stated that it will continue using the warning whether the monograph requires it or not.

The Panel's recommended warning was not included in the tentative final monograph (51 FR 27346 at 27355) in response to several comments urging its deletion. The comments had argued that the warning was unwarranted and unnecessary for dandruff control products, and the agency agreed.

The agency stated in the tentative final monograph that children under 2 years of age are not normally subject to dandruff and do not customarily use these products. The agency added that the margin of safety for dandruff control drug products is sufficiently great that the occasional exposure of young children to these products should not constitute any major medical problem. The comment did not submit any data to show that the warning is necessary. The agency concludes that it is not necessary to include a warning against using dandruff control products on children under 2 years of age in this final monograph.

The agency notes the comment's desire to continue using this warning even though the final monograph does not require it. As long as the required monograph warnings and directions appear on the product's label, the agency has no objection to the information described by the comment also appearing in some other portion of the label. Such information, however, may not appear in any portion of the labeling that is required by the monograph and may not appear in the boxed area or under the designation "APPROVED INFORMATION" provided for in 21 CFR 330.1(c) (2) (i).

22. One comment contended that the warning in § 358.750(c) (2) (i) regarding exposure to sunlight after applying coal tar products is inappropriate for washoff products used on the scalp or for hair grooming products which are used by persons with enough hair to protect them from the sun. This warning states: "Use caution in exposing skin to sunlight after applying this product. It may increase your tendency to sunburn for up to 24 hours after application."

The agency considers this warning to be necessary both for washoff hair products and for other hair grooming products that contain coal tar. As discussed in the tentative final monograph (51 FR 27346 at 27355), coal tar has been shown to produce photosensitivity reactions. Because residual amounts of coal tar remain on the scalp, hair, and surrounding areas (e.g., neck) after using a washoff product (e.g., shampoo or rinse), the likelihood of photosensitivity occurring is increased. Although hair on the scalp gives some protection from the sun, the degree of protection is related to the amount of hair an individual has. Further, the skin surrounding the scalp is not protected by hair. Therefore, the agency is requiring the warning in § 358.750 (c) (2) (i) to protect consumers by alerting them to be careful about exposure to sunlight after applying any coal tar-containing products.

23. One comment contended that the proposed directions in § 358.750(d) (3) applicable to soap products for the control of seborrheic dermatitis or psoriasis of the skin, which state "Use on affected areas in place of your regular soap," are contradictory to the proposed warning statement in § 358.750(c) (5), "If condition covers a large area of the body, consult your doctor before using this product." In contrast, the comment mentioned that the warning for leave-on coal tar-containing creams, ointments, and lotions in § 358.750(c) (3), "Do not use this product in or around the rectum or in the genital area or groin except on the advice of a doctor," is not required for coal tar-containing soap products that are washed off, even if used in the bath for prolonged soaking periods.

The agency does not believe the directions in § 358.750(d) (3) are contradictory to the warning in § 358.750(c) (5). The agency believes that consumers with seborrheic dermatitis or psoriasis covering a large area of the body should consult a doctor before using these products in any form (e.g., soaps, ointments, etc.). The warning in § 358.750(c)(3) applies to coal tar-containing creams, lotions, and ointments that are intended to remain on the skin. Soap products covered by the directions in § 358.750(d) (3) are intended to be washed off. Even though a consumer could be exposed to a soap product containing coal tar for an extended period of time while bathing, the coal tar would be highly diluted and the time of exposure would be considerably less than that of products left on the skin. Therefore, the agency does not believe it is necessary to have a warning concerning the use of soap products containing coal tar in or around the rectum or in the genital area or groin because the exposure time and potential for absorption are significantly less for this type of product.

II. Summary of Significant Changes From the Proposed Rule

1. Proposed §§ 358.712 and 358.752, active ingredients and labeling of drug products for the control of cradle cap, respectively, are not included in this final monograph because no additional data to support this use were submitted to the agency. In addition, the definition of cradle cap in proposed § 358.703(b) is not included in the final monograph. Accordingly, proposed § 358.703(c), (d), and (e) have been redesignated as § 358.703(b), (c), and (d), respectively, in this final monograph.

2. The agency has moved the last sentence under the definition for coal tar in proposed § 358.703(a) of the tentative final monograph to the active ingredient sections for coal tar in § 358.710(a)(1), (b)(1), and (c)(1) in this final monograph. This sentence, which provides information on the concentration of coal tar in the final product, is more appropriately conveyed as part of the active ingredient information. This sentence now reads: "When a coal tar solution, derivative, or fraction is used as the source of coal tar, the labeling shall specify the identity and concentration of the coal tar source used and the concentration of the coal tar present in the final product." (See comment 7 above.)

3. The agency is lowering the lower limit for the concentration of pyrithione zinc in § 358.710(a)(2) from 0.95 percent to 0.3 percent in rinse-off products for the control of dandruff. (See comment 11 above.)

4. The other allowable statements proposed in § 358.750(f) have been incorporated into the indications in § 358.750(b) of this final monograph.

5. The warning in proposed § 358.750(c)(1)(ii), "Avoid contact with the eyes—if this happens, rinse thoroughly with water," has been reworded to improve the reading style as follows: "Avoid contact with the eyes. If contact occurs, rinse eyes thoroughly with water." (See comment 18 above.)

III. The Agency's Final Conclusions on OTC Dandruff, Seborrheic Dermatitis, and Psoriasis Drug Products

Based on available evidence, the agency is issuing a final monograph establishing conditions under which OTC dandruff, seborrheic dermatitis, and psoriasis drug products are generally recognized as safe and effective and not misbranded. Specifically, the agency has determined

that the only ingredients that meet monograph conditions are coal tar preparations and salicylic acid for dandruff, seborrheic dermatitis, and psoriasis; pyrithione zinc and selenium sulfide for dandruff and seborrheic dermatitis; sulfur for dandruff; and salicylic acid and sulfur in combination for dandruff. All other ingredients and combinations that were considered in this rulemaking have been determined to be nonmonograph conditions for use in an OTC dandruff, seborrheic dermatitis, and psoriasis drug product.

In the **Federal Register** of November 7, 1990 (55 FR 46914), the agency published a final rule in 21 CFR Part 310 establishing that certain active ingredients that had been under consideration in a number of OTC drug rulemaking proceedings were not generally recognized as safe and effective. That final rule included in § 310.545(a)(7) a number of OTC dandruff, seborrheic dermatitis, and psoriasis active ingredients and was effective on May 7, 1991. This current final rule does not result in the addition of any other ingredients to those already listed in § 310.545(a)(7). However, the parenthetical statement following menthol in the list of ingredients in § 310.545(a)(7), which reads "Does not apply to the use of menthol as an antipruritic when used in combination with the Category I antidandruff ingredient coal tar," is now being deleted because the data submission supporting this combination was found to be inadequate. (See comment 14 above.) Accordingly, any drug product labeled, represented, or promoted for use as an OTC dandruff, seborrheic dermatitis, or psoriasis drug product that contains any of the ingredients listed in § 310.545(a)(7) or that is not in conformance with the monograph (21 CFR part 358, subpart H) may be considered a new drug within the meaning of section 201(p) of the act (21 U.S.C. 321(p)) and misbranded under section 502 of the act (21 U.S.C. 352) and may not be marketed for this use unless it is the subject of an approved application under section 505 of the act (21 U.S.C. 355) and part 314 of the regulations (21 CFR part 314). An appropriate citizen petition to amend the monograph may also be submitted under 21 CFR 10.30 in lieu of an application. Any OTC dandruff, seborrheic dermatitis, or psoriasis drug product initially introduced or initially delivered for introduction into interstate commerce after the effective date of the final rule mentioned above or this final rule that is not in compliance with the regulations is subject to regulatory action.

As a convenience to the reader, the following list is included as a summary of final agency action on the categorization and uses of dandruff, seborrheic dermatitis, and psoriasis active ingredients considered in this rulemaking.

Active ingredients	Category [1]	Uses [2]
Alkyl isoquinolinium bromide.	NM	A
Allantoin	NM	A
Benzalkonium chloride.	NM	A
Benzethonium chloride.	NM	A
Benzocaine	NM	A
Boric acid	NM	A
Calcium undecylenate.	NM	A
Captan	NM	A
Chloroxylenol	NM	A
Coal tar preparations.	M	A
Colloidal oatmeal	NM	A
Cresol, saponated.	NM	A
Ethohexadiol	NM	A
Eucalyptol	NM	A
Juniper tar	NM	A
Lauryl isoquinolinium bromide.	NM	A
Menthol	NM	A
Mercury oleate	NM	A
Methylbenzethonium chloride.	NM	A
Methyl salicylate	NM	A
Phenol	NM	A
Phenolate sodium.	NM	A
Pine tar	NM	A
Povidone-iodine	NM	A
Pyrithione zinc	M	D, S
Resorcinol	NM	A
Salicylic acid	M	A
Selenium sulfide	M	D, S
Sodium borate	NM	A
Sodium salicylate	NM	A
Sulfur	M	D
Thymol	NM	A
Undecylenic acid	NM	A

[1] NM=Nonmonograph, M=Monograph
[2] D=Dandruff, S=Seborrheic dermatitis, P=Psoriasis, A=All Uses

No comments were received in response to the agency's request for specific comment on the economic impact of this rulemaking (51 FR 27346 at 27362). The agency has examined the economic consequences of this final rule in conjunction with other rules resulting from the OTC drug review. In a notice published in the **Federal Register** of February 8, 1983 (48 FR 5806), the agency announced the availability of an assessment of these economic impacts. The assessment determined that the combined impacts of all the rules resulting from the OTC drug review do not constitute a major rule according to the criteria established by Executive Order 12291. The agency therefore concludes that no one of these rules, including this final rule for OTC dandruff, seborrheic dermatitis, and psoriasis drug products, is a major rule.

The economic assessment also concluded that the overall OTC drug review was not likely to have a significant economic impact on a substantial number of small entities as defined in the Regulatory Flexibility Act (Pub. L. 96-354). That assessment included a discretionary regulatory flexibility analysis in the event that an individual rule might impose an unusual or disproportionate impact on small entities. However, this particular rulemaking for OTC dandruff, seborrheic dermatitis, and psoriasis drug products is not expected to pose such an impact on small businesses. This final rule will require some relabeling for products containing monograph ingredients. Manufacturers will have one year to implement this relabeling. This final rule will also require reformulation of combination products containing coal tar and menthol to delete the menthol. For all other nonmonograph active ingredients listed in the chart above, the effective date was May 7, 1991, after which products containing these ingredients could no longer be initially introduced or initially delivered for introduction into interstate commerce. Therefore, the agency certifies that this final rule will not have a significant economic impact on a substantial number of small entities.

The agency has determined under 21 CFR 25.24(c)(6) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

List of Subjects

21 CFR Part 310

Administrative practice and procedure, Drugs, Labeling, Medical devices, Reporting and recordkeeping requirements.

21 CFR Part 358

Labeling, Miscellaneous external drug products, Over-the-counter drugs.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, 21 CFR parts 310 and 358 are amended as follows:

PART 310—NEW DRUGS

1. The authority citation for 21 CFR part 310 continues to read as follows:

Authority: Secs. 201, 301, 501, 502, 503, 505, 506, 507, 512–516, 520, 601(a), 701, 704, 705, 706 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321, 331, 351, 352, 353, 355, 356, 357, 360b–360f, 360j, 361(a), 371, 374, 375, 376); secs. 215, 301, 302(a), 351, 354–360F of the Public Health Service Act (42 U.S.C. 216, 241, 242(a), 262, 263b–263n).

2. Section 310.545 is amended in paragraph (a)(7) by removing the entry "Methol" including the parenthetical statement and alphabetically adding the entry "Menthol", by revising the introductory text of paragraph (d), and by adding paragraph (d)(3) to read as follows:

§ 310.545 Drug products containing certain active ingredients offered over-the-counter (OTC) for certain uses.

* * * * *

(d) Any OTC drug product that is not in compliance with this section is subject to regulatory action if initially introduced or initially delivered for introduction into interstate commerce after the dates specified in paragraphs (d)(1), (d)(2), and (d)(3) of this section.

* * * * *

(3) December 4, 1992, for products subject to paragraph (a)(7) of this section that contain menthol as an antipruritic in combination with the antidandruff ingredient coal tar identified in § 358.710(a)(1) of this chapter.

PART 358—MISCELLANEOUS EXTERNAL DRUG PRODUCTS FOR OVER-THE-COUNTER HUMAN USE

3. The authority citation for 21 CFR part 358 continues to read as follows:

Authority: Secs. 201, 501, 502, 503, 505, 510, 701 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321, 351, 352, 353, 355, 360, 371).

4. Subpart G is reserved and new subpart H, consisting of §§ 358.701 through 358.750, is added to read as follows:

Subpart G—[Reserved]

Subpart H—Drug Products for the Control of Dandruff, Seborrheic Dermatitis, and Psoriasis

Sec.

358.701 Scope.
358.703 Definitions.
358.710 Active ingredients for the control of dandruff, seborrheic dermatitis, or psoriasis.
358.720 Permitted combinations of active ingredients.
358.750 Labeling of drug products for the control of dandruff, seborrheic dermatitis, or psoriasis.

Subpart G—[Reserved]

Subpart H—Drug Products for the Control of Dandruff, Seborrheic Dermatitis, and Psoriasis

§ 358.701 Scope.

(a) An over-the-counter dandruff, seborrheic dermatitis, or psoriasis drug product in a form suitable for topical application is generally recognized as safe and effective and is not misbranded if it meets each of the conditions in this subpart and each general condition established in § 330.1 of this chapter.

(b) References in this subpart to regulatory sections of the Code of Federal Regulations are to chapter I of title 21 unless otherwise noted.

§ 358.703 Definitions.

As used in this subpart:

(a) *Coal tar.* The tar used for medicinal purposes that is obtained as a byproduct during the destructive distillation of bituminous coal at temperatures in the range of 900 °C to 1,100 °C. It may be further processed using either extraction with alcohol and suitable dispersing agents and maceration times or fractional distillation with or without the use of suitable organic solvents.

(b) *Dandruff.* A condition involving an increased rate of shedding of dead epidermal cells of the scalp.

(c) *Psoriasis.* A condition of the scalp or body characterized by irritation, itching, redness, and extreme excess shedding of dead epidermal cells.

(d) *Seborrheic dermatitis.* A condition of the scalp or body characterized by irritation, itching, redness, and excess shedding of dead epidermal cells.

§ 358.710 Active ingredients for the control of dandruff, seborrheic dermatitis, or psoriasis.

The active ingredient of the product consists of any of the following within the specified concentration established for each ingredient:

(a) *Active ingredients for the control of dandruff.* (1) Coal tar, 0.5 to 5 percent. When a coal tar solution, derivative, or fraction is used as the source of the coal tar, the labeling shall specify the identity and concentration of the coal tar source used and the concentration of the coal tar present in the final product.

(2) Pyrithione zinc, 0.3 to 2 percent when formulated to be applied and then washed off after brief exposure.

(3) Pyrithione zinc, 0.1 to 0.25 percent when formulated to be applied and left on the skin or scalp.

(4) Salicylic acid, 1.8 to 3 percent.

(5) Selenium sulfide, 1 percent.

(6) Sulfur, 2 to 5 percent.

(b) *Active ingredients for the control of seborrheic dermatitis.* (1) Coal tar, 0.5 to 5 percent. When a coal tar solution, derivative, or fraction is used as the source of the coal tar, the labeling shall specify the identity and concentration of the coal tar source used and the concentration of the coal tar present in the final product.

(2) Pyrithione zinc, 0.95 to 2 percent when formulated to be applied and then washed off after brief exposure.

(3) Pyrithione zinc, 0.1 to 0.25 percent when formulated to be applied and left on the skin or scalp.

(4) Salicylic acid, 1.8 to 3 percent.

(5) Selenium sulfide, 1 percent.

(c) *Active ingredients for the control of psoriasis.* (1) Coal tar, 0.5 to 5 percent. When a coal tar solution, derivative, or fraction is used as the source of the coal tar, the labeling shall specify the identity and concentration of the coal tar source used and the concentration of the coal tar present in the final product.

(2) Salicylic acid, 1.8 to 3 percent.

§ 358.720 Permitted combinations of active ingredients.

Salicylic acid identified in § 358.710(a)(4) may be combined with sulfur identified in § 358.710(a)(6) provided each ingredient is present within the established concentration and the product is labeled for the control of dandruff.

§ 358.750 Labeling of drug products for the control of dandruff, seborrheic dermatitis, or psoriasis.

(a) *Statement of identity.* The labeling of the product contains the established name of the drug, if any, and identifies the product with one or more of the following, as appropriate:

(1) "Dandruff (insert product form)" or "antidandruff (insert product form)".

(2) "Seborrheic dermatitis (insert product form)".

(3) "Psoriasis (insert product form)".

(b) *Indications.* The labeling of the product states, under the heading "Indications," the phrase listed in paragraph (b)(1) of this section and may contain any of the terms listed in paragraph (b)(2) or (b)(3) of this section. Other truthful and nonmisleading statements, describing only the indications for use that have been established and listed in paragraph (b) of this section, may also be used, as provided in § 330.1(c)(2) of this chapter, subject to the provisions of section 502 of the Federal Food, Drug, and Cosmetic Act (the act) relating to misbranding and the prohibition in section 301(d) of the act against the introduction or delivery for introduction into interstate

commerce of unapproved new drugs in violation of section 505(a) of the act.

(1) ("For relief of" or "Controls") "the symptoms of" (select one or more of the following, as appropriate: "dandruff," "seborrheic dermatitis," and/or "psoriasis.")

(2) The following terms or phrases may be used in place of or in addition to the words "For the relief of" or "Controls" in the indications in paragraph (b)(1) of this section: "fights," "reduces," "helps eliminate," "helps stop," "controls recurrence of," "fights recurrence of," "helps prevent recurrence of," "reduces recurrence of," "helps eliminate recurrence of," "helps stop recurrence of."

(3) The following terms may be used in place of the words "the symptoms of" in the indications in paragraph (b)(1) of this section: ("skin" and/or "scalp," as appropriate) (select one or more of the following: "itching," "irritation," "redness," "flaking," "scaling,") "associated with."

(c) *Warnings.* The labeling of the product contains the following warnings under the heading "Warnings":

(1) *For products containing any ingredient identified in § 358.710.* (i) "For external use only."

(ii) "Avoid contact with the eyes. If contact occurs, rinse eyes thoroughly with water."

(iii) "If condition worsens or does not improve after regular use of this product as directed, consult a doctor."

(2) *For any product containing coal tar identified in § 358.710(a), (b), or (c).* (i) "Use caution in exposing skin to sunlight after applying this product. It may increase your tendency to sunburn for up to 24 hours after application."

(ii) "Do not use for prolonged periods without consulting a doctor."

(3) *For products containing coal tar when formulated to be applied and left on the skin (e.g., creams, ointments, lotions).* "Do not use this product in or around the rectum or in the genital area or groin except on the advice of a doctor."

(4) *For products containing coal tar identified in § 358.710(c) for the control of psoriasis.* "Do not use this product with other forms of psoriasis therapy such as ultraviolet radiation or prescription drugs unless directed to do so by a doctor."

(5) *For products containing any ingredient identified in § 358.710(b) or (c) for the control of seborrheic dermatitis or psoriasis.* "If condition covers a large area of the body, consult your doctor before using this product."

(d) *Directions.* The labeling of the product contains the following information under the heading "Directions." More detailed directions applicable to a particular product formulation may also be included.

(1) *For products containing active ingredients for the control of dandruff, seborrheic dermatitis, or psoriasis when formulated to be applied and then washed off after brief (a few minutes) exposure (e.g, shampoos, preshampoo rinses, postshampoo rinses).* "For best results use at least twice a week or as directed by a doctor."

(2) *For products containing active ingredients for the control of dandruff, seborrheic dermatitis, or psoriasis when formulated so as to be applied and left on the skin or scalp (e.g., creams, ointments, lotions, hairgrooms).* "Apply to affected areas one to four times daily or as directed by a doctor."

(3) *For products containing active ingredients for the control of seborrheic dermatitis or psoriasis of the skin when formulated as soaps.* "Use on affected areas in place of your regular soap."

(e) The word "physician" may be substituted for the word "doctor" in any of the labeling statements in this section.

Dated: July 31, 1991.

David A. Kessler,

Commissioner of Food and Drugs.

[FR Doc. 91–28893 Filed 12–3–91; 8:45 am]

BILLING CODE 4160–01–M

Federal Register

Wednesday
December 4, 1991

Part III

Department of the Interior

Bureau of Indian Affairs

Indian Gaming; Sisseton-Wahpeton, South Dakota; Approved Tribal-State Compact; Notice

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Indian Gaming; Sisseton-Wahpeton Sioux Tribe, South Dakota; Approved Tribal-State Compact

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of Approved Tribal-State Compact.

SUMMARY: Pursuant to 25 U.S.C. 2710, of the Indian Gaming Regulatory Act of 1988 (Pub. L. 100–497), the Secretary of the Interior shall publish, in the **Federal Register**, notice of approved Tribal-State Compacts or considered approved for the purpose of engaging in Class III (casino) gambling on Indian reservations. The Assistant Secretary—Indian Affairs, Department of the Interior, through his delegated authority is publishing a Tribal-State Compact between the Sisseton-Wahpeton Sioux Tribe and the State of South Dakota which is considered approved, but only to the extent the compact is consistent with the provisions of the Indian Gaming Regulatory Act.

SUPPLEMENTAL INFORMATION: Because the expiration of the 45 days specified in 25 U.S.C. 2710(d)(8)(B) in which the Secretary could approve or disapprove this compact, the Lower Brule Sioux Tribe video lottery compact is considered approved as specified in 25 U.S.C. 2710(d)(8)(B) to the extent that it is consistent with the Indian Gaming Regulatory Act.

However, it is our opinion that section 11.1 of part A of the compact is not consistent with the Act.

DATES: This action is effective December 4, 1991.

ADDRESSES: Office of Tribal Services, Bureau of Indian Affairs, Department of the Interior, MS/MIB 4603, 1849 "C" Street, NW., Washington, DC 20240.

FOR FURTHER INFORMATION CONTACT: Joyce Grisham, Bureau of Indian Affairs, Washington, DC 20240, (202) 208–7445.

Dated: November 26, 1991.

Eddie F. Brown,

Assistant Secretary—Indian Affairs.

[FR Doc. 91–29093 Filed 12–3–91; 8:45 am]

BILLING CODE 4310–02–M

federal register

Wednesday
December 4, 1991

Part IV

Department of Education

34 CFR Parts 600 and 668

Institutional Eligibility Under The Higher Education Act of 1965; Student Assistance General Provisions; Notice of Proposed Rulemaking

DEPARTMENT OF EDUCATION

34 CFR Parts 600 and 668

RIN 1840-AB46

Institutional Eligibility Under the Higher Education Act of 1965, as Amended; Student Assistance General Provisions

ACTION: Notice of proposed rulemaking.

SUMMARY: The Secretary proposes to amend parts 600 and 668 of title 34 of the Code of Federal Regulations governing the student financial assistance programs authorized by Title IV of the Higher Education Act of 1965, as amended (Title IV, HEA programs). These amendments are necessary to prevent serious abuses of the statutory requirement that an institution that seeks eligibility as a proprietary institution of higher education, a postsecondary vocational institution, or a vocational school must have been in existence for two years (the two-year rule). The proposed regulations would apply the two-year rule to locations of eligible institutions and would make certain conforming changes and technical changes.

DATES: Comments must be received on or before January 21, 1992.

ADDRESSES: All comments concerning these proposed regulations should be addressed to Ms. Carol F. Sperry, U.S. Department of Education, 400 Maryland Avenue, SW. (Regional Office Building 3, room 3030), Washington, DC 20202–5242.

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: Ann S. Clough, U.S. Department of Education, 400 Maryland Avenue, SW. (Regional Office Building 3, room 3030), Washington, DC 20202–5242. Telephone (202) 708–4906. Deaf and hearing impaired individuals may call the Federal Dual Party Relay Service at 1–800–877–8339 (in the Washington, DC 202 area code, telephone 708–9300) between 8 a.m. and 7 p.m., Eastern Time.

SUPPLEMENTARY INFORMATION: The Institutional Eligibility regulations contain requirements that postsecondary educational institutions must meet in order to be eligible to apply for participation in programs authorized under the Higher Education Act of 1965, as amended (HEA). The Student Assistance General Provisions regulations contain requirements that are common to the participation of postsecondary institutions in the Title IV, HEA programs. The Title IV, HEA programs include the Pell Grant, Stafford Loan (formerly Guaranteed Student Loan), PLUS, Supplemental Loans for Students, Consolidation Loan, Income Contingent Loan, Perkins Loan, College Work-Study, Supplemental Educational Opportunity Grant, and State Student Incentive Grant programs.

Background on the Two-Year Rule and Additional Locations

Among the criteria that must be met by an institution in order for it to qualify as an eligible proprietary institution of higher education, postsecondary vocational institution, or vocational school, is the statutory requirement that the institution have been in existence for two years (the two-year rule).

The statutory two-year rule has two principal objectives: ensuring that an institution has the financial and administrative capability to operate independently of Title IV, HEA program funds before the institution is permitted to participate in these programs, and ensuring that an institution exists primarily to provide an educational and training function rather than to participate in the student financial assistance programs.

Under current Education Department (ED) practice, the Secretary permits eligible institutions to add locations to those included within the institutional eligibility notice issued by the Secretary without subjecting the added locations to the two-year rule. Under this practice, there has been tremendous growth in the number of locations participating in the Title IV, HEA programs. In a significant number of instances, particularly in the proprietary school sector, this growth has exceeded the administrative and financial capabilities of the institutions to meet their responsibilities under the Title IV, HEA programs.

An example of this uncontrolled expansion through added locations is a school that established 20 "branch campuses" nationwide in three years, and whose annual tuition receipts grew from $2 million to $26 million in that period. When the school closed, it owed more than $10 million in refunds to students and former students. Moreover, at one location of the school, of more than 1,500 students who had enrolled, only 100 graduated and only 10 found jobs in the field for which they had been trained. At another location of that school, only 40 of 1,600 students graduated.

It is apparent to the Secretary that, even in cases where the abuses are not as flagrant as the example, expansion of institutions through the addition of locations frequently has been financed to a large extent through the availability of Title IV, HEA program funds. This expansion has all too often been undertaken without either sufficient capital reserves or sufficient and adequate personnel to provide an acceptable level of training and to administer properly the Title IV, HEA programs.

In addition to their use for unrestricted expansion, additional locations are also a device for circumventing the two-year rule in the creation of new eligible institutions. Often, after a location has been in existence for two years, it separates from its parent and obtains accreditation, eligibility, and certification as a free-standing institution. In purported satisfaction of the two-year rule, the newly established free-standing institution relies on its experience in its prior status as a subordinate location of an eligible institution. Thus, despite the objectives of the two-year rule to ensure the capacity of an institution to operate independently of Federal funds and to ensure that the institution is not created primarily to obtain Federal funds, an eligible institution has been created without ever having operated independently of the financial foundation of Federal student financial assistance. It is not uncommon for this now free-standing institution to start establishing its own added locations immediately.

A variation on the practice of conversions from added location to free-standing institution is the "lease-purchase" arrangement. This practice involves (a) the establishment of a new location by an eligible institution, frequently in a different State and frequently with an entirely unrelated curriculum, (b) the operation of the location for two years under the eligibility of the parent, and (c) the sale of the location (often to the manager of the location) after the two-year period. As in the case of an ordinary conversion to free-standing status, the new owner submits the institution's history as a location of its former parent institution in order to satisfy the two-year rule. In many of these cases, it is difficult to avoid the inference that the owner of the new institution has, in essence, rented the accreditation, eligibility, and certification of the former parent for a period of two years in order to avoid the two-year rule. The new institution thus

has gained access to Title IV, HEA program funds without ever having had to prove its viability in the absence of the financial underpinning provided by those funds.

Description of Proposed Changes

The Secretary is proposing to amend the Institutional Eligibility regulations by amending § § 600.5, 600.6, and 600.7, and by adding a new § 600.12. Under these changes, each location that a proprietary institution of higher education, a postsecondary vocational institution, or a vocational school seeks to add to the locations included within the Secretary's designation of eligibility for that institution, must satisfy the two-year rule as a location of that eligible institution unless (a) that location provides no more than 50 percent of the instructional time of an eligible program (the remainder of the program being provided at a location that is included in the institutional eligibility notice issued by the Secretary), (b) that location is established solely to complete the training of students who had been enrolled at a school that had closed, or (c) that location is part of an institution of higher education under § 600.4 that in the case of a postsecondary vocational institution, has existed—either at that location or at another location—for at least two years. Also under these changes, any location of an eligible institution that seeks to become an eligible institution in its own right must satisfy the two-year rule as an independent, free-standing, institution, even if that location had been part of the eligible institution for two or more years, unless that location (i) was part of an institution of higher education under § 600.4 that has existed—either at that location or at another location—for at least two years, and (ii) continues to be part of an institution of higher education. This exception means that the new location must qualify as both an institution of higher education under § 600.4 and a postsecondary vocational institution.

An institution that provides postsecondary vocational training, such as a junior or community college, may qualify as both an "institution of higher education" under § 600.4 and a "postsecondary vocational institution" under § 600.6, because the HEA statutory definitions of the two types of institutions, with two exceptions, are virtually identical. One exception involves the length of the vocational program offered. Thus, the former type of institution offers long-term postsecondary vocational training programs of at least one year in length, while the latter type of institution offers short-term postsecondary vocational training programs of between six months and one year in length.

The other exception involves the point in time when an institution may qualify as an eligible institution of higher education or an eligible postsecondary vocational institution. An educational institution may qualify as the former once it begins to provide postsecondary training, while an institution must have been providing vocational training for at least two years before it can qualify as the latter. Compare section 1201 (a) of the HEA (20 U.S.C. 1141(a)) with section 481(c)(3) of the HEA (20 U.S.C. 1088(c)). However, in those cases where an institution of higher education elects to provide short-term training programs eligible under the "postsecondary vocational institution" definition, and thus falls within both statutory definitions, the applicability of the statutory 2-year rule is ambiguous. Accordingly, the Secretary must harmonize those provisions to best effect Congress' purposes. As indicated above, the purpose of the 2-year rule is addressed to the viability of the educational institution, not merely to specific academic programs of a specified length. The Secretary has interpreted the 2-year rule to be satisfied if a postsecondary vocational program is part of an institution of higher education that has existed for two years, either at the same or a different location.

The Secretary believes that this approach carries out the principal objectives of the two-year rule, as described above. As a practical matter, currently, an educational institution, such as a junior or community college, that qualifies as both types of institutions does not create a separate component within the institution to offer short-term training programs merely because those programs qualify the institution as a postsecondary vocational institution, as opposed to an institution of higher education. Nor does the institution establish different enrollment standards for such programs or separate faculty for such programs. Consequently, the dual categorization of such an institution under the HEA, based upon the long term or short term nature of the programs it offers, would be artificial. Moreover, the Secretary has no evidence that abuses of the two-year rule have occurred among these institutions.

As noted above, if such an educational institution offers both short-term and long-term vocational training programs at a new location, the long-term program immediately becomes eligible to participate in the Title IV, HEA Programs. The Secretary believes that, to the extent possible, the same result should apply with regard to the short-term program in terms of initial institutional eligibility and the eligibility of new locations.

To produce this result, the Secretary has proposed that an educational institution may satisfy the two-year rule for a postsecondary vocational institution if that institution also qualifies as an eligible institution of higher education, and has qualified as an eligible institution of higher education during the 24 months preceding the date of application for eligibility as a postsecondary vocational institution. With regard to initial eligibility, these proposed regulations are contained in § 600.6(b)(2). With regard to the eligibility of new locations, these proposed regulations are contained in § 600.12(b)(1).

An educational institution may also qualify as both an institution of higher education and vocational school under the Guaranteed Student Loan Programs. Under section 435(c) of the HEA, in order to qualify as an eligible vocational school, an educational institution must have been in existence for two years, or be "specially accredited by the Secretary" as having met the other definitional elements of a vocational school. The Secretary proposes to amend § 600.7 to provide that the Secretary will specially accredit an educational institution as a vocational school, if the institution qualifies as an institution of higher education under § 600.4 and satisfies all the elements of the definition of a vocational school, other than having been in existence for two years. This proposal reflects the Secretary's judgment that the 2-year rule is unnecessary, for the reasons described above, if a vocational school is part of an institution of higher education, and that special accreditation is warranted in these cases. With regard to initial eligibility of a vocational school, these proposed regulations are contained in § § 600.7(b)(2) and 600.7(d). With regard to the eligibility of new locations, these proposed regulations are contained in § 600.12(b)(1).

The Secretary requests comments on these provisions, including any alternative approaches to addressing abuses of the 2-year requirement.

The Secretary also proposes to amend § 600.32 by deleting paragraphs (c) and (d), which are subsumed by § 600.12, by revising paragraph (b) accordingly, and by re-designating paragraph (e) as paragraph (c).

In addition, the Secretary proposes to amend § 668.12 of the Student

Assistance General Provisions regulations by adding a new paragraph (f). Under this new paragraph the institution's program participation agreement (under which the institution participates in the Title IV, HEA programs) would automatically terminate with regard to a location if and when that location ceases to be a part of the eligible institution. This change is needed because of the proposed addition of new § 600.12.

Institutions Affected by These Proposed Regulations

These proposed regulations would apply to any institution that is or seeks to become eligible as a proprietary institution of higher education, a postsecondary vocational institution, or a vocational school.

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 that 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. The small entities affected by these proposed regulations are small institutions of postsecondary education. Although the proposed regulations would inhibit expansion financed by access to Title IV, HEA program funds, the regulations would not deny existing eligible institutions (including their existing additional locations) access to those Federal funds.

Paperwork Reduction Act of 1980

Sections 600.5, 600.6, 600.7, 600.30 and 600.31 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. (44 U.S.C. 3504(h))

Annual public reporting burden for this collection of information is expected to average one-quarter hour per response for 100 respondents, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

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: Daniel J. Chenok.

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 3030, Regional Office Building 3, 7th and D Streets, SW., Washington, DC, 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 600

Administrative practice and procedure, College and universities, Consumer protection, Education, Grant programs—education, Loan programs—education, Reporting and record-keeping requirements, Student aid.

List of Subjects in 34 CFR Part 668

Administrative practice and procedure, Colleges and universities, Consumer protection, Education, Grant programs—education, Loan programs—education, Reporting and record-keeping requirements, Student aid.

Dated: November 27, 1991.

Lamar Alexander

Secretary of Education.

(Catalog of Federal Domestic Assistance Numbers: 84.007 Supplemental Educational Opportunity Grant Program; 84.032 Guaranteed Student Loan Program; 84.032 PLUS Program; 84:032 Supplemental Loans for Students Program; 84.033 College Work-Study Program; 84.038 Perkins Loan Program; 84.226 Income Contingent Loan Program; 84.063 Pell Grant Program; 84.069 State Student Incentive Grant Program; 84.185 Robert. C. Byrd Honors Scholarship Program)

The Secretary proposes to amend parts 600 and 668 of Title 34 of the Code of Federal Regulations as follows:

PART 600—INSTITUTIONAL ELIGIBILITY UNDER THE HIGHER EDUCATION ACT OF 1965, AS AMENDED

1. The authority citation for part 600 continues to read as follows:

Authority: 20 U.S.C. 1085, 1088, 1094, and 1141, unless otherwise noted.

2. Section 600.5 is amended by removing the last sentence in paragraph (a)(7); by redesignating paragraph (b) as paragraph (c); by removing the cross-reference "(b)(1)" in redesignated paragraph (c)(2) and adding, in its place, "(c)(1)"; and by adding a new paragraph (b) to read as follows:

§ 600.5 Proprietary institution of higher education.

* * * * *

(b)(1) Except as provided in paragraph (b)(2) of this section, the Secretary considers an institution to have been in existence for two years only if it has been legally authorized to provide, and has provided, during the 24 months (except for normal vacation periods) preceding the date of application for eligibility, a continuous training program to prepare students for gainful employment in a recognized occupation.

(2) In determining whether an applicant institution satisfies the requirement contained in paragraph (b)(1) of this section, the Secretary does not count any period during which the applicant institution was a part of another eligible proprietary institution of higher education, postsecondary vocational institution, or vocational school.

* * * * *

3. Section 600.6 is amended by removing the last sentence in paragraph (a)(6); by redesignating paragraph (b) as paragraph (c); by removing the cross-reference "(b)(1)" in redesignated paragraph (c)(2) and adding, in its place, "(c)(1)"; and by adding a new paragraph (b) to read as follows:

§ 600.6 Postsecondary vocational institution.

* * * * *

(b)(1) Except as provided in paragraph (b)(2) of this section, the Secretary considers an institution to have been in existence for two years only if it has been legally authorized to provide, and has provided, during the 24 months (except for normal vacation periods) preceding the date of application for eligibility, a continuous training program to prepare students for gainful employment in a recognized occupation.

(2) In determining whether an applicant institution satisfies the

requirement contained in paragraph (b)(1) of this section, the Secretary—

(i) Counts any period during which the applicant institution qualified as an eligible institution of higher education;

(ii) Counts any period during which the applicant institution was part of another eligible institution of higher education, provided that the applicant institution continues to be part of an eligible institution of higher education; and

(iii) Does not count any period during which the applicant institution was a part of another eligible proprietary institution of higher education, postsecondary vocational institution, or vocational school.

* * * * *

4. Section 600.7 is amended by revising the phrase "Has been specifically determined by the Secretary" in paragraph (a)(5)(ii) to read "Has been specially accredited by the Secretary"; by redesignating paragraph (b) as paragraph (b)(1); and by adding a new paragraph (b)(2) and a new paragraph (d) to read as follows:

§ 600.7 Vocational school.

* * * * *

(b) * * *

(2) In determining whether an applicant institution satisfies the requirement contained in paragraph (b)(1) of this section, the Secretary does not count any period during which the applicant institution was a part of another eligible proprietary institution of higher education, postsecondary vocational institution, or vocational school.

* * * * *

(d) Under § 600.7(a)(5)(ii), the Secretary specifically determines that a school qualifies as an eligible location of a vocational school, despite not having been in existence for two years, only if the school also qualifies as an accredited, eligible institution of higher education.

5. Section 600.12 is added to read as follows:

§ 600.12 Providing education or training at locations not included within the Secretary's eligibility designation.

(a)(1) Except as provided in paragraph (b) of this section, if an educational institution that has been designated as an eligible proprietary institution of higher education, postsecondary vocational institution, or vocational school provides education or training at a location that is not included within the Secretary's eligibility designation for that institution, the Secretary does not consider that location to be part of the eligible proprietary institution of higher education, postsecondary vocational institution, or vocational school until that location has been in existence for at least two years as part of that educational institution.

(2) The Secretary considers a location to have been in existence for at least two years only if the institution has been legally authorized to provide, and has provided, at that location, during the 24 months (except for normal vacation periods) preceding the date of the application for a designation of eligibility for that location, a continuous training program to prepare students for gainful employment in a recognized occupation.

(b) If an educational institution that has been designated by the Secretary as an eligible proprietary institution of higher education, postsecondary vocational institution, or vocational school provides education or training at a location that is not included within the Secretary's eligibility designation for that institution, the Secretary considers that location to be part of the eligible proprietary institution of higher education, postsecondary vocational institution, or vocational school if—

(1) That location is also a part of an eligible institution of higher education, and the institution of higher education has provided postsecondary education or training at any location during the 24 months (except for normal vacation periods) preceding the date of application for eligibility of that location;

(2)(i) The education or training provided at the new location does not include more than 50 percent of the instructional time of any eligible program, as defined in 34 CFR § 668.8; and

(ii) The balance of any eligible program of which a portion of the education or training is provided at the new location is provided by the eligible institution at a location or locations included within the Secretary's designation of eligibility for that institution; or

(3)(i) The institution provides education or training at the new location—

(A) Solely to students enrolled in an eligible program, as defined in 34 CFR 668.8, at another eligible institution that has terminated teaching activities for that eligible program before its completion; and

(B) In order to enable those students to complete their courses of study or substantially similar courses of study; and

(ii) The period of education or training provided at that location to any of those students does not exceed one year.

(Authority: 20 U.S.C. 1085, 1088)

6. Section 600.30 is amended by revising the introductory text of paragraph (a) to read as follows:

§ 600.30 Institutional changes requiring review by the Secretary.

(a) Except as provided in paragraph (b) of this section, an eligible institution shall notify the Secretary in writing, at an address specified by the Secretary in a notice published in the **Federal Register**, at the same time that it notifies its accrediting agency or association, but not later than 10 days after the change occurs, of any change in the following information provided in the institution's eligibility application:

* * * * *

7. In § 600.31, paragraph (a) is amended by removing the word "and" at the end of paragraph (a)(4), removing the period and adding "; and " at the end of paragraph (a)(5), and adding a new paragraph (a)(6), to read as follows:

§ 600.31 Change in ownership resulting in a change of control.

(a) * * *

(6) If the institution has been divided into two or more institutions, all of the resulting institutions have jointly notified the Secretary in writing as to which one of the resulting institutions they consider to be the same institution.

8. In § 600.32, paragraphs (c) and (d) are deleted, paragraph (e) is redesignated as paragraph (c) and paragraph (b) is revised to read as follows:

§ 600.32 Eligibility of additional locations.

* * * * *

(b) To qualify as an eligible location, the additional location must satisfy the applicable requirements of this section, §§ 600.4 through 600.7, and § 600.12.

* * * * *

PART 668—STUDENT ASSISTANCE GENERAL PROVISIONS

9. 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.

10. Section 668.12 is amended by adding a new paragraph (f) and by revising the authority citation to read as follows:

§ 668.12 Institutional participation agreement.

* * * * *

(f) An institution's participation agreement automatically terminates with respect to any one of the institution's locations on the date that

the location ceases to be a part of the eligible institution.

(Authority: 20 U.S.C. 1085, 1088, 1091, 1092, 1094, and 1141)

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Part V

Department of Agriculture

Forest Service

36 CFR Part 230

State and Private Forestry Assistance; Stewardship Incentive Program; Interim Rule

DEPARTMENT OF AGRICULTURE

Forest Service

36 CFR Part 230

State and Private Forestry Assistance; Stewardship Incentive Program

AGENCY: Forest Service, USDA.

ACTION: Interim rule with request for comments.

SUMMARY: This interim rule establishes the interim procedures for administration of the Stewardship Incentive Program, authorized by the Food, Agriculture, Conservation, and Trade Act of 1990. The intended effect is to give timely notice to State forestry organizations, cooperating agencies and organizations, and potential landowner applicants of the rules governing this new cost-share program and to enable the Department of Agriculture to put this new program into operation to comply with Congressional appropriations for fiscal year 1991. Public comment is requested and will be considered in adoption of a final rule.

DATES: This rule is effective December 4, 1991.

Comments on the rule must be received in writing on or before January 21, 1992.

ADDRESSES: Send written comments to the Stewardship Incentive Program, Cooperative Forestry Staff (3200), Forest Service, USDA, P.O. Box 96090, Washington, DC 20090–6090.

FOR FURTHER INFORMATION CONTACT: Mary Carol Koester, Stewardship Incentive Program Specialist, 202–205–1381.

SUPPLEMENTARY INFORMATION:

Background

The Stewardship Incentive Program (Program) is authorized under the Cooperative Forestry Assistance Act (1978) as amended by title XII of the Food, Agriculture, Conservation, and Trade Act of 1990 (the Act). This Program is intended to encourage private landowners throughout the United States to manage their forest lands for economic, environmental, and social benefits.

The establishment of a State and Private Forestry Title in the Food, Agriculture, Conservation, and Trade Act reflects a renewed recognition of the economic and environmental benefits of State and private forestry programs. Private landowners currently own 55 percent of the nation's forests; 45 percent of which are nonindustrial. Private forests provide much of the nation's fish and wildlife habitat, wetlands, forest recreation, and wood supply. Moreover, domestic demand for wood products and other forest resources is expected to double over the next 50 years. In order to meet future demand for both commodity and non-commodity resources, protection and productivity of all forest resources must be augmented on private lands.

USDA currently provides landowners with various types of forestry assistance. The Cooperative Forestry Assistance Act and the Forestry Incentives Program provide technical, financial, and related assistance to State forestry organizations and private landowners. This assistance, however, is primarily limited to timber, insect, and disease management; for example, the Cooperative Forestry Assistance Act recognizes, but does not focus on, other forest uses such as fish and wildlife habitat, recreation, agroforestry, aesthetics, and soil and water quality. To meet present and future multiple resource management goals, the Stewardship Incentive Program includes a broad array of forest uses and is intended to complement and expand upon existing forestry assistance programs.

Cooperative Partnerships

The Stewardship Incentive Program is administered by the Forest Service of the United States Department of Agriculture (USDA). Section 1212 of the Act, entitled Findings, Purpose and Policy, states that the Department of Agriculture, through the coordinated effort of its agencies with forestry responsibilities, cooperating with other Federal agencies, State Foresters, and State political subdivisions, has the expertise and experience to assist private landowners in achieving individual goals and public benefits regarding forestry. This section further authorizes the Secretary to assist in the establishment of a coordinated and cooperative Federal, State, and local forest stewardship program for management of the non-Federal forest lands. Moreover, section 1212 states it is the policy of Congress that it is in the national interest for the Secretary to work through and in cooperation with State Foresters, or equivalent State officials, nongovernmental organizations, and the private sector in implementing Federal programs affecting non-Federal forest lands. Accordingly, the Forest Service intends to work through and in cooperation with these agencies and entities in implementing the Stewardship Incentive Program. Within each State, a State Forest Stewardship Coordinating Committee will be established as required by the Act. The Committee, composed of representatives from other USDA agencies, State resource agencies, private landowners, forest industry, consulting foresters, and environmental and conservation organizations, will make recommendations to the State Forester concerning State program policy and operating procedure.

The Forest Service has received input from several agencies and organizations relative to the development of program policy, activities, and procedures. These include the Extension Service, Agricultural Stabilization and Conservation Service, and Soil Conservation Service.

Section-by-Section Analysis of Interim Rule

The rules governing Forest Service procedures for administering the Stewardship Incentive Program on nonindustrial private lands will be codified as a new subpart A of a new part 230 of title 36 of the Code of Federal Regulations. The following section-by-section analysis describes in detail the provisions of the interim rule.

Section 230.1 Purpose and Scope

This section cites the legal authority of the Stewardship Incentive Program and, as provided in the Act, states that cost-share assistance under the Program shall complement rather than replace or duplicate existing USDA landowner assistance programs.

Section 230.2 Definitions

This section defines special terms used in the interim rule.

Section 230.3 National Program Administration

Paragraph (a) requires the Chief to develop and oversee Program policy and procedure and to monitor implementation of such policy and procedure over the life of the Program. This directs the Chief to assume overall responsibility for Program administration within the Forest Service as stipulated in the Act.

Paragraph (b) of this section requires the Chief of the Forest Service to annually distribute such cost-share funds to the States as may be available following assessment of public benefits and consultation with a representative group of State Foresters. This consultation is important since each State Forester will administer the Program. Paragraph (c) of this section cites tree planting, tree maintenance, and tree improvement as a national priority for practices receiving cost-share funds and allows for the

development of additional national practice priorities by the Chief in consultation with the State Foresters.

Paragraph (d) requires the Chief to review and determine approval of State plans. This federal level review and approval is necessary to ensure that the Program accomplishes, in the aggregate, national forest resource enhancement goals and objectives and to ensure a certain level of consistency in the administration of the Program.

Paragraph (e) requires the Chief to annually reevaluate and set the percentage of Program funding to be made available for landowner forest stewardship plan development. Since landowner forest stewardship plans are required for landowners to receive cost-share funds under the Program, it is anticipated the demand for plan development will be high during the initial years of Program implementation; however, as landowner forest stewardship plans are developed and this need decreases over time, it is expected that the percentage of Program funds used to develop landowner forest stewardship plans will also decrease.

Paragraph (f) allows the Chief to enter into agreements with other USDA agencies to administer the Program. While this authority already exists, it is included in the rule to signal that the Forest Service intends to administer the Program drawing on the established expertise of other USDA agencies. The Forest Service may enter into agreements with other USDA agencies to perform all or part of the following: Determining participant eligibility, accepting applications for cost-share funds, managing accounting ledgers, arranging for the disbursement of Federal cost-share payments, and compiling statistical data on Program practices.

Finally, paragraph (g) provides that the Chief retain the final authority to resolve issues which may arise in the administration of the Program. Given the role of the States and the involvement of other agencies, it is essential to provide clear authority in the rule on the resolution of any issues that may arise.

Section 230.4 State Program Administration

This section directs the Secretary of Agriculture, in consultation with the State Forester, to establish a State Forest Stewardship Coordinating Committee to make recommendations to the State Forester on Program policy and procedure in the States, as required by the Act. Paragraph (b) lists those matters that the State Committee shall consider and recommend to the State Forester for approval.

Paragraph (b)(1) requires the Committee to identify and recommend unique resource needs and opportunities found in the State. These may include reforestation, especially along streams to control nonpoint source water pollution, protection of critical watersheds, or the development of green belts to enhance wildlife habitat and to increase recreational opportunities.

Paragraph (b)(2) requires the Committee to recommend to the State Forester the minimum contiguous acreage that a landowner must have to participate in the Program, not to exceed 25 acres. The intent of the 25-acre limitation is to ensure that small landowners have reasonable opportunity to participate in the Program.

Paragraph (b)(3) directs the Committee to identify those nationally approved practices that will be eligible for cost sharing within the State. These practices should reflect the State's specific resource needs and opportunities as identified in paragraph (b)(1) of this section.

Paragraph (b)(4) requires the Committee to recommend to the State Forester those technical practices and specifications that are needed to accomplish State goals and objectives. Given the diversity of forest types and associated forest management techniques required for successful implementation of Program practices throughout the nation, this flexibility is needed to meet Program goals within each State.

Paragraph (b)(5) requires the Committee to recommend to the State Forester cost-share levels for Program practices which will result in multiple resource benefits. The flexibility to establish cost-share levels on a State-by-State basis allows the States to set cost-share levels at a rate competitive with other existing federal financial assistance programs and thus encourage landowners to consider installation of practices deemed important to the State.

Paragraph (b)(6) requires the Committee to recommend the fixed rate of reimbursement or designated percentage of total cost for practice components. This value will be based on prices for labor and materials such as fertilizer, tree shelters, animal repellents, or artificial nest boxes and will be used to calculate cost-share payment to the landowner.

Paragraph (b)(7) directs the Committee to develop and recommend a distribution mechanism for the allocation of cost-share funds with the State. This allows States the flexibility to distribute funds directly to counties or to pool funds at the State level for later disbursal.

Paragraph (b)(8) authorizes the State Forester to utilize the expertise of other agencies or individuals to provide technical assistance. For example, a State Fish and Wildlife agency may be assigned technical responsibility within a state for Wildlife Habitat Enhancement (SIP8).

Paragraph (b)(9) requires the State Forester to annually establish guidelines for setting priorities for approval of landowner applications. In establishing priorities, the State Forester must consider landowner objectives in light of national and State resource management goals and opportunities.

Paragraph (b)(10) requires the Committee to recommend to the State Forester the mechanisms for ensuring landowner compliance with practice specifications. This provision allows each State to determine a reasonable and prudent schedule for inspecting landowner accomplishments and for certifying satisfactory compliance.

Paragraph (b)(11) requires the Committee to recommend to the State Forester the mechanisms to monitor State participation in the Program. This provision is necessary to ensure State Programs are meeting State goals and objectives as identified in paragraph (b)(1).

Paragraph (b)(12) requires the Committee to identify and report to the State Forester any adjustments in Program guidelines, administration, or funding levels that will better achieve Program goals and objectives within the State. This provision allows for States to react to new information involving advances in forest research, economic trends, changes in public values, or unexpected natural events.

Paragraph (c) of this section authorizes the State Forester, after giving full consideration to the recommendations of the Committee, to approve Program administrative procedures as set forth in paragraph (b). In the event the Committee fails to make timely recommendations, the State Forester is authorized to approve administrative procedures without delay. This provision is intended only to ensure timely administration of the Program and is not intended to diminish the responsibility of the Committee to advise the State Forester on Program policy and procedure.

Paragraph (d) requires the State Forester, in consultation with the Committee, to establish a 5-year State Plan which provides baseline data on and outlines threats to the forest resources of the State as well as

addresses management problems, opportunities, and objectives associated with intermingled land ownerships, as specified in the Act. Paragraph (d)(2) allows State Foresters to use existing resource inventories and planning data in the development of the State plan.

Paragraph (e) assigns responsibility to the State Forester for State Program administration and monitoring, and for ensuring landowner compliance with practice installation specifications and maintenance of the practice.

Paragraphs (f) and (g) of this section further provide that the State Forester may request from the Regional Forester up to 10 percent of Program funds to use for Program administration and up to the allowable established percentage of Program funds to use for landowner forest stewardship plan development. This provision is necessary to ensure that States have funding capability to adequately implement and monitor the Program and ensures that States will have sufficient funds in the initial phase of Program implementation for the development of landowner forest stewardship plans.

Finally, paragraph (h) of this section requires the State Forester to make available for public inspection all determinations regarding the State Program.

Section 230.5 Eligibility Requirements

Paragraph (a) of this section makes clear that all landowners who otherwise meet eligibility requirements are eligible to participate in the Program, without regard to race, color, religion, national origin, age, sex, martial status, or handicap.

Paragraph (b) provides that to be eligible, a landowner must own 1,000 acres or less of nonindustrial private forest land except where the State Forester, with the concurrence of the Regional Forester, approves ownership of 5,000 acres or less. The maximum landowner acreage requirements are similar to those used in the administration of the Forestry Incentive Program. Although the average size of forest land holdings differs considerably among the geographic regions of the country, the majority of nonindustrial private forest landowners own less than 100 acres. The maximum acreage limitation of 1,000 acres, therefore, adequately allows for broad Program participation. The approval of landowners of over 1,000 acres but less than 5,000 acres will be based on the assessment of unique environmental attributes such as the opportunity to expand wildlife habitat, manage critical watersheds, or conduct extensive reforestation.

Paragraph (c) provides that minimum contiguous acreage limits will be set by each State Forester, but that no State may set a minimum contiguous acreage higher than 25 acres. As previously noted, the 25-acre limitation ensures that landowners of small woodlots will be eligible for participation in the Program. This section further stipulates that a landowner must agree to manage nonindustrial private forest land under a landowner forest stewardship plan and must maintain Program practices for 10 years unless otherwise specified by the Chief. This is a requirement of the Act and included in the rule to ensure that landowners are aware of all the statutory requirements governing Program participation.

Section 230.6 Landowner Forest Stewardship Plan

Paragraphs (a) and (b) of this section require a landowner to have an approved landowner forest stewardship plan, which will remain in effect for 10 years, prior to receiving approval for other Program practices. The landowner forest stewardship plan is intended to reflect the long-term management objectives of the landowner and should cover a planning horizon comparable to the life span of approved practices.

Paragraph (c) of this section authorizes the Service Representative to determine whether an existing landowner management plan meets or can be amended to meet the requirements of a landowner forest stewardship plan. This provision allows landowners to utilize and expand upon existing resource management plans, inventories, and surveys and to avoid unnecessary and costly redundant effort.

Finally, paragraph (d) of this section states that if the landowner sells or otherwise conveys land covered by a plan, the new landowner may agree to adopt the plan, whereupon such plan may be used to obtain approval of new Program practices. However, if the new landowner does not adopt the plan, the new landowner cannot obtain approval of new Program practices without preparation and approval of a new landowner forest stewardship plan. This provision provides flexibility and choice to new landowners while ensuring compliance with the basic requirement of the Act that all participants must have an approved landowner forest stewardship plan.

Section 230.7 Program Practices

This section authorizes nine national Program practices as required by the Act for which cost sharing is available, including landowner forest stewardship plan development; reforestation and afforestation; forest and agroforest improvement; windbreak and hedgerow establishment, maintenance, and renovation; soil, water, riparian, and wetland protection and improvement; fish and wildlife habitat enhancement; and forest recreation enhancement. This section further stipulates that all practices must be carried out in accordance with existing laws and regulations and gives notice that anyone who carries out practices under the Program is responsible for obtaining appropriate and necessary legal documents.

Section 230.8 Application and Approval

Paragraph (a) of this section instructs landowners who wish to participate in the Program to contact the local office of the State Forester. The State Forester, or designee, will provide the landowner with the information necessary to make application for the Program.

Paragraph (b) of this section requires the State Forester, or designee, to make the landowner eligibility determinations and to approve Program practices. This process recognizes the broad authority and responsibility of the State Forester to administer the Program within the State.

Paragraph (c) cites the criteria upon which Program practices will be approved by the State Forester or such official as the State Forester may delegate. These criteria include verification of an approved forest stewardship plan, a determination of whether the practice is needed and feasible, and a determination that the practice is consistent with State funding priorities.

Paragraph (d) makes clear that applications will not be approved unless cost-share funds are available. This provision is necessary to avoid making future funding obligations that cannot later be honored due to lack of sufficient funds. This paragraph also makes clear that approval by the State Forester or designee constitutes agreement between the landowner and the United States to cost-share approved practices upon acceptable performance.

Paragraph (e) of this section requires that upon approval of practices, the Service Representative will prepare a practice project outline which describes the mandatory requirements of practice establishment and maintenance. The project outline will become incorporated in the landowner's forest stewardship plan and will constitute the basis for certification of practice completion. This project outline prepared by a Service

Representative is critical to ensure the technical adequacy of the conservation measures to be undertaken.

Section 230.9 Payment to Landowners

This section cites the conditions under which cost-share payments will be made to the landowner. These provisions are similar to the rules governing the Forestry Incentives Program and the Agricultural Conservation Program (7 CFR part 701) and provide prudent business practices to protect the United States government.

Paragraph (a) of this section requires the landowner to install a practice within eighteen months of approval of such practice unless factors beyond the control of the landowner prevent this, in which case, the Service Representative may grant an additional six month extension for completion of the practice.

Paragraph (b) makes clear that cost-share payment to the landowner is not made until the Service Representative certifies the practice has been completed in accordance with specifications agreed to. This section further states the Service Representative shall have the right of access to the landowner's property to inspect practices for the duration of the practice maintenance period.

Paragraph (c) of this section prohibits payment in excess of $10,000 to any one landowner in any fiscal year. This payment limitation is established to ensure that the Program benefits a large number of landowners.

Paragraph (c)(1) states that a husband and wife holding joint ownership of non-industrial private forest land will be treated as a single landowner and subject to the maximum payment authorized by this rule. This is consistent with other treatment of common ownership as it applies to payment limitation under the Program.

Paragraph (c)(2) states that any number of individuals holding common ownership of nonindustrial private forest land will be treated as a single landowner and subject to the maximum payment authorized by this rule. This treatment ensures that the Program not only benefits a large number of landowners but that Program funding will be distributed over the greatest number of acres.

Paragraph (c)(3) prevents any individual engaged in an ownership interest involving two or more individuals, from receiving more than the maximum amount authorized by this rule. This paragraph also sets forth the basis for computing partner shares; for example, where a landowner consisting of a partnership between two individual participates in the Program, each equal partner is eligible to receive up to 50 percent of the maximum allowable payment or no more than $5,000.

Paragraph (d) of this section requires the State Forester to set cost-share levels paid to landowners at no more than 75 percent of the total cost of implementing Program practices, as required by the Act. However, non-federal program funds and other donated assistance may be used to supplement cost-share payments, but not to exceed 100 percent of the actual cost of practice implementation. This section further provides the procedure to be followed when making partial payment as well as making payment when a practice has failed due to no fault of the landowner.

In order to protect the government's investment in site preparation, paragraph (b) requires landowners to re-establish trees with the benefit of additional cost-share funding where landowners have, through no fault of their own, been previously unsuccessful in establishing trees.

Paragraph (h) of this section provides for the recapture of cost-share payments made by the United States government to a landowner if such landowner sells, conveys or otherwise loses control of lands. Where the new landowner does not agree to maintain the practice for the duration of the required maintenance period, the original landowner is liable to the United States government for the full value of cost-share payments.

Paragraph (j) of this section authorizes the landowner to assign the cost-share payment, in whole or part, to another private legal entity. This permits landowners to provide for direct payment to contractor or equipment vendors for practice installation.

Paragraph (j)(1) of this section requires that payments be assigned only for those costs directly related to establishing a Program practice.

Paragraph (j)(2) of this section prohibits the assignment of a Program payment to pay or secure any preexisting debt. This provision protects landowners from forfeiting payments due to outstanding indebtedness.

Paragraph (j)(3) of this section prohibits legal action against the Federal government, the Forest Service, the Secretary of Agriculture, or any disbursing agent where payment is made to the assignor rather than to the assignee or where payment is made to only one of several assignees. This provision is consistent with other Federal conservation programs regarding assignment of payment and is necessary to protect the Federal Government, the Forest Service, the Secretary of Agriculture, or any disbursing agent from claims by assignees.

Finally, paragraph (k) of this section prohibits claims against all or part of a cost-share payment made under the Program arising under State law by any creditor, but authorizes claims against all or part of a cost-share payment made under the Program by the United States government. This provision is necessary to protect the Federal interest.

Section 230.10 Prohibitions

This section cites the provisions for which cost-share payment under the Program is not authorized. Paragraph (a) of this section provides that no cost-share funds will be paid for costs incurred before approval of an application, for the implementation of a practice already required by law, and for normal repairs or maintenance of a practice.

Paragraph (b) provides that no cost-share payment will be made to a landowner where a practice which has previously been installed under another assistance program is re-established on the same site by the same landowner, except where such practices are repeated due to a failure of a prior practice without the fault of the landowner. This provision protects previous conservation investments made by the United States government.

Section 230.11 Recapture of Payment

As required by the Act, this section delineates the procedures to be followed in the event a landowner fails to comply with the policies and procedures outlined in this interim rule. Paragraph (a) of this section requires that the United States government withhold cost-share funds or require the landowner, successor or assignee to refund all or part of any payment where a scheme or device has been used to benefit a landowner, successor or assignee unjustly or where a landowner, successor or assignee has failed to maintain a practice for the designated maintenance period.

Paragraph (b) makes clear that in the event any landowner or successor takes any action or fails to take action which results in the destruction or impairment of a prescribed practice for the duration of the practice, cost-share funds will be withheld or a recapture of all or part of any Program payments otherwise due or paid will be secured based on the extent and effect of destruction and impairment.

Paragraph (c) gives notice that penalties or liabilities may be incurred by participating landowners who engage

in prohibited practices. The procedures of this section protect the United States Government from unjust actions and will be monitored and enforced by the State Forester.

Section 230.12 Reconsideration

This section establishes a procedure to be followed in the event a landowner is dissatisfied with a determination such as determining eligibility, practice feasibility, certification of completion of a practice, or any other determination made under the Program. The landowner may seek reconsideration in writing first from the State Forester and then, if not satisfied, from the Regional Forester.

Section 230.13 Information Requirements

This section complies with the Paperwork Reduction Act and identifies the information requirements contained in the rule, namely, the State forest stewardship plan, the landowner forest stewardship plan, the assignment of payment requirements of the Program, and the application requirements of the Program and displays the control number assigned by the Office of Management and Budget.

Public Comment

Pursuant to 5 U.S.C. 553(b)(3)(B), it is impracticable to provide notice and comment prior to adoption of this rule. Congress has directed implementation of the Stewardship Incentive Program in FY 1991 and has appropriated funds for this purpose. Further delay in adopting the rule will prevent installation of approved practices during the important fall field season. Adoption of the interim rule permits immediate distribution of appropriated funds to the States for Program implementation. The time required to attain public comment on a proposed rule, to consider that comment, and to adopt a final rule would not provide the States with sufficient time for planning and organizing cooperators to begin approving work for the fall.

Moreover, aware of Congressional funding action, many producers of tree seedlings and other plant materials have already increased their production levels and have stock on hand for the coming planting season. Much of this stock will be destroyed or disposed of at a loss if planting cannot begin this fall. Furthermore, nurseries need advance information on seedling and other plant material needs at the earliest possible date to plan their output levels for the following year. Therefore, good cause exists to make this rule effective without the benefit of prior public comment. However, comments are invited on the interim rule and will be considered in adoption of a final rule.

Regulatory Impact

This interim rule has been reviewed under USDA procedures and Executive Order 12291 on Federal Regulations. It has been determined that this is not a major rule. The rule itself will not have an annual effect of $100 million or more on the economy, substantially increase prices or costs for consumers, industry, or State or local governments, nor adversely affect competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete in foreign markets. Because the Program is national in scope and features an entire array of forest resources, it should have broad appeal and elicit widespread participation. It is anticipated that much of the Program will be concentrated in the Eastern United States where most of the private forest land and forest landowners are located and where the heaviest demands are placed on private forest lands. Limitations on the size of annual payments to individual participants, the maximum ownership size criteria, and the variety of approved program practices will serve to ensure that funds are well-distributed geographically within the area of heaviest demand and across business sectors.

The great majority of Program practices will be applied to enhance the productivity of existing forest lands and, to the extent that this does occur, these practices represent net additions to, rather than the displacement of, economic activities associated with other lands. Clearly, there will be increased activity in the forestry sector, including tree and other plant material production, sales, and distribution and further expansion of contractor vendors for tree planting and the installation of other conservation practices. Beyond this, there will be increased purchases of a variety of supplies and equipment such as tree seedlings, fertilizer, and seed for wildlife covers, which will be locally important. And in the years ahead, there should be increased economic activity associated with the use and consumption of increased forest products and greater recreational attractiveness attributable to the Program which will benefit landowners, State and local governments and economies, and the general public.

This interim rule has been considered in light of the Regulatory Flexibility Act (5 U.S.C. 601 *et. seq.*), and it has been determined that this Program will not have a significant negative impact on a substantial number of small entities as defined by the Act. To the contrary, the Program will create new economic activity and opportunities in rural areas.

This interim rule has also been reviewed for its possible impacts on private property rights pursuant to Executive Order 12630, and it has been determined that the Stewardship Incentive Program will not have effects on private property rights since participation in the Program is purely voluntary and consensual on the part of participating landowners.

Paperwork Reduction Act

It should be noted that the content of a State Forest Stewardship Plan as required by § 230.4(d), a Landowner Forest Stewardship Plan as would be required by § 230.6, and the application requirements of § 230.8, of this interim rule represent new information requirements as defined in 5 CFR part 1320, Controlling Paperwork Burdens on the Public. In accordance with those rules and the Paperwork Reduction Act of 1980 as amended (44 U.S.C. 3507), the Forest Service has requested Office of Management and Budget review and approval of the information required. The agency estimates that each State Forester preparing a State plan will spend an average of 40 hours preparing and submitting the plan for Forest Service review and approval; that each individual landowner shall spend an average of 4 hours providing information to the Resource Management Professional for the development of a Landowner Forest Stewardship Plan for review and approval by the Service Representantive and that landowners will spend an average of 25 minutes preparing applications for cost-share funding of practices under the rule.

The Office of Management and Budget has approved these requirements for use through February 25, 1992, and assigned them OMB Control No. 0596–0120. The agency intends to use several forms to administer the Stewardship Incentive Program. These forms are modifications of several existing approved forms currently used in the administration of the Forestry Incentives Program and the Agricultural Conservation Program. The new USDA forms would be SIP–245, used to complete an application for cost-share funds; SIP 36, used to assign cost-share payment to a third party; SIP 502, used to review payment limitation requirements; SIP 211, used to appoint power of attorney; SIP 211–1, used to appoint power of attorney for husband and wife; and SIP–1, used to make preliminary landowner eligibility recommendations. These new USDA forms have been approved for use and

also assigned OMB Control No. 0596–0120.

Reviewers who wish to comment on the information requirements in this rule should submit their views to the Forest Service at the address listed earlier in this document as well as to the:

Forest Service Desk Officer, Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503.

Environmental Impact

Based on environmental analysis, this interim rule will not have a significant effect on the human environment; therefore, an environmental impact statement was not prepared. Copies of the environmental assessment and finding of no significant impact may be obtained by writing or calling the persons and offices listed under **FOR FURTHER INFORMATION CONTACT.**

List of Subjects in 36 CFR Part 230

Forests and forest products, Grant programs—natural resources, Intergovernmental relations, Reporting and recordkeeping requirements, Trees.

Therefore, for the reasons set forth in the preamble, chapter II of title 36 of the Code of Federal Regulations is hereby amended by adding a new part 230, consisting of subpart A, to read as follows:

PART 230—STATE AND PRIVATE FORESTRY ASSISTANCE

Subpart A—Stewardship Incentive Program

Sec.

230.1 Purpose and scope.
230.2 Definitions.
230.3 National program administration.
230.4 State program administration.
230.5 Eligibility requirements.
230.6 Landowner forest stewardship plan.
230.7 Program practices.
230.8 Application and approval.
230.9 Payment to landowners.
230.10 Prohibitions.
230.11 Recapture of payment.
230.12 Reconsideration.
230.13 Information requirements.

Authority: 16 U.S.C. 2103b, 2114.

Subpart A—Stewardship Incentive Program

§ 230.1 Purpose and scope.

(a) The regulations in this subpart govern the operation of the Stewardship Incentive Program as provided in section 6 of the Cooperative Forestry Assistance Act, as amended by title XII of the Food, Agriculture, Conservation, and Trade Act of 1990 (16 U.S.C. 2101, *et seq.*). This subpart sets forth the rules and procedures by which the Stewardship Incentive Program will be administered by the Forest Service to establish forest stewardship practices on nonindustrial private forest land.

(b) The cost-share assistance provided under the Stewardship Incentive Program shall complement rather than replace or duplicate the existing Agricultural Conservation Program and Forestry Incentives Program. Tree planting and improvement and other State priorities for program activities and practices funded under the Stewardship Incentive Program shall be designed to provide multiple resource benefits not available through other cost-share programs.

§ 230.2 Definitions.

As used in this subpart, the following terms shall mean:

Act means the Cooperative Forestry Assistance Act as amended (16 U.S.C. 2101, *et seq*).

Assignee means any person, corporation, government agency, or other legal entity to whom a landowner transfers legal rights to receive all or part of federal cost-share payments.

Chief means the Chief of the Forest Service.

Committee means the State Forest Stewardship Coordinating Committee established pursuant to section 19(b)(1) of the Act.

Fiscal year means the fiscal year of the United States Government which is October 1 through September 30.

Landowner means any private individual, group, association, corporation, Indian tribe or other native group, or other private legal entity, excluding corporations whose stocks are publicly traded or legal entities principally engaged in the production of wood products.

Nonindustrial private forest land means rural lands with existing tree cover or which are suitable for growing trees and owned by any landowner as defined in this subpart.

Practice means a stewardship activity or conservation measure consistent with the landowner plan to accomplish the landowner's desired management objectives.

Program means the Stewardship Incentive Program.

Regional Forester means the Forest Service official charged with the administration of a Region of the National Forest System as described in 36 CFR 200.2, except that with reference to the States covered by the Eastern Region, such term shall mean the Area Director for States and Private Forestry, Northeastern Area (36 CFR 200.2);

Resource Management Professional means any person who is recognized by the State Forester as having the knowledge and skills to develop landowner plans for managing the biological, economic, and environmental interrelationship of forest resources and to identify appropriate activities to manage, protect, or enhance forest resources including, but not limited to, an employee of a State forestry agency, other State resource agency, the Soil Conservation Service, a consulting forester, or wildlife biologist.

Service Representative means a resource management professional designated by the State Forester to perform any or all of the following technical assistance functions: Review and approval of landowner plans, determination of need and feasibility of practices, establishment of site specific practice specifications, certification of completion of practices and performance of compliance checks pursuant to this subpart.

State means any one of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands of the United States, Guam, American Samoa, the Commonwealth of the North Marianas Islands, the Trust Territory of the Pacific Islands and the Territories and possessions of the United States.

State Forester means the employee of a State responsible for administration and delivery of forestry and assistance within such State.

USDA means the U.S. Department of Agriculture.

§ 230.3 National program administration.

(a) The Chief shall develop and oversee all Program policy and procedure and monitor the implementation of such policy and procedure over the life of the Program.

(b) The Chief shall annually distribute among the States such cost-share funds as may be available for the Program after addressing the public benefit incidental to such distribution and after giving appropriate consideration to the following: The total acreage of nonindustrial private forest land in each State, the potential productivity of such land, the number of owners eligible for cost sharing in each State, the need for reforestation in each State, the opportunities to enhance nontimber resources on such forest lands, and the anticipated demand for timber and nontimber resources in each State. In making distributions under this paragraph, the Chief shall consult with a group of not less than five State Foresters selected by a majority of the State foresters.

(c) Tree planting, tree maintenance, and tree improvement are national

priorities for cost-share practices under the Programs. In addition to these practices, the Chief, in consultation with the State Foresters, may develop other national priorities for practices to be cost shared under the Program and shall communicate such priorities to guide administration of the Program.

(d) The Chief shall review and determine approval of State plans, including any revisions of such plans.

(e) The Chief, in consultation with the State Foresters, shall annually reevaluate and set the percentage of Program funding to be made available for landowner forest stewardship plan development (§ 230.7(a)(1) of this subpart).

(f) The Chief may enter into such agreements with any other USDA agency as are necessary to administer the Program. These agreements may include provisions authorizing the collection of Program participant information, the management of accounting ledgers, and the disbursement of payment to participants.

(g) The Chief shall retain final authority to resolve all issues which may arise in the administration of the Program.

§230.4 State program administration.

(a) In each State participating in the Program, the Secretary of Agriculture, in consultation with the State Forester, shall establish a State Forest Stewardship Coordinating Committee whose composition meets the requirements of section 19(b) of the Act. The Committee shall be chaired by the State Forester, or the designee thereof.

(b) In each State participating in the Program, the Committee shall recommend to the State Forester for approval:

(1) Stewardship Incentive Program needs within the State;

(2) The minimum contiguous acreage of eligible nonindustrial private forest land, consistent with § 230.5(c) of this subpart;

(3) Those nationally approved practices that will be eligible for cost-share assistance within the State;

(4) Those nationally approved technical practices and minimum specifications to be used in implementing practices;

(5) The cost-share levels, by practice, which will encourage tree planting, maintenance, and improvement, and other high priority practices within the State that will result in multiple resource benefits;

(6) The fixed rate or reimbursement or designated percentage of total cost for practice components;

(7) The distribution mechanism for the allocation of cost-share funds within the State;

(8) The assignment of technical responsibility, by type of Program practice, to the appropriate Service Representative;

(9) Guidelines for establishing annual priorities for the approval of landowner applications;

(10) The mechanisms for ensuring landowner compliance with practice specification;

(11) The mechanisms to monitor State participation in the Program; and

(12) Any adjustments in Program guideline, administration, or funding levels to better achieve Program objectives within the State.

(c) The State Forester, after giving full consideration to the recommendations of the Committee, shall approve Program administration procedures as set forth in paragraph (b) of this section. In the event a Committee fails to make timely recommendations with regard to any matter listed in paragraph (b) of this section, the State Forester is authorized to approve administrative procedures for implementing the Program without further delay.

(d) To participate in the Program, the State Forester, in consultation with the Committee, shall develop a State plan that shall provide baseline data on the forest resources of the State; outline threats to the forest resources of the State; describe economic and environmental opportunities that are linked with the forest resources of the State; address management problems, opportunities, and objectives associated with intermingled Federal, State, and private land ownership patterns within the State; and make planning recommendations for Federal, State, and local implementation of the Act.

(1) The State Plan shall cover a 5-year period, identify management goals for nonindustrial private forest lands and set priorities for achieving the goals and objectives identified for the State for each year.

(2) State Foresters may use existing resource inventories, landowner surveys, and other relevant planning data to develop the State plan.

(3) State plans shall become effective upon approval by the Chief.

(e) The State Forester shall administer the Program within the State and monitor the Programs to ensure that it is achieving desired results and shall ensure landowner compliance with practice installation specifications and maintenance of the practice.

(f) Not more than 10 percent of a State allocation of funds may be used to finance State Program development and administration. The State Forester must obtain approval from the Regional Forester of the amount of the State's Program allocation to be used for State Program development and administration.

(g) The percent of the State's Program allocation of funds that may be used to cost-share the development of Landowner Forest Stewardship plans will be determined pursuant to § 230.3(e) of this subpart. The State Forester must obtain approval from the Regional Forester of the amount of the State's Program allocation to be used for Landowner Forest Stewardship Plan development (§ 230.7(a)(1) of this subpart).

(h) The State Forester shall document and make available for public inspection all determinations made in consultation with the Committee.

§ 230.5 Eligibility requirements.

(a) All nonindustrial private forest landowners as defined in § 230.2 of this subpart, including those who produce forest products on a part-time or intermittent basis, who meet the requirements of this section, are eligible to apply for and receive assistance under the Program without regard to race, color, religion, national origin, age, sex, marital status, or handicap.

(b) To be eligible to receive cost-share funds under the Program, a landowner shall own not more than a total of 1,000 acres of nonindustrial private forest land, except where the State Forester, with the concurrence of the Regional Forester, determines that significant public benefits would accrue from approval of a landowner owning not more than 5,000 acres. In making a determination of significant public benefits, the State Forester and the Regional Forester shall consider, at a minimum, whether the installation of practices by landowners who own more than 1,000 acres but less than 5,000 acres are necessary to achieve cost-effective resource management objectives without unduly affecting Program participation of other eligible landowners.

(c) To be eligible to receive cost-share funds under the Program, a landowner shall not own less than the minimum contiguous acreage as established by the State Forester. However, in no case shall the minimum contiguous acreage requirement be higher than 25 acres.

(d) To be eligible to receive cost-share funds under the Program, a landowner must agree to manage the following lands under a Landowner Forest Stewardship Plan prepared pursuant to § 230.6 of this subpart:

(1) All of their nonindustrial private forest land with existing tree cover within a contiguous tract; and

(2) Other nonindustrial private forest land within the same contiguous tract which is identified by the landowner and approved by the Service Representative as suitable for growing trees and scheduled for conversion to a Program practice.

(e) To be eligible to receive cost-share funds under the Program, a landowner must agree to maintain Program practices for 10 years, unless otherwise specified by the Chief.

§ 230.6 Landowner forest stewardship plan.

(a) Prior to receiving approval to implement any Program practice identified in § 230.7(a)(2)–(9) of this subpart, eligible landowners shall have an approved landowner forest stewardship plan. The landowner forest stewardship plan shall be prepared by a Resource Management Professional and approved by a Service Representative and shall identify and describe actions to be taken by the landowner to protect and manage soil, water, aesthetic qualities, recreation, timber, and fish and wildlife resources in a manner which is compatible with the objectives of the landowner.

(b) A landowner forest stewardship plan shall be effective for not less than 10 years, but shall be reviewed at least every five years and may be revised as needed, subject to approval of the Service Representative.

(c) To the extent deemed applicable by the Service Representative, where existing landowner management plans such as conservation plans, Tree Farm management plans, or similar plans meet or can be amended to meet Landowner Forest Stewardship Plan requirements, such plans shall satisfy the requirements of this section.

(d) If a landowner sells or otherwise conveys land covered by a landowner forest stewardship plan, such plan shall remain in effect if agreed to by the new owner. New landowner objectives shall be incorporated through plan revision as needed. Where the new landowner does not agree to adopt the Landowner Forest Stewardship plan, the new landowner cannot obtain approval of new Program practices without preparation and approval of a new Landowner Forest Stewardship Plan.

§ 230.7 Program practices.

(a) Practices for which cost sharing is available under the Stewardship Incentive Program and the reporting codes assigned to each are as follows:

(1) Landowner Forest Stewardship Plan Development (SIP1), which identifies landowner objectives and multiple resource management decisions.

(2) Reforestation and Afforestation (SIP2), which includes establishment or reestablishment of diverse stands of forest trees through natural regeneration, planting, or direct seeding for conservation purposes and sustainable timber production.

(3) Forest and Agroforest Improvement (SIP3), which includes the improvement of forest and agroforest stand productivity, vigor, and health, and the value and quality of wood products.

(4) Windbreak and Hedgerow Establishment, Maintenance and Renovation (SIP4), which includes the establishment, maintenance, and renovation of windbreaks and hedgerows to conserve energy, protect farmsteads, livestock, and crops, and reduce soil erosion.

(5) Soil and Water Protection and Improvement (SIP5), which includes the maintenance or improvement of water quality and soil productivity on forest land.

(6) Riparian and Wetland Protection and Improvement (SIP6), which includes the protection, restoration, and improvement of wetlands and riparian areas to maintain water quality and enhance habitat.

(7) Fisheries Habitat Enhancement (SIP7), which includes the protection and enhancement of habitat for native resident and anadromous fisheries.

(8) Wildlife Habitat Enhancement (SIP8), which includes the establishment and enhancement of permanent habitat for game and nongame wildlife species.

(9) Forest Recreation Enhancement (SIP9), which includes the enhancement of outdoor recreation activities and aesthetics.

(b) In the application and use of pesticides, including biological, chemical, and behavioral substances, practice performance shall meet all label requirements, State and Federal regulations, and local ordinances.

(c) Anyone who carries out practices under this Program shall be responsible for obtaining the authorities, rights, easements, or other approvals necessary to the performance and maintenance of the practices in keeping with applicable laws and regulations.

§ 230.8 Application and approval.

(a) A landowner wishing to participate in the Program shall contact the local office of the State Forester who shall provide information necessary to make application.

(b) The State Forester, or such official as the State Forester may designate, shall make basic eligibility determinations, including whether the applicant meets nonindustrial private forest land ownership criteria and minimum and maximum acreage criteria in accordance with § 230.5 of this subpart, and approve Program practices. The landowner shall be notified of such determination in writing by mail.

(c) The State Forester, or such official as the State Forester may designate, shall approve Program practices based on the following:

(1) For approval of practices described in § 230.7(a)(2)–(a)(9) of this subpart, verification that the landowner has an approved landowner forest stewardship plan.

(2) A determination whether the practice is needed and feasible.

(3) A determination that the practice is consistent with funding priorities established by the State Forester.

(d) Applications shall not be approved unless cost-share funds are available. Approval of an application shall constitute an agreement by the United States and the landowner to cost-share approved practices upon acceptable performance.

(e) Upon approval of Program practices, a Service Representative shall prepare a project outline that identifies the needed technical practices, specifications, and approximate time frame(s) for the implementation of the practice(s) to achieve the objectives of the landowner forest stewardship plan. Upon agreement by the landowner and the Service Representative to the requirements set forth in the project outline, the outline shall be attached to and become part of the landowner forest stewardship plan and shall be effective for the duration of the practice. Requirements of a project outline shall constitute the basis for determining acceptable performance upon practice completion.

(f) Upon approval of Program practices, the landowner shall be notified of approved practices in writing. Such notice shall state that the landowner can begin implementing approved practices.

§ 230.9 Payment to landowners.

(a) To be eligible for cost-share payments, a landowner must complete each practice within eighteen months of approval. However, if practice(s) are not completed in eighteen months due to conditions beyond the landowner's control, a six month extension period may be granted by the Service Representative.

(b) Upon certification by the Service Representative that a practice has been completed in accordance with specifications, the federal cost-share payment will be calculated and disbursed to the landowner. Service Representatives shall have the right of access to the landowner's property to inspect practices for the duration of the practice maintenance period.

(c) The amount of payment under the Program to any one landowner shall not exceed $10,000 in any given fiscal year. For each landowner participating in the Program, the payment limitation shall apply as follows:

(1) Where husband and wife hold joint ownership, they shall be considered as a single landowner.

(2) Where any number of individuals hold common ownership, they shall be considered as a single landowner.

(3) Where the individual is a partner, corporate shareholder, or has an ownership interest in another private legal entity, the amount of payment to the individual shall be equivalent to the percentage of ownership the individual holds in such partnership, corporation or other private legal entity times the payment made to such partnership, corporation or other legal entity.

(d) Levels of federal cost-share funds to be paid to landowners shall be set by the State Forester, but shall not exceed 75 percent of the actual costs incurred by a participating landowner. Non-Federal program funds and other donated assistance may be used to supplement cost-share assistance under the Program; however, the total of all funds and assistance shall not exceed 100 percent of the actual cost of practice implementation.

(e) A practice may consist of one or more component activities. A landowner may receive partial payment for completed components on the condition that the landowner agrees to complete the remaining component(s) of the practice within the time period specified by the Service Representative, not to exceed eighteen months following approval to implement the practice, unless an extension is justified as provided in paragraph (a) of this section.

(f) Where performance actually rendered does not meet the minimum specifications of a practice due to factors beyond the landowner's control, the State Forester or designee may approve cost-share payment under one of the following conditions:

(1) The landowner repeats applications of components previously implemented or establishes additional eligible components under such terms and conditions as the Service Representative may require, in which case, the State Forester shall approve additional cost-sharing for additional or repeated components to the extent such measures are needed to meet the objectives of the landowner forest stewardship plan; or

(2) The landowner establishes to the satisfaction of the Service Representative that:

(i) A reasonable effort was made to meet the minimum requirements; and

(ii) The practice, as performed, adequately meets the objectives of the landowner forest stewardship plan.

(g) Where the landowner has received cost-share assistance for site preparation and the establishment of trees has been unsuccessful due to factors beyond the landowner's control, the Service Representative shall require that trees be re-established and shall approve cost-share assistance for such activity.

(h) If a landowner sells, conveys, or otherwise loses control of lands upon which there is a continuing obligation to maintain a practice and the new landowner does not agree to assume the responsibility for maintaining the practice, the landowner who was originally obligated to maintain the practice shall be liable to reimburse the United States for all cost-share payments on such practices.

(i) In case of death or incompetency of any landowner, the State Forester shall approve cost-share payments to the successor if the successor agrees to maintain the practices for the duration of the required maintenance period.

(j) Any landowner who may be entitled to any cost-share payment under this subpart may assign the right thereto, in whole or in part, under the following terms:

(1) Payments may be assigned only for performance of a Program practice.

(2) A payment which is made to a landowner may not be assigned to pay or secure any preexisting debt.

(3) Neither the United States, the Forest Service, the Secretary of Agriculture, nor any disbursing agent shall be liable in any suit if payment is made to an assignor rather than to an assignee, and nothing in this section shall be construed to authorize any suit against the United States, the Forest Service, the Secretary or any disbursing agent if payment is not made to the assignee, or if payment is made to only one of several assignees.

(k) No cost-share payment or portion thereof due and owing any landowner shall be subject to any claim arising under State law by any creditor, except agencies of the United States Government.

§ 230.10 Prohibitions.

(a) No cost-share funds shall be paid for the following:

(1) Costs incurred before an application for cost-share assistance is approved;

(2) The implementation of any practice(s) already required by law, regulation, or other authority; and

(3) Repairs or normal upkeep or maintenance of any practice.

(b) No cost-share assistance shall be paid for repeating practices on the same site by the same landowner which have been implemented under the Forestry Incentives Program (16 U.S.C. 2104) or any other Federal, State, or local government programs, or private sector programs, except where such practices are repeated due to a failure of a prior practice without fault of the landowner.

§ 230.11 Recapture of payment.

(a) If any landowner, successor, or assignee uses any scheme or device to unjustly benefit from this program, the cost-share funds shall be withheld or a refund of all or part of any Program payments otherwise due or paid that person shall be secured. A scheme or device includes, but is not limited to, coercion, fraud or misrepresentation, false claims, or any business dissolution, reorganization, revival, or other legal mechanism designed for or having the effect of evading the requirements of this subpart.

(b) If any landowner or successor takes any action or fails to take action which results in the destruction or impairment of a prescribed practice for the duration of the practice, cost-share funds shall be withheld or a recapture of all or part of any Program payments otherwise due or paid shall be secured based on the extent and effect of destruction and impairment.

(c) Nothing in this section requiring the withholding or refunding of cost-share funds shall preclude any penalty or liability otherwise imposed by law.

§ 230.12 Reconsideration.

Any landowner, successor, or assignee who is dissatisfied with any determination made under the Program may request reconsideration by the State Forester and, if the matter is still not resolved, by the Regional Forester. All requests for reconsideration shall be in writing and shall contain factual information explaining the basis for requesting reconsideration. All decisions upon reconsideration shall be issued in writing.

§ 230.13 Information requirements.

The requirements governing the preparation of a State forest stewardship plan in § 230.4(d) of this subpart, the landowner forest stewardship plan in § 230.6 of this subpart, and the application requirements of § 230.8 constitute information requirements as defined by the Paperwork Reduction Act of 1980 (44 U.S.C. 3507) and have been approved for use pursuant to 5 CFR part 1320 and assigned OMB Control Number 0596–0120.

Dated: November 6, 1991.

James R. Moseley,

Assistant Secretary, Natural Resources and Environment.

[FR Doc. 91–28985 Filed 12–3–91; 8:45 am]

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federal register

Wednesday
December 4, 1991

Part VI

Department of Agriculture

Food and Nutrition Service

7 CFR Part 271 et al.

Food Stamp Program: Mickey Leland Memorial Domestic Hunger Relief Act of 1990; Implementation of Provisions; Final Rules

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Parts 271, 272, 273, and 278

[Amendment No. 335]

Food Stamp Program: Miscellaneous Provisions of the Mickey Leland Memorial Domestic Hunger Relief Act and Food Stamp Certification Policy

AGENCY: Food and Nutrition Service, USDA.

ACTION: Final rule.

SUMMARY: On June 28, 1991, the Department published a rulemaking at 56 FR 29594 which proposed several changes to the Food Stamp Program regulations as a result of certain provisions of the Mickey Leland Memorial Domestic Hunger Relief Act (Title XVII of Pub. L. 101–624), the Omnibus Budget Reconciliation Act of 1990 (Pub. L. 101–508), and food stamp certification policy inquiries from Program administrators. Comments were solicited on the provisions of the proposed rulemaking through July 17, 1991. This action makes final the provisions of the proposed rulemaking taking into consideration comments received from the interested public. The provisions of Public Law 101–624 being implemented by this final action include: (1) Providing supplemental security income (SSI) applicants or recipients with the same information at the social security office as social security applicants or recipients receive, (2) expanding the type of group homes not considered institutions, (3) increasing the minimum benefit for one- and two-person households, and (4) clarifying the method for State agencies to follow in offering eligible households a deduction for certain recurring medical expenses. This action also removes references to a single application form for certain persons applying for supplemental security income and food stamps as a result of section 5040 of Public Law 101–508, which amended the Social Security Act to remove the requirement for developing such a single application form. Lastly, this action also includes a provision to allow elderly or disabled aliens with temporary resident status to be eligible for food stamps and clarifies current policy governing the treatment of allowances, earnings, or payments received by individuals under the Job Training Partnership Act, Public Law 97–300.

DATES: ss271.2, 271.7, 273.1(e)(1)(iii), 273.2(k)(1)(i)(H), 273.10, 273.12, 273.18, 278.1 are effective and must be implemented on February 1, 1992. The remaining provisions are effective February 1, 1992.

FOR FURTHER INFORMATION CONTACT: Questions regarding this rulemaking should be addressed to Judith M. Seymour, Supervisor, Eligibility and Certification Rulemaking Section, Certification Policy Branch, Program Development Division, Food Stamp Program, Food and Nutrition Service, USDA, 3101 Park Center Drive, Alexandria, Virginia 22302 or by telephone at 703–756–3496.

SUPPLEMENTARY INFORMATION:

Classification

Executive Order 12291 and Department Regulation 1512–1

This final action has been reviewed under Executive Order 12291 and Departmental Regulation No. 1512–1 and has been classified as not major because it does not meet any of the three criteria identified under the Executive Order. This action will not have an annual effect on the economy of $100 million or more, nor will it result in major increases in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions. Furthermore, it will not have significant adverse effects on completion, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Executive Order 12372

The Food Stamp Program is listed in the Catalog of Federal Domestic Assistance under No. 10.551. For the reasons set forth in the final rule and related Notice(s) to 7 FR 3015, subpart V (48 FR 29115, June 24, 1983), this Program is excluded from the scope of Executive Order 12372 which requires intergovernmental consultation with State and local officials.

Regulatory Flexibility Act

This action has been reviewed with regard to the requirements of the Regulatory Flexibility Act of 1980 (5 U.S.C. 601–612). Betty Jo Nelsen, the Administrator of the Food and Nutrition Service, certified that this rule will not have a significant economic impact on a substantial number of small entities. However, State welfare agencies will be affected to the extent that they must implement provisions described in this action. Potentially eligible and currently participating households may receive increased benefits due to the cost-of-living adjustments to the minimum benefit. Potentially eligible households may become aware of the Food Stamp Program and decide to participate as a result of the requirement to inform all SSI applicants and participants about the Food Stamp Program at the Social Security Administration office. Additional households in Guam and the Virgin Islands may become eligible for the Food Stamp Program as a result of the provision expanding the types of group homes not considered institutions in Guam and the Virgin Islands. Certain elderly or disabled aliens with lawful temporary resident status will become eligible for the Food Stamp Program and receive restored benefits as a result of this action.

Paperwork Reduction Act

This action does not contain reporting or recordkeeping requirements subject to approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1980 (44 U.S.C. 3507).

Background

On June 28, 1991, the Department published a proposed rulemaking to implement certain provisions of the Mickey Leland Memorial Domestic Hunger Relief Act (Title XVII of Pub. L. 101–624), the Omnibus Budget Reconciliation Act of 1990 (Pub. L. 101–508), and additional certification policy issues. Interested persons were invited to comment by July 17, 1991.

Eight comment letters, containing 12 comments, were received on this rulemaking. Comments were received from five State agencies, two from a Federal agency, and one advocacy group. All comments received were carefully considered.

Inform all Supplement Security Income Households of the Food Stamp Program at Social Security Administration Offices (7 CFR 273.2(k)(1)(i)(H) and 273.2(m))

As explained in the preamble of the June 28 proposed rulemaking, current rules at 7 CFR 273.2(l) provide that social security applicants or recipients must be informed at the Social Security Administration (SSA) office of the availability of benefits under the Food Stamp Program and the availability of an application to participate in the Food Stamp Program. With regard to Supplemental Security Income (SSI) applicants/recipients, current regulations at 7 CFR 273.2(k)(1)(i) provide that if all members of a household receive SSI, then the household may apply for food stamps at the SSA office. If only some household members receive SSI, then the SSA

office does not take a food stamp application from the household, but refers the household to the correct food stamp office in accordance with 7 CFR 273.2(k)(1)(i)(H).

Pursuant to section 1741 of Public Law 101–624, the Department proposed to extend the requirements at 7 CFR 273.2(1) governing applicants/recipients of social security benefits to all persons applying for or receiving SSI benefits. Thus, § 273.2(m) of the June 28 proposed rulemaking provided that any individual who is an applicant for or recipient of SSI income would have to be informed of the availability of benefits under the Food Stamp Program and informed of the availability of an application to participate in the Food Stamp Program at the SSA office. The SSA office would not be required to accept applications or to conduct interviews for the Food Stamp Program SSI applicants or recipients who are not members of households consisting only of SSI applicants or recipients, unless the State agency has chosen to outstation food stamp eligibility workers at the SSA office. When such outstationing occurs, processing is to be conducted in accordance with 7 CFR 273.2(k)(1)(ii).

When the Department discussed the current information policy at 7 CFR 273.2(1) for informing applicants or recipients of social security benefits about the benefits of the Food Stamp Program and the availability of an application, the preamble to the June 28 proposed rulemaking used the word "told" rather than "informed." Comments from three interested parties focused on the use of the word "told." All commenters expressed their understanding that the word "told" might imply a personal oral encounter between the representative of the social security office and the applicant or recipient and that this should be made clear in the proposed provision in § 273.2(m) of the June 28 rulemaking. One commenter suggested that the word "informed" be changed to read "verbally informed."

The Department is not changing the proposed provision. The Department used the word "told" to simplify the discussion of current policy in the preamble of the proposed rule and to avoid being too repetitive with the use of the word "inform" throughout the preamble discussion of current provisions and the discussion for the new proposed in § 273.2(m) of the proposal. The Department did not intend to imply that there may be a change in the policies discussed. The word "inform" appears in the current regulations at 7 CFR 273.2(k) and 273(l) and in related statutes to these provisions. Also, "informed" appears in the new proposed § 273.2(m) and in the Food Stamp Act of 1977, as amended by section 1741 of Public Law 101–624). Thus, the word "informed" is the appropriate wording for the provision.

Accordingly, the proposed amendment to 7 CFR 273.2 to add a new paragraph (m) to extend the same informational benefits to individuals who are applicants or recipients of SSI as those already received by applicants or recipients of social security benefits is adopted as final without change by this action. The proposed conforming amendment to 7 CFR 273.2(k)(1)(i)(H) is also adopted as final by this action without change.

The Department's Memorandum of Understanding with the Department of Health and Human Services will be revised to reflect the new requirement to inform persons who are members of households in which not everyone receives SSI about the Food Stamp Program and the availability of a food stamp application at the social security office.

Expanding of Types of Group Homes Not Considered Institutions—7 CFR 271.2, 273.1(e)(1)(iii), and 278.1(f)

Pursuant to section 1712 of Public Law 101–624, the June 28 proposed rulemaking at §§ 271.2, 273.1(e)(1)(iii) and 278.1, proposed to expand the types of group homes that would not be considered an "institution" and, thus, residents of such homes could receive food stamps. The June 28 rulemaking proposed to: (1) Change the definition of "eligible foods" to add meals prepared for and served to people who receive benefits under Titles I (Old Age Assistance), II (Social Security), X (Aid to the Blind), and XIV (Aid to the Permanently and Totally Disabled) of the Social Security Act, (2) change the definition of group living arrangements to include institutions in Guam and the Virgin Islands, and (3) provide that residents of group living arrangements which are certified under standards determined by the Secretary to be comparable to standards under the Social Security Act are eligible for food stamps.

The Department did not receive any comments on these provisions of the proposed rulemaking and the provisions are being adopted as final by this action without change.

Minimum Benefit (7 CFR 271.2, 271.7, 273.10, 273.18)

In accordance with section 1730 of Public Law 101–624, the $10 minimum monthly benefit provided to all one- and two-person households is required to be adjusted based on annual changes in the Thrifty Food Plan (TFP) rounded to the nearest $5. In order to implement this provision of law, the June 28 proposed rulemaking provided that adjustments in the minimum benefit would be made as follows: (1) Each year, the percentage change in the TFP from the preceding June to the current June (prior to rounding) will be calculated. (2) This percentage change would be multiplied by the previous "unrounded" minimum benefit to obtain a new unrounded minimum benefit amount. The new unrounded minimum benefit would be rounded to the nearest $5 in accordance with the statute. The current minimum benefit of $10 would be considered the unrounded minimum benefit for the first year of adjustment. This unrounded minimum benefit would be rounded to the nearest $5. The preamble clarified this proposed calculation procedure through example. The June 1990 TFP (prior to rounding) was $342.25 and the June 1989 TFP was $324.55 for a percentage increase of 5.45 percent. The current unrounded minimum benefit for the first year would be $10 as explained earlier. This $10 minimum benefit would be multiplied by the percentage increase of 5.45 percent to obtain a new rounded minimum benefit of $10.55. This unrounded minimum benefit would be rounded to the nearest $5. Because of the statutory rounding to the nearest $5, there would be no change from the $10 minimum for fiscal year 1991. For fiscal year 1992, the percentage increase in the TFP from June 1990 to June 1991 would be multiplied by the fiscal year 1991 unrounded minimum benefit of $10.55 to obtain a new unrounded minimum benefit.

The proposed rulemaking further provided that each year's unrounded and rounded minimum benefit numbers would be announced in the same manner as other Food Stamp Program cost-of-living adjustments.

The Department did not receive any comments on the minimum benefit provisions of the June 28 proposed rulemaking. Therefore, the proposed amendment to 7 CFR 271.2 to reflect a new definition for minimum benefit and the proposed conforming amendments to 7 CFR 271.7 (b) and (d), 273.10(e)(2)(ii)(C) and (vi)(B), and 273.18(g)(4) are being adopted as final by this action without change.

Verification of Recurring Anticipated Medical Expenses/Excess Medical Deduction (7 CFR 273.2(f)(8) and 273.21(i)(1))

As discussed in the preamble of the proposed rulemaking, section 1717 of Public Law 101–624 amended section 5(e) of the Food Stamp Act (7 U.S.C. 2014(e)) to take into account situations where certain reasonably anticipated recurring medical expenses are expected to change. The preamble further explained that according to the language of the statute, the method must rely on reasonable estimates of the household member's expected medical expenses for the certification period, including changes that can be reasonably anticipated based on available information about the household member's medical condition, public or private medical insurance coverage, and the current verified medical expenses incurred by the member. Furthermore, the method must not require further reporting or verification of a change in medical expenses if that change had been anticipated for the certification period. The preamble stated that it is the Department's opinion that section 1717 reflects current policy at 7 CFR 273.2(f)(8) and 273.21(i)(1) and that no regulatory change was necessary to implement section 1717 of Public Law 101–624. The Department did not receive comments to the contrary and retains its original interpretation that no change to current policy is required.

Prerelease/Single-application Requirement (7 CFR 273.2(c)(1), 273.2(i)(3)(i), and 273.2(k)(1)(i)(D))

On November 5, 1990, section 5040 of the Social Security Act was amended by Public Law 101–508 to provide that, instead of a single joint application form, the Secretaries of the Departments of Health and Human Services and Agriculture would be required to establish procedures under which an individual could apply for food stamps at the same time he/she applies for SSI. The preamble of the proposed rule explained that since this is the procedure currently being followed, no substantive change in food stamp regulations was necessary. However, in order to clarify that a separate joint application form is no longer required, the Department proposed to make some minor word changes to the current provisions at 7 CFR 273.2(i)(3)(i) and 273.2(k)(1)(i)(D). The Department did not receive any comments on these proposed changes and the changes are adopted as final by this action without change. A conforming minor word change is also being made to 7 CFR 273.2(c)(1).

Elderly/Disabled Aliens With Temporary Status (7 CFR 273.4(a)(8))

As explained in the preamble of the June 28 proposed rulemaking, current regulations at 7 CFR 273.4(a) (8) and (9) provide that aliens lawfully admitted pursuant to section 245A of the Immigration and Nationality Act (INA) must be aged, blind, or disabled (as defined in section 1614(a)(1) of the Social Security Act) and they must meet one of two criteria to be eligible to receive food stamps. These are that they must be either: (1) Lawfully admitted for permanent residence, or (2) have received their lawful temporary resident status at least five years prior to applying for food stamps and they must have subsequently gained lawful permanent resident status pursuant to Section 245A of the INA. Thus, aged, blind or disabled aliens who were admitted for temporary residence must wait five years prior to receiving food stamps, while aged, blind, or disabled aliens who were admitted for permanent residence are entitled to receive food stamps immediately.

The preamble further explained that the five-year ban on receiving food stamps related to a general provision under section 245A(h) of the Immigrant and Nationality Act (INA) as added by section 201(a) of the Immigration Reform and Control Act (IRCA) of 1986, Public Law 99–603, that there would be a five-year ban on participation of lawful temporary residents in certain federal assistance programs, one of which was the Food Stamp Program. However, section 245A(h) of the INA specified that there would be two exceptions to this general ban. The first exception was Cuban and Haitian entrants and the second exception was for aged, blind, or disabled individuals (as defined in section 1614(a)(1) of the Social Security Act).

Lastly, the preamble explained that the Department's original interpretation governing the current provision at 7 CFR 273.4(a)(8) was that aged, blind, or disabled aliens must be in a permanent resident status in order to receive food stamps. The current provision at 7 CFR 273.4(a)(8) was incorporated into the regulations by rulemaking published at 52 FR 20055, dated May 29, 1987. The Department's interpretation was questioned, causing the Department to reconsider its original interpretation. Upon reconsideration, the Department determined that the exception to the five-year ban set forth in IRCA was meant to apply to aged, blind, or disabled individuals regardless of whether they were admitted for permanent residence or for temporary residence. The Department implemented this new interpretation by issuing Indexed Policy Memo 8–90–25, dated August 22, 1990. The June 28 rulemaking proposed to officially correct the regulations to reflect the revised interpretation.

The Department did not receive any comments on the proposed amendment to 7 CFR 273.4(a)(8). Thus, the proposed amendment is adopted final by this action without change.

Technical Correction Concerning Certain Allowances Under the Job Training Partnership Act (7 CFR 273.9(b)(1)(iii) and 273.9(c))

The preamble to the June 28 rulemaking stated that the Department was proposing a technical correction concerning the treatment of training allowances and payments provided under the Job Training Partnership Act (JTPA) to clarify that most JTPA payments or allowances are countable income.

One commenter disagreed with the Department's preamble statement that this provision is a technical correction. The commenter stated that the preamble statement which provides that the intent of the proposal is to clarify that most JTPA payments or allowances are countable income appears to actually contradict current policy. Current policy provides that only earnings received from certain on-the-job training programs under JTPA are countable income and that all other JTPA allowances, earnings and payments are excludable income. Thus, the commenter believes the intent of the proposed changes as stated in the preamble represent a major program change. The commenter further stated that the preamble appears to use the words "allowances," "earnings," and "payments" interchangeably which contributes to the confusion. This commenter is correct. It is the Department's intent to clarify current policy, not change it.

Pursuant to section 142(b) of the JTPA (Pub. L. 97–300), all allowances, earnings and payments received under the JTPA are excluded from consideration as income. Subsequent to the JTPA, the Food Security Act of 1985 (Pub. L. 99–198) was passed which partially supersedes the income exclusion provision of the JTPA. Section 1509(c) of the Food Security Act of 1985 provides that, notwithstanding the JTPA, earnings to individuals participating in on-the-job training programs under Section 204(5) of the JTPA shall be considered income

for food stamp purposes, except for such earnings to individuals under 19 years of age who are under the parental control of an adult household member. The Department issued regulations on March 24, 1989 (54 FR 12169) to incorporate the provision of the Food Security Act of 1985 into the regulations at 7 CFR 273.9(b)(1)(v). However, the Department did not make a conforming amendment to 7 CFR 273.9(c) to address the fact that all other JTPA allowances, earnings and payments (including reimbursements) are excluded from income in accordance with the JTPA. At that time, the Department did not believe it was necessary to specifically include the JTPA exclusion provision in the regulations as current rules at 7 CFR 273.9(c)(10) already include a standing requirement to exclude income which is excluded by any other Federal law. However, lack of a specific income exclusion provision has caused some confusion among Program administrators. Thus, the Department is making a technical correction to include a specific income exclusion provision to address the JTPA and clarify that allowances, earnings, and payments (including reimbursements) to individuals participating in programs under the JTPA are excluded from consideration as income, except as provided under current regulations at 7 CFR 273.9(b)(1)(v). The Department is making this technical change at 7 CFR 273.9(c)(10) rather than adding a new paragraph (c)(15) as proposed. Current regulations at 7 CFR 273.9(c)(10)(v) provide an income exclusion for payments received from certain programs under the Comprehensive Employment and Training Act (CETA) Amendments of 1978. Since the JTPA repealed the CETA, it is appropriate to include the JTPA exclusion provision at this location in the regulations.

In addition, this action includes a conforming technical correction to current regulations at 7 CFR 273.9(b)(1)(iii) which provides that Federal, State and local training allowances are countable income to the extent such allowances are not a reimbursement, except for allowances authorized under the JTPA. The location of the JTPA exception statement has caused some confusion as to whether or not JTPA reimbursements are countable or excluded income. As stated earlier, except for JTPA earnings prescribed at 7 CFR 273.9(b)(1)(v), all other JTPA allowances, earnings and payments (including reimbursements) are excluded income. To better clarify this policy, the Department is amending 7 CFR 273.9(b)(1)(iii) to make the JTPA exception statement a separate sentence.

The Department is also making a technical correction to 7 CFR 273.9(b)(1)(v). As discussed earlier, that provision provides that "earnings" to individuals participating in the on-the-job training programs under section 204(5), title II, of the JTPA are countable income (except for such earnings to individuals under 19 years of age who are under the parental control of an adult household member). Current policy clarifies that "earnings" for the purpose of this provision includes monies paid by the JTPA or the employer. Accordingly, the Department is making a technical correction to 7 CFR 273.9(b)(1)(v) to incorporate this policy clarification into the regulatory text.

Implementation

One commenter requested that State agencies be allowed a 90-day period to implement provisions of the final rulemaking. Under section 1781 of Public Law 101–624, the Department has no discretion with regard to establishing an effective date and/or implementation timeframe for those provisions which implement Public Law 101–624. The Department is making every effort to ensure that State agencies will have plenty of time for implementation of those Public Law 101–624 provisions which require an implementation effort on the part of State agencies. The remaining provisions of this final action are of a technical nature and, therefore, do not require special implementation efforts on the part of the State agencies.

Accordingly, this action amends 7 CFR 271.2(g) to add a new paragraph to address implementation requirements for this final action. That paragraph provides that the provisions contained in § § 271.1, 271.7, 273.1(e)(1)(iii), 273.2(k)(1)(i)(H), 273.2(m), 273.10, 273.18 and 278.1 are effective on February 1, 1992 and shall be implemented as follows:

The Guam and Virgin Islands State agencies shall communicate the two new group home provisions (§ § 271.2, 273.1(e)(1)(iii) and 278.1) to group homes in their areas by this date so that they can apply for the appropriate certification and residents can apply for food stamps without delay. State agencies shall implement the expanded group home provisions for applicants newly applying for program benefits on or after February 1, 1992 for approved group homes.

No special implementation efforts are required with regard to the provisions § § 273.2(k)(1)(i)(H) and 273.2(m) informing SSI applicants about the Food Stamp Program and the availability of an application at the SSA office. In regard to the provisions in § § 271.2, 271.7, 273.10 and 273.18 relative to the minimum benefit for one- and two-person households, this action clarifies that the method of calculating the minimum benefit will not result in an increase in the minimum benefit for some time. However, State agencies are expected to have the capability of implementing a change timely when such a change is announced by the Department and should not wait until an actual change in the minimum benefit is announced to adjust computers and train caseworkers.

The remaining provisions of this action are effective 30 days from the publication date of this final action. The provisions which reflect that a joint application is no longer required for SSI applicants (§ § 273.2(c), 273.2(i), and 273.2(k)(1)(i)(D)) do not require implementation efforts by State agencies. The remaining provisions (§ § 273.4, 273.9(b) and 273.9(c)) also do not require special implementation efforts by State agencies as the provisions reflect current policy.

This action further provides that any variance resulting from implementation of the provisions of this amendment shall be excluded from quality control error analysis for 90 days from the required implementation date which shall be handled in accordance with 7 CFR 275.12(d)(2)(vii).

List of Subjects

7 CFR Part 271

Administrative practice and procedures, Food stamps, Grant program-social programs.

7 CFR Part 272

Alaska, Civil rights, Food stamps, Grant programs-social programs, Reporting and recordkeeping requirements.

7 CFR Part 273

Administrative practice and procedure, Aliens, Claims, Food stamps, Fraud, Grant programs-social programs, Penalties, Reporting and recordkeeping requirements, Social Security, Students.

7 CFR Part 278

Administrative practice and procedure, Food stamps, Groceries-retail, Groceries, General line-wholesaler, Penalties.

Accordingly, 7 CFR parts 271, 272, 273, and 278 are amended as follows:

1. The authority citation for parts 271, 272, 273 and 278 continue to read as follows:

Authority: 7 U.S.C. 2011–2031.

PART 271—GENERAL INFORMATION AND DEFINITIONS

2. In § 271.2,

a. In the definition of "Eligible foods," paragraph (5) is amended by adding the words "title I," before the words "title II" and by adding the words ", title X, title XIV," after the words "title II";

b. In the definition for "Group living arrangement," the first sentence is amended by adding the words "or under standards determined by the Secretary to be comparable to standards implemented by appropriate State agencies under section 1616(e) of the Social Security Act" to the end of the sentence and the second sentence is amended by adding the word "Title I," before the words "title II" and by adding the words ", title X, title XIV," after the words "Title II"; and

c. A new definition for "Minimum benefit" is added.

The addition reads as follows:

§ 271.2 Definitions.

* * * * *

Minimum benefit means the minimum monthly amount of food stamps that one- and two-person households receive. The amount of the minimum benefit will be reviewed annually and adjusted to the nearest $5 each October 1 based upon the percentage change in the Thrifty Food Plan for the twelve month period ending the preceding June.

* * * * *

§ 271.7 [Amended]

3. In § 271.7,

a. Paragraph (b) is amended by removing the words "a minimum benefit of $10" in the last sentence and adding the words "the minimum benefit" in their place;

b. Paragraph (d)(1)(ii) is amended by removing the words "a minimum benefit of $10" in the third sentence and adding the words "the minimum benefit" in their place;

c. Paragraph (d)(2)(i) is amended by removing the words "a $10 minimum benefit level" in the second sentence and adding the words "the minimum benefit" in their place; and

d. Paragraph (d)(3) is amended by removing the words "$10 shall receive a minimum benefit of $10" in the second sentence and adding the words "the minimum benefit shall receive the minimum benefit" in their place.

PART 272—REQUIREMENTS FOR PARTICIPATING STATE AGENCIES

4. In § 272.1, a new paragraph (g)(120) is added to read as follows:

§ 272.1 General terms and conditions.

* * * * *

(g) *Implementation.* * * *

(120) *Amendment No. 335.* The provisions contained in *Amendment No. 335* are effective and shall be implemented as follows:

(i) The provisions contained in §§ 271.2, 271.7, 273.1(e)(1)(iii), 273.2(k)(1)(i)(H), 273.2(m), 273.10, 273.18 and 278.1 of Amendment No. 335 are effective on February 1, 1992 and shall be implemented on that date as follows:

(A) The Guam and Virgin Islands State agencies shall communicate the two new group home provisions (§§ 271.2, 273.1(e)(1)(iii) and 278.1) to group homes in their areas by this date so that they can apply for the appropriate certification and residents can apply for food stamps without delay. All State agencies shall implement the expanded group home provisions for applicants newly applying for program benefits on or after February 1, 1992 for approved group homes.

(B) No special implementation efforts are required with regard to the provisions in §§ 273.2(k)(1)(i)(H) and 273.2(m) about informing SSI applicants about the Food Stamp Program and the availability of an application at the social security office.

(C) State agencies are not required to adjust their computers or train their caseworkers immediately in order to implement the provisions in §§ 271.2, 271.7, 273.10 and 273.18 relative to the minimum benefit for one- and two-person households because the methodology for annually adjusting the minimum benefit will not result in an increase in the minimum benefit for some time. However, State agencies are expected to have the capability of implementing a change in the minimum benefit in a timely manner when such a change in announced and, therefore, shall not wait until an actual change in the minimum benefit to adjust computers and train caseworkers.

(ii) The remaining provisions of Amendment No. 335 are effective February 1, 1992. The provisions which reflect that a joint application is no longer required for SSI applicants §§ (i)(3)(i), and 273.2(k)(1)(i)(D)) do not require implementation efforts by State agencies. The remaining provisions (§§ 273.4, 273.9(b) and 273.9(c)) also do not require special implementation efforts by State agencies as the provisions reflect current policy.

(iii) Any variance resulting from implementation of the provisions of this amendment shall be excluded from quality control error analysis for 90 days from the required implementation date which shall be handled in accordance with 7 CFR 275.12(d)(2)(vii).

PART 273—CERTIFICATION OF ELIGIBLE HOUSEHOLDS

§ 273.1 [Amended]

5. In § 273.1, paragraph (e)(1)(iii) is amended by adding the words "title I," before the words "title II" and by adding the words ", title X, title XIV," after the words "title II";

6. In § 273.2,

a. In paragraph (c)(1) the last sentence is amended by adding the words "food stamp" before the word "application" the second time it appears;

b. In paragraph (i)(3)(i) the second sentence is amended by adding the words "food stamp" before the word "application";

c. In paragraph (k)(1)(i)(D) the second sentence is removed;

d. In paragraph (k)(1)(i)(H) the first sentence is revised; and

e. A new paragraph (m) is added.

The revision and addition read as follows:

§ 273.2 Application processing.

* * * * *

(k) *SSI households.* * * *

(1) *Initial application and eligibility determination.* * * *

(i) * * *

(H) SSA shall refer non-SSI households to the correct food stamp office. * * *

* * * * *

(m) *Households where not all members are applying for or receiving SSI.* An applicant for or recipient of SSI shall be informed at the SSA office of the availability of benefits under the Food Stamp Program and the availability of a food stamp application at the SSA office. The SSA office is not required to accept applications or to conduct interviews for SSI applicants or recipients who are not members of households in which all are SSI applicants or recipients unless the State agency has chosen to outstation eligibility workers at the SSA office. In this case, processing shall be in accordance with § 273.2(k)(1)(ii).

§ 273.4 [Amended]

7. In § 273.4, paragraph (a)(8) is amended by adding the words "temporary or" after the word "for" and before the word "permanent".

8. In § 273.9,

a. Paragraph (b)(1)(iii) is amended by removing the words ", except for allowances received through programs authorized by the Job Training

Partnership Act" and adding a new sentence to the end of the paragraph;

b. Paragraph (b)(1)(v) is amended by adding a new sentence to the end of the paragraph; and

c. Paragraph (c)(10)(v) is revised in its entirety.

The addition and revision read as follows:

§ 273.9 Income and deductions.

* * * * *

(b) *Definition of income.* * * *

(1) * * *

(iii) * * * Training allowances under Job Training Partnership Act, other than earnings as specified in paragraph (b)(1)(v) of this section, are excluded from consideration as income.

* * * * *

(v) * * * For the purpose of this provision, earnings include monies paid by the Job Training Partnership Act and monies paid by the employer.

* * * * *

(c) *Income exclusions.* * * *

(10) * * *

(v) Allowances, earnings, or payments (including reimbursements) to individuals participating in programs under the Job Training Partnership Act (Pub. L. 90–300), except as provided for under paragraph (b)(1)(v) of this section.

* * * * *

9. In § 273.10,

a. Paragraph (e)(2)(ii)(C) is amended by removing the words "of $10" and adding the words "equal to the minimum benefit" in their place;

b. Paragraph (e)(2)(vi)(B) is revised;

c. Paragraph (e)(2)(vi)(D) is amended by removing the words "a $10" and replacing them with the word "the";

The revision reads as follows:

§ 273.10 Determining household eligibility and benefit levels.

* * * * *

(e) *Calculating net income and benefit level*—* * *

(2) * * *

(vi) * * *

(B) Except as provided in paragraphs (a)(1), (e)(2)(ii)(B), and (e)(2)(vi)(C) of this section, one- and two-person households shall be provided with at least the minimum benefit.

* * * * *

§ 273.18 [Amended]

10. In § 273.18, paragraph (g)(4) is amended by removing the words "a $10 minimum benefit level" appearing in the sixth sentence and adding the words "the minimum benefit" in their place.

PART 278—PARTICIPATION OF RETAIL FOOD STORES, WHOLESALE FOOD CONCERNS AND INSURED FINANCIAL INSTITUTIONS

§ 278.1 [Amended]

11. In § 278.1, the second sentence of paragraph (f) is amended by adding the words "or under standards determined by the Secretary to be comparable to standards implemented by appropriate State agencies under section 1616(e) of the Social Security Act" at the end of the sentence.

Dated: November 22, 1991.

Betty Jo Nelsen,

Administrator, Food and Nutrition Service.

[FR Doc. 91–29017 Filed 12–2–91; 10:31 am]

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DEPARTMENT OF AGRICULTURE

7 CFR Parts 271, 272, and 273

[Amendment No. 336]

Food Stamp Program: Monthly Reporting and Retrospective Budgeting Amendments and Mass Changes

AGENCY: Food and Nutrition Service, USDA.

ACTION: Final rule.

SUMMARY: This rule finalizes provisions of a proposed rule published in the **Federal Register** on August 13, 1991 (56 FR 40146). The proposed rule included the monthly reporting and retrospective budgeting (MRRB) provisions of the Mickey Leland Memorial Domestic Hunger Relief Act (Title XVII, Pub. L. 101–624, 104 Stat. 3359, November 28, 1990). These provisions include the State agency option to budget retrospectively households not subject to monthly reporting, the addition of households residing on Indian reservations to the categories of households exempt from monthly reporting, and the elimination of the requirement that the Secretary of Agriculture prescribe the standards for report forms. The proposed rule also included numerous procedural changes to the Food Stamp Program MRRB requirements and revisions and clarifications of the procedures for handling mass changes. These procedural changes include a clarification of procedures for handling prorated or annualized income; revised procedures for budgeting certain new household members; clarification of procedures for handling certain mass changes for retrospectively-budgeted households; procedures for handling income received in the form of a single monthly payment or deductions paid in a monthly sum; revised procedures for handling the income of new household members; redefinition of the information required on the monthly report; optional prospective or retrospective suspension; more flexible procedures regarding the mailing of recertification forms; and changes in the current reinstatement policy. This rule also clarifies procedures for implementing regulatory changes for households subject to MRRB.

DATES: The provision at 7 CFR 273.21(b) introductory text which give State agencies the option of using retrospective budgeting for nonmonthly reporting households is effective as of November 28, 1990, but no action is necessary to implement that provision. The provisions at 7 CFR 273.21(b)(4), 7 CFR 273.21(h)(3), and 7 CFR 273.21(j)(1)(ii) are effective and must be implemented on February 1, 1992. The remaining provisions are effective January 3, 1992 and must be implemented no later than July 1, 1992.

FOR FURTHER INFORMATION CONTACT: Judith M. Seymour, Supervisor, Eligibility and Certification Regulations Section, Certification Policy Branch, Program Development Division, Food Stamp Program, Food and Nutrition Service, USDA, 3101 Park Center Drive, Alexandria, Virginia, 22302; Telephone: (703) 756–3496.

SUPPLEMENTARY INFORMATION:

Executive Order 12291

The Department has reviewed this rule under Executive Order 12291 and Secretary's Memorandum No. 1512–1. This final rule affects the economy by less than $100 million a year. The rule would not significantly raise costs or prices for consumers, industries, government agencies or geographic regions. There would be no 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. Therefore, the Department has classified this rule as "non-major".

Executive Order 12372

The Food Stamp Program is listed in the Catalog of Federal Domestic Assistance under No. 10.551. For the reasons set forth in the final rule and related Notice(s) to 7 CFR part 3105, subpart V (48 FR 29115, June 24, 1983; or 48 FR 54317, December 1, 1983, as appropriate), this Program is excluded from the scope of Executive Order 12372

which requires intergovernmental consultation with State and local officials.

Regulatory Flexibility Act

This final rule has also been reviewed with respect to the requirements of the Regulatory Flexibility Act of 1980 (Pub. L. 96–354, 94 Stat. 1164, September 19, 1980). Betty Jo Nelsen, Administrator of the Food and Nutrition Service (FNS), has certified that this rule would not have a significant economic impact on a substantial number of small entities. The changes would affect food stamp applicants and recipients and State local agencies which administer the Food Stamp Program.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1980 (44 U.S.C. 3507), the reporting and recordkeeping requirements associated with MRRB have been approved by the Office of Management and Budget (OMB) under OMB No. 0584–0064. The provisions in this final rule are related to certification and MRRB but they do not impose additional reporting or recordkeeping requirements.

Background

On August 13, 1991, the Department published in the **Federal Register** at 56 FR 40146 a proposed rule that would amend the Food Stamp Program regulations governing the monthly reporting and retrospective budgeting system (MRRB) and the handling of mass changes. The proposed rule had four primary objectives. First, the Department proposed to implement the provisions of Sections 1718, 1723 and 1724 of the Mickey Leland Memorial Domestic Hunger Relief Act (Title XVII, Pub. L. 101–624, 104 Stat 3359, November 28, 1990) (Leland Act). Second, the Department proposed to clarify and simplify procedures regarding the handling of mass changes in the administration of the Food Stamp Program. Third, the Department proposed numerous changes to the procedures governing the operation of the MRRB system. The fourth objective of this rule was to incorporate several indexed policy memoranda into the regulations.

The Department accepted comments on this rulemaking through September 12, 1991. Seventeen letters were received addressing the provisions in the proposed rule. Commenters included 14 State agencies, one local agency, and two public interest groups. The comments are discussed below. An explanation of the rule is contained in the preamble of the proposed rule. The reader should refer to the preamble of that rule for a full understanding of the provisions of this final rule.

The procedures governing MRRB were first published in an interim rule on May 25, 1982 at 47 FR 22684 and through a final rule published on December 8, 1983 at 48 FR 54951. The Food Security Act of 1985 (Pub. L. 99–198, December 23, 1985) amended the Food Stamp Act of 1977 (7 U.S.C. 2011 et seq.) by requiring State agencies to apply MRRB to households with earnings or a recent work history. State agencies were allowed to apply MRRB to other categories, with the exception of migrant farmworker households in the migrant job stream and households with no earned income in which all adult members were elderly or disabled. The statutory MRRB provisions were amended by the Hunger Prevention Act of 1988 (Pub. L. 100–435, September 19, 1988). Under the Hunger Prevention Act, MRRB became a State agency option; the categories of households statutorily exempt from MRRB were expanded to include all seasonal or migrant farmworker households and homeless households; prospective budgeting was mandated for all households in the beginning months of participation in the Program; and prospective budgeting was mandated for all households not subject to monthly reporting. The MRRB provisions of the Hunger Prevention Act were effective October 1, 1988 and a final rule was published on June 6, 1989 at 54 FR 24149. The Leland Act made several changes to the MRRB provisions. Section 1718 of the Leland Act gave State agencies the option of using retrospective budgeting for nonmonthly reporting households, except for those which are statutorily exempt from MRRB. Section 1723 of the Leland Act added households residing on Indian reservations to the categories of households excluded from MRRB, and section 1724 eliminated the requirement that report forms conform to standards prescribed by the Secretary.

Retrospective Budgeting of Nonmonthly Reporting Households—7 CFR 273.21(b)

In the proposed rule, the Department proposed to amend 7 CFR 273.21(b) to give State agencies the option of using retrospective budgeting for nonmonthly reporting households other than those households exempt from monthly reporting under the provisions of section 6(c)(1)(A) of the Food Stamp Act. Two comments were received on this provision. One State agency supported the provision. One public interest group requested that State agencies be required to specify in their State Plans the standards being used to consign households to retrospective budgeting and that these standards must be non-discriminatory. Section 272.6(a) of the Food Stamp Program regulations already requires that State agencies not discriminate against any applicant or participant in any aspect of program administration. Further, the requirement for non-discrimination is also part of the Federal/State Agreement, one of the basic components of the State Plan of Operation. Therefore, we do not believe it is necessary to reiterate the non-discrimination requirement in 7 CFR 273.21(b). Nor do we believe that it is appropriate to incorporate the State agency's monthly reporting and retrospective budgeting standards in the State Plan. State agencies need the flexibility to determine which types of households most appropriately belong in either monthly reporting or retrospective budgeting based on quality control error findings and administrative needs. Accordingly, the Department has not changed the proposal and adopts the proposed provision as written.

Households Residing on Indian Reservations—7 CFR 273.21(b)(4)

Section 1723 of the Leland Act added households residing on Indian reservations to the list of households exempt from MRRB. To implement this provision, the Department proposed to add a new section at 7 CFR 273.21(b)(4) exempting households residing on Indian reservations from MRRB. The Department received five comments on this provision, one supporting it, one opposing it, and three requests for clarification. Exclusion of households residing on Indian reservations from MRRB is mandated by the Leland Act. Commenters pointed out that the regulatory provision does not distinguish between Indians and non-Indians residing on the reservation. The legislation does not specify that only Indian households are exempt from MRRB; it specifies that all households residing on reservations are so exempt. Therefore, the Department has not revised the provision to only include Indian households. One commenter pointed out that some Indians have tribal memberships that entitle them to be treated as if they reside on reservations. The Department believes that the provision excluding households which reside on Indian reservations from MRRB applies to Indians whose tribal membership deems them as residing on Indian reservations. However, it would be responsibility of the Indian household to prove that its tribal membership deemed it as residing on a reservation. This final rule adopts the proposed provision as written.

The Monthly Report Form—7 CFR 273.21(h)

Section 1724 of the Leland Act delegated responsibility to the State agencies for the design of the monthly report form and the determination of the information regarding eligibility and benefits which will be included in the form. To implement this legislative provision, the Department proposed to eliminate at 7 CFR 273.21(h)(3) the mandatory list of items which must be included on the monthly report. The Department received two comments on this provision, one supporting the proposal and one requesting that the requirements in 7 CFR 273.21(h)(2) also be eliminated. As discussed in the preamble of the proposed rule, the requirements in 7 CFR 273.21(h)(2) are mandated explicitly or implicitly by law and therefore must be included on the monthly report form. In reviewing the comments, the Department noted that revisions to 7 CFR 273.21(j)(1)(ii)(B) and (C) are required to conform that section to the changes in 7 CFR 273.21(h)(3). Accordingly, in this final rule, the Department has revised these sections to specify that if information required by the monthly report was missing, the report would be considered incomplete.

As discussed above, the Department sought in the August 13 proposed rule to clarify and simplify procedures regarding mass changes and additional technical changes to the MRRB requirements. These remaining proposals are discussed below.

Mass Changes—7 CFR 273.12(e)

The Department proposed to clarify current policy on implementing mass changes by addition of a sentence to 273.12(e)(1) to require State agencies to implement all adjustments to eligibility standards, allotments, deductions, and State adjustments to the standard utility allowance (SUA) prospectively, in the same month for all households regardless of budgeting system. The Department also proposed at 7 CFR 273.12(e)(1) to require state agencies to implement seasonal adjustments in SUA's prospectively for all households. Finally, the Department proposed at 7 CFR 273.21(j)(1)(vii)(B) to require State agencies which budget public assistance (PA) grants prospectively to use 7 CFR 273.12(e)(2) to implement mass changes in PA grants. The Department received one comment supporting these provisions. Accordingly, the proposed provisions have been adopted in the final rule.

Additional MRRB Changes

One- and Two-Month Systems—7 CFR 273.21(d)

The Department proposed at 7 CFR 273.21(d) to give State agencies the option of using either one or two beginning months in a one-month MRRB system. One comment was received supporting this provision. The provision has been adopted in the final rule as proposed.

Budgeting the Income of a New Household Member Who Had Been Previously Providing Income to the Household—7 CFR 273.21(f)(1)

The Department proposed to amend 7 CFR 273.21(f)(1)(iii)(B) to disregard previously provided income of a new household member when that new household member's current income is being prospectively budgeted. The Department received four comments on this provision. Two supported the provision; one opposed it on the grounds that there is no basis for excluding the income and that to do so is administratively complex. The fourth commenter wanted deemed income addressed as well. Excluded household members whose income has been deemed as available to the household are added retrospectively (Policy Memorandum 87–04, which is being incorporated in this final rulemaking as 7 CFR 273.21(f)(1)(iv)). One of the supporters requested a delay in implementation of this provision to enable State agencies to determine whether the provision was automatable. The Department has considered these comments and has determined that it is inappropriate to count income that a new member provided to the household retrospectively simultaneously. Therefore, the Department has left the provision as proposed and adopts the provision as written.

Budgeting the Income of a New Household Member Who Has Received Income From a Terminated Source—7 CFR 273.21(f)(1)(iii)

The Department proposed to amend 7 CFR 273.21(f)(1)(iii)(C) to require the disregard of budget month income previously received by a new household member from a terminated source. Four comments were received on this provision. Three commenters supported the provision. One commenter opposed the provision because it was another exception to the principle of retrospective budgeting, was administratively complex, and was error prone. The Department has considered the comments and has determined that it is inappropriate to attribute income to a household which has never had the benefit of that income. Therefore, the Department has adopted the provision as proposed.

Adding New Household Members—7 CFR 273.21(f)(1)

In response to waiver requests and in order to achieve greater consistency with AFDC MRRB systems, the Department proposed to add a new paragraph (D) to 7 CFR 273.21(f)(1)(iii) to give State agencies the option of prorating benefits for a new member from the date the new member joins the household if the State agency uses a similar system in its AFDC Program. The Department received four comments supporting this provision. The Department has adopted the provision as proposed.

Prorated Income and Deductions—7 CFR 273.21(f)(2)

The Department proposed in 7 CFR 273.21(f)(2) (ii) and (iii) to require State agencies to budget prospectively all prorated income over the period which it is intended to cover and in 7 CFR 273.21(f)(2)(iv) to require that deductible expenses prorated over more than one month not be deducted over more months than they are intended to cover. The Department received five comments on these provisions. Four commenters opposed them, and one supported them. The commenters who opposed the provisions felt that it was administratively complex to treat some income prospectively and other income retrospectively. One commenter suggested that income should be retrospectively budgeted but that a provision should be added to the regulations that the income could not affect more benefit months than the number of months in the period for which it was prorated. The Department agrees with the commenters that the proposed procedure is administratively complex. Thus, the Department has decided to adopt the commenter's proposal to specify that such income be budgeted retrospectively but that the income could not affect more benefit months than the number of months for which it was prorated. Sections 273.21(f)(2) (ii) and (iii) have been revised accordingly. One commenter pointed out that changes in many deductible expenses are not required to be reported and that an expense prorated over the period intended to be covered may correctly be deducted over additional months if the household does not report a bill for a subsequent period. The Department has added a sentence to 7 CFR 273.21(f)(2)(iv) to clarify that the State agency shall continue to allow

deductions for expenses incurred even if billed on other than a monthly basis unless the household reports a change in the expense.

Budgeting Income Received in the Form of a Single Monthly Payment—7 CFR 273.21(f)(2)

The Department proposed to add a new paragraph (v) to 7 CFR 273.21(f)(2) to provide that unearned income and stable earned income and deductions received or paid in the form of a single monthly payment be counted for the month it is intended to cover.

Three comments were received concerning this provision. Two commenters opposed the provision, though one opposed it only for stable earned income. Two supported the provision, one only for unearned income. One supporter recommended that bi-monthly income also be counted for the month it is intended to cover rather than for the month of receipt. The Department has considered the comments and determined that both unearned and stable earned income received in the form of a single monthly payment should be counted for the month they are intended to cover. Attributing income based on temporary changes in mailing or payment cycles distorts the picture of a household's circumstances and could result in a household not receiving any benefits in one month even though its need is unchanged. One commenter believed that the language of the regulatory provision needed to be clarified to ensure that it only applied to income received as a single monthly payment. The provision has been revised to make this clear. One commenter was concerned about how this would apply to medical and utility deductions. As this only applies to stable expenses such as monthly rent or a monthly utility bill, State agencies should not have any difficulty in determining the month that the expense is intended to cover. This final rule adopts the proposed provisions as amended.

Interest Income—7 CFR 273.21(f)(2)

The Department proposed at 7 CFR 273.21(f)(2)(vi) to give State agencies three options regarding the handling of interest income: actual budget month interest income; a prorated amount obtained by dividing total anticipated interest by the number of months the interest will be received; or an averaged amount adjusted for any known differences from the average. Two comments were received on this proposal, both supporting it. One commenter requested clarification of what was meant by "an averaged amount adjusted for any known differences from the average." The eligibility worker would take a series of monthly figures, divide that total by the number of months involved, and use that average as the monthly figure taking into account any evidence that this average would no longer be expected to continue as a reliable average. State agencies have the option to either decide how different types of interest will be handled across the board for all households or may allow each household to choose which method it wishes to use to have its interest counted. Section 273.21(f)(2)(vi) has been revised to make this clearer and the final rule adopts the proposed provisions as amended.

Terminated Income Received in Beginning Months—7 CFR 273.21(g)

The Department proposed to amend 7 CFR 273.21(g)(3) to disregard terminated income received in either or both of the beginning months when the household switches from prospective to retrospective budgeting. No comments were received on this proposal. The final rule adopts this proposed provision as written. The Department also proposed that income would be considered terminated for this purpose only if the terminated source of income was not replaced with a similar type of income within 30 days. A similar type of income was defined as income from a new source received within 30 days of the date of the last receipt of income from the former source and within $25 of the monthly income from the former source. The Department received seven comments on this proposal; six opposed it and one requested clarification. The commenters pointed out that the proposal was not workable because information pertaining to a new source would not be available within the time frames for determining benefits, particularly in a one-month system. The Department agrees with the commenters. Accordingly, the Department is not adopting the proposed provision to count income from a terminated source if replaced by a similar source.

Converting and Averaging Income—7 CFR 273.21 (g) and (j)

The Department proposed at 7 CFR 273.21(g)(3) and 7 CFR 273.21(j)(1)(vii)(A) to allow State agencies to convert and/or average income in beginning months and to switch to the use of actual budget month income following beginning months. No comments were received on these proposals. The Department is adopting these proposals in this final rule as written.

Verification—7 CFR 273.21(i)

The Department proposed at 7 CFR 273.21(i) to mandate that verification be provided only for those items designated by the State agency which have changed since the last monthly report was submitted. The State agency could continue to require verification of any additional information it considered questionable. Three comments were received on this proposal. Two opposed it, and one supported it. The two commenters opposing the proposal felt it was too restrictive. They believed that State agencies should be allowed to request verification of any item included on the monthly report form. Further, they pointed out that the AFDC Program requires verification of all earned income. The Department has revised this provision in the final rule to allow a State agency to request that verification be submitted for those items it so designates on the monthly report. Requests for such verification must be uniform for all households required to submit monthly reports, e.g., if the State agency requires verification of earned income, every household with earned income would be required to submit verification with the monthly report.

State Action on Reports—7 CFR 273.21(j)(1)(vii)(B)

The Department proposed at 7 CFR 273.21(j)(1)(vii)(B) to disregard terminated income retrospectively when PA grants are prospectively budgeted and the issuance month PA grant increases as a result of the terminated source of income. If the PA grant is unaffected, reduced, or terminated, the terminated income must be included. Two comments were received on this proposal, both opposing it. One local agency opposed the proposal because it increased its workload and was error prone. A State agency opposed it because it does not have a terminated source policy for ongoing AFDC cases. Current policy requires that terminated sources of income which would otherwise be budgeted retrospectively be disregarded in the food stamp budget when the State agency prospectively budgets the PA grant to be paid in the issuance month. The Department's policy is intended to prevent the situation in which food stamps are significantly decreased because the increased PA grant is added to the terminated income from the budget month. This proposal clarifies that the terminated income is disregarded only when the PA grant is increased as a result of the terminated income. The Department believes that it is not

appropriate to disregard the terminated income if the PA grant is not increased in the issuance month to reflect the terminated income. Therefore, this final rule adopts the provision as proposed.

Deductions—7 CFR 273.21(j)(1)(vii)(C)

The Department proposed at 7 CFR 273.21(j)(1)(vii)(C) to prohibit the averaging of expenses regularly billed more frequently than monthly. The Department received two comments on this proposal. Both commenters opposed the proposal. One State agency opposed it because averaging was the only way to address medical expenses. Another State agency pointed out that having to recalculate deductions each month for child care expenses, which are usually billed weekly and for weekly rent expenses, would be a major administrative workload increase. The Department has decided not to adopt the proposal and decided to leave the regulation as it currently is, allowing the averaging of expenses regularly billed more frequently than monthly.

Notices of Missing or Incomplete Reports—7 CFR 273.21(j)(3)(ii)

The Department proposed at 7 CFR 273.21(j)(3)(ii) to add a new paragraph (G) the provide State agencies with the option of either separate notices of incomplete filing and termination or a combined notice advising the household that its participation will be terminated if it fails to submit a completed report by the extended filing date. The Department received two comments on this proposal, one supporting it and one opposing it. The commenter who opposed felt that the current requirement of two separate notices was preferable from the recipients' standpoint. The commenter also believed that the provision for two separate notices worked well for State agencies that used it and that State agencies where it was an administrative burden had waivers so that no change was necessary. The Department has considered the concerns about recipients' awareness of their rights when the two notices are combined and agrees that some recipients may get confused when the notices are combined, particularly households new to the monthly reporting. The Department's waiver authority provides a mechanism that allows the two notices to be combined when a State agency can demonstrate that a single notice would not impair the recipients' rights and would improve the State's administration of the Program. Further, the Department can monitor the impact of the single notice on recipients more carefully through the waiver process. As the waiver process provides a mechanism to alleviate administrative burdens and difficulties for State agencies, the Department has decided not to adopt the proposal to allow State agencies the option of a combined notice.

Reinstatement and Proration of Benefits—7 CFR 273.21(k)

The Department proposed at 7 CFR 273.21(k)(2)(ii) to provide that benefits be prorated for households which submit a report in the issuance month and are reinstated following termination for failure to submit a complete monthly report. The Department received seven comments on this proposal. Three commenters supported the proposal; three opposed it. One commenter suggested a modification to be consistent with AFDC that would allow for a good cause determination with no proration. One of the commenters who opposed the provision believed that it would be unnecessarily harsh to recipients who had failed to comply with a technical requirement, i.e., timely submission of a monthly report, but whose circumstances continued to be the same. A State agency which opposed the provision stated that it is usually households new to the monthly reporting system who are terminated for submitting incomplete reports. Another State agency opposed the policy because it was not consistent with its AFDC policy and because in its state a majority of the late monthly reports are caused by worker errors. The State agency felt that it would not be appropriate to penalize clients for worker errors. The Department has reconsidered this proposal and decided not to adopt it. As there are different AFDC policies in effect regarding termination and proration, consistency with AFDC would not be achieved. Achieving consistency with AFDC is one of the reasons for modification of the MRRB system. It is the Department's goal to minimize any workload increase in making the modifications to the MRRB system in this rulemaking.

Other Reporting Requirements—7 CFR 273.21(l)(1)

The Department proposed at 7 CFR 273.21(l)(1) to clarify that the monthly report is the sole reporting requirement for items required to be reported on the monthly report. The Department received one comment supporting this provision. The Department is adopting the provision as proposed.

Information Reported Outside of the Monthly Report—New § 273.21(o)

The Department proposed at 7 CFR 273.21(o) that information reported outside the monthly report would be handled as if it were included in the report, i.e., budget month changes would be reflected in the household's allotment for the appropriate issuance month. The Department received two comments on this proposal, one in support and one in opposition. The commenter who opposed this provision said that it was inconsistent with its AFDC policy. Whenever possible, the Department tries to increase consistency with AFDC. Consequently, the Department has reconsidered this provision and decided not to adopt it in the final rule.

Continuation of Benefits—7 CFR 273.21(p)(2) and 273.21(m)

The Department proposed at 7 CFR 273.21(p)(2) (i) and (iii) that, in cases in which the submission of a monthly report is at issue and the household has made a timely request for fair hearing, the household would receive continued benefits, provided that a completed report is submitted no later than the last day of the issuance month. The Department also proposed to amend 7 CFR 273.21(m)(2)(iv) to provide that the notice of termination shall advise the household that it may receive benefits pending the hearing if the sole issue is the submission of the report and the household submits a complete report. Two comments were received on these provisions, both supporting them. One of the commenters assumed that the provision in (m) would not apply when a combined notice is used instead of separate notices. This is incorrect. As specified in the new provision allowing a combined notice, 7 CFR 273.21(j)(3)(ii)(C), the combined notice must conform to the criteria required by paragraph (m)(2).

Recertification—7 CFR 273.21(q)

The Department proposed to amend 7 CFR 273.21(q) (3) and (4) to allow State agencies to mail the applicable forms separately as long as they are mailed at the same time and to allow State agencies to combine the notice of expiration with the monthly report form. Four comments were received on this provision, three in support. The Department is adopting the proposal in this final rule with an amendment. One commenter requested an additional option, to be able to put the notice of expiration on the recertification form. The Department concurs with this recommendation and has incorporated it in 7 CFR 273.21(q)(3).

Changes in Reporting/Budgeting Status—Addition of 273.21(r)

The Department proposed the addition of a new provision (r) to 7 CFR 273.21 that contains procedures for handling households in transition between different reporting and budgeting systems. Section 273.21(r)(1) provides State agencies with broad discretion in moving prospectively-budgeted households into the MRRB system. Section 273.21(r)(2)(i) provides that State agencies shall move households which become exempt from MRRB to prospective budgeting in the month following the month the State agency becomes aware of the change. Section 273.21(r)(2)(ii) allows the State agencies to move other households from MRRB to prospective budgeting at any time. The Department received five comments concerning these provisions. One commenter supported the provision; two opposed it. Two requested clarifications.

One commenter opposed the provision in 7 CFR 273.21(r)(1)(ii) which prohibits requiring a household to submit a monthly report during any month in which the household was subject to change reporting because it was inconsistent with AFDC and could leave part of a month exempt from any reporting requirement. The prohibition against requiring a household to submit a monthly report during any month in which the household was subject to change reporting is current policy. The Department has not changed this provision in the final rule because a household cannot be required to submit a monthly report for any month during which it was subject to the change reporting requirements.

One commenter wanted to continue to have households submit monthly reports for any month in which it was retrospectively budgeted. Two commenters requested clarification or wanted changes to the requirements pertaining to moving households exempt from MRRB to prospective budgeting. The Department has reconsidered the requirements at 7 CFR 273.21(r)(2)(i). In order to provide the maximum administrative flexibility for State agencies while still ensuring that households exempt from MRRB are expeditiously moved to prospective budgeting and continue to have their rights of notice for any adverse actions, we are allowing State agencies to retrospectively budget these households based on the last monthly report submitted prior to the household's becoming exempt from MRRB. However, a household could not be required to submit any additional monthly reports and must be notified that its reporting and budgeting status is being changed and when that change will occur. Accordingly, the final rule at 7 CFR 273.21(r)(2)(i) has been revised to state that a State agency may continue to budget a household retrospectively based on the last monthly report received before the State agency became aware that the household had become exempt from MRRB. The rule continues to require that the household be notified within 10 days that its reporting and budgeting status has changed. That notification must indicate when the change will take effect. The Department has adopted the remaining provisions of 7 CFR 273.21(r) as proposed.

Implementation of Regulatory Changes for MRRB Households—Addition of 273.21(s)

The Department proposed a new paragraph (s) at 7 CFR 273.21 that would require implementation of all regulatory changes prospectively based on the implementation time frame in a rule. The Department received three comments on this provision. One commenter supported the provision but only if sufficient time, at least 120 days, was allowed for implementation. Another commenter wanted at least 180 days to implement all new regulations. The third commenter wanted to be able to implement regulations at certification and recertification for new households, prospectively for eligibility factors, and retrospectively for budgeting. The Department is aware of State agency needs for significant time to implement regulations. Whenever possible, the Department provides State agencies with a reasonable amount of time to implement. However, in many instances, the time frames for implementing the regulations are mandated by outside entities such as Congress or the courts. This provision did not address the time frames for implementing regulations, but rather how any regulation would be implemented—either retrospectively or prospectively. The Department has considered the comments and noted that they focused primarily on implementation periods rather than whether changes should be prospectively or retrospectively budgeted. Only one commenter wanted to continue to implement retrospectively for retrospectively-budgeted households. The Department believes that prospective implementation of regulatory changes is analogous to the procedures for implementing mass changes and ensures that all regulatory changes are implemented uniformly for all households. Accordingly, 7 CFR 273.21(s) requires implementation prospectively based on the effective date provided in the rule.

MRRB Policy Memoranda

The Department proposed to incorporate into regulation several clarifications made in indexed policy memoranda. These policy memoranda are numbers 82–27, 84–6, 84–19, and 87–04. The Department received three comments in support of the provisions.

One commenter requested clarification of the provision at 7 CFR 273.21(j)(1)(vii)(A) (Policy Memorandum 84–6) which specifies that the State agency shall count the budget month earned income of a student only if that student is eighteen years of age or older at the beginning of the budget month. The following example should clarify this. In a two month retrospective budgeting system, if a student turned 18 during the month of September, the student's earned income would not be counted until the month of October becomes the budget month, which would be the first budget month when the student is eighteen years of age at the beginning of the budget month.

The Department is adopting as proposed the introductory provision of 7 CFR 273.21(g), the definition of "Beginning month(s)" in 7 CFR 271.2, 7 CFR 273.21(j)(1)(vii)(A), and 7 CFR 273.21(e)(2). Section 273.21(f)(1)(iii)(E) concerns adding new household members in a two-month system when the household reports, in the month between the budget month and the corresponding issuance month, that it has gained a new member. This is an inappropriate cite for incorporation of Policy Memorandum 87–04. Accordingly, the Department has renumbered this paragraph as 7 CFR 273.21(f)(1)(iv). The Department has also added the word retrospectively to the provision to clarify how these new members should be budgeted when they are added.

Implementation

There are two separate parts to this rule, the legislatively-mandated portions that implement the provisions of the Leland Act and the discretionary provisions concerning mass changes and the additional MRRB changes. The changes mandated by the Leland Act which require action on the part of the State agency must be implemented by law on February 1, 1992. The discretionary changes which require action on the part of the State agency may be implemented on a different time schedule. In the proposed rule, the Department proposed to implement all the changes on February 1, 1992. We

have reconsidered this implementation date for the discretionary changes. Commenters pointed out that some of these changes were complex and would require changes to automated eligibility systems. In addition, State agencies state that they are working with expanding caseloads under severe fiscal constraints which are already straining the ability of the State agencies to function properly. For these reasons, the Department is establishing an implementation date of no later than the first day of the month 180 days after publication of the final rule. Variances resulting from implementation of the provisions of this rule shall be excluded from error analysis for 90 days from the required implementation date, in accordance with 7 CFR 275.12(d)(2)(vii).

List of Subjects

7 CFR Part 271

Administrative practice and procedure, Food stamps, Grant programs-social programs.

7 CFR Part 272

Alaska, Civil rights, Food stamps, Grant programs-social programs, Reporting and recordkeeping requirements.

7 CFR Part 273

Administrative practice and procedures, Aliens, Claims, Food stamps, Grant programs-social programs, Penalties, Reporting and recordkeepings, requirements, Social security, Students.

Accordingly, 7 CFR parts 271, 272, and 273 are amended as follows:

1. The authority citation of parts 271, 272, and 273 continues to read as follows:

Authority: 7 U.S.C. 2011–2031.

PART 271—GENERAL INFORMATION AND DEFINITIONS

2. In § 271.2, the definition of "Beginning month(s)" is amended by adding a new sentence at the end of the definition to read as follows:

§ 271.2 Definitions.

* * * * *

Beginning month(s) * * * The month following the month of termination resulting from a one-month temporary change in household circumstances shall not be considered a beginning month.

* * * * *

PART 272—REQUIREMENTS FOR PARTICIPATING STATE AGENCIES

3. In § 272.1, a new paragraph (g)(121) is added to read as follows:

§ 272.1 General Terms and Conditions.

* * * * *

(g) *Implementation.* * * *

(121) *Amendment No. 336.* The provisions of Amendment No. 336 are effective and must be implemented as follows:

(i) The provision that gives State agencies the option of using retrospective budgeting for nonmonthly reporting households other than those exempt from monthly reports (7 CFR 273.21(b) introductory text) was effective as of November 28, 1990, the date of enactment of the Leland Act.

(ii) The provisions exempting households residing on Indian reservations from MRRB (7 CFR 273.21(b)(4)) and delegation of the responsibility for design of the monthly report form (7 CFR 273.21(h)(3) and 7 CFR 273.21(j)(1)(ii)) must be implemented by February 1, 1992.

(iii) The remaining provisions are effective January 3, 1992 and must be implemented July 1, 1992.

(iv) Any variances resulting from implementation of the provisions of this amendment shall be excluded from error analysis for 90 days from the required implementation dates in accordance with 7 CFR 275.12(d)(2)(vii).

PART 273—CERTIFICATION OF ELIGIBLE HOUSEHOLDS

4. In § 273.12, the introductory text of paragraph (e)(1)(i) is revised to read as follows:

§ 273.12 Reporting changes

* * * * *

(e) *Mass changes.* * * *

(1) *Federal adjustments to eligibility standards, allotments, and deductions, and State adjustments to utility standards.* (i) State agencies shall implement these changes for all households at a specific point in time. Adjustments to Federal standards shall be implemented prospectively regardless of the household's budgeting system. Annual and seasonal adjustments in State utility standards shall also be implemented prospectively for all households.

* * * * *

5. In § 273.21:

a. The fourth and fifth sentences of the introductory text of paragraph (a) are removed.

b. The second sentence of the introductory text of paragraph (b) is revised.

c. A new paragraph (b)(4) is added.

d. The second sentence of the introductory text of paragraph (d) is revised.

e. The second and third sentences of paragraph (d)(1) are removed.

f. Paragraph (e)(2) is revised.

g. Paragraphs (f)(1)(iii) (B) and (C) are amended by adding a new sentence to the end of each paragraph.

h. New paragraphs (f)(1)(iii)(D) and (f)(1)(iv) are added.

i. Paragraphs (f)(2)(ii) and (f)(2)(iii) are revised.

j. Paragraphs (f)(2) (iv) and (f)(2)(v) are redesignated (f)(2)(vii) and (f)(2)(viii), respectively, and three new paragraphs (f)(2)(iv), (v) and (vi) are added.

k. The introductory text of paragraph (g) is amended by adding a new sentence at the end of the paragraph.

l. The last two sentences of paragraph (g)(3) are revised.

m. Paragraph (h)(3) is revised.

n. Paragraph (i) is revised.

o. Paragraph (j)(1)(ii) (B) and (C) are revised.

p. Paragraph (j)(1)(vii)(A) is amended by adding the words ", including the earned income of a student only if the student is eighteen years of age or older at the beginning of the budget month," after the first appearance of the word "month" in the first sentence and by adding two new sentences to the end of the paragraph.

q. Paragraph (j)(1)(vii)(B) is amended by adding the words "which results in an increase in the PA grant" after the word "source" in paragraph (j)(1)(vii)(B)(*2*) and by adding a new concluding sentence to the end of paragraph (j)(1)(vii)(B).

r. Paragraph (k)(2)(ii) is amended by adding one new sentence to the end of the paragraph.

s. Paragraph (l)(1) is revised.

t. Paragraph (m)(2)(iv) is amended by adding a new sentence to the end of the paragraph.

u. Paragraphs (p)(2) (i) and (iii) are amended by revising the last sentence of each paragraph.

v. Paragraph (q)(3)(ii) is amended by adding a new sentence to the end of the paragraph.

w. Paragraph (q)(4)(ii) is revised.

x. New paragraphs (r) and (s) are added.

The revisions and additions read as follows:

§ 273.21 Monthly Reporting and Retrospective Budgeting (MRRB).

* * * * *

(b) *Included and excluded households.* * * * Except for the categories of households described in paragraphs (b)(1) through (b)(4) of this section, households not required to submit monthly reports may have their

benefits determined on either a prospective or retrospective basis at the State agency's option. * * *

* * * * *

(4) Households residing on Indian reservations.

* * * * *

(d) *One and two-month systems.* * * * A one-month system shall have either one or two beginning months in the certification period and a two-month system shall have two beginning months. * * *

* * * * *

(e) *Determining eligibility for households not certified under the beginning months' procedures of § 273.21(g).* * * *

(2) *Retrospective eligibility.* The State agency shall determine eligibility by considering all factors of eligibility retrospectively using the appropriate budget month except for residency and compliance with the requirements regarding social security numbers. Compliance with work registration provisions shall be considered as of the issuance month or month of application. The 60-day time frame for determining the applicability of the voluntary quit provision of § 273.7(n) shall be measured by the State agency from the date of application.

(f) *Calculating allotments for households following the beginning months.*

(1) * * *

(iii) * * *

(B) * * *

If the new member had been providing income to the household on an ongoing basis prior to becoming a member of the household, the State agency shall exclude the previously provided income in determining the household's issuance month benefits and eligibility.

(C) * * * In determining the issuance month eligibility and benefit level of the household into which the individual has moved, the State agency shall disregard budget month income received by the new member from a terminated source.

(D) The State agency may add new members to the household effective the first day of the issuance month following the month the household gains the new member, or may add the new member using the same method that the State agency uses in its AFDC Program.

(iv) The State agency shall add a previously excluded member who was disqualified for an intentional program violation or failure to comply with workfare or work requirements, was ineligible because of failure to comply with the social security number requirement, or was previously an ineligible alien retrospectively to the household the month after the disqualification period ends. All other previously excluded members shall be added in accordance with the procedures in paragraph (f)(1)(iii)(B) of this section, using the new member's issuance month income and expenses.

(2) * * *

(ii) The State agency shall prorate contract income received over a period of less than one year and retrospectively budget such income. Such income shall not effect more benefit months than the number of months in the period over which it is prorated.

(iii) The State agency shall prorate and budget retrospectively over the period they are intended to cover any nonexcluded scholarships, deferred educational loans, and other educational grants. Such income shall not effect more benefit months than the number of months in the period over which it is prorated.

(iv) The State agency shall budget deductible expenses prorated over two or more months retrospectively, *provided* That such deductions are not budgeted over more months than they are intended to cover, and the total amount deducted does not exceed the total amount of the expenses. The State agency shall continue to allow deductions for expenses incurred even if billed on other than a monthly basis unless the household reports a change in the expense.

(v) The State agency shall budget stable income regularly received as a single monthly payment for the month such income is intended to cover. The State agency shall budget deductions regularly billed as a single monthly payment for the month such deductions are intended to cover.

(vi) The State agency may budget interest income using one of the following methods in paragraphs (f)(2)(vi) (A), (B), or (C) of this section. The State agency shall either establish categories of interest to be handled by each of the methods or shall offer each household the option of which method to budget the interest income.

(A) Actual interest income received in the budget month.

(B) Prorated interest income calculated by dividing the amount of interest anticipated during the certification period by the number of months in the certification period.

(C) An averaged amount adjusted for anticipated changes.

* * * * *

(g) *Determining eligibility and allotments in the beginning months.* * * * The State agency shall not apply the procedures of this paragraph to the month(s) following the month of termination resulting from a temporary one-month change.

* * * * *

(3) *The first months of retrospective budgeting following the beginning months.* * * * If the State agency had been averaging income or converting weekly or biweekly income to a monthly amount in the beginning months, it may begin using the household's actual budget month income when the household becomes subject to retrospective budgeting. For purposes of this paragraph, any income received in either or both of the beginning months from a source which no longer provides income to the household (terminated income), which was included in the household's prospective budget, shall be disregarded when the beginning month becomes the budget month.

(h) *The monthly report form.* * * *

(3) *Reported information.* The State agency may determine the information relevant to eligibility and benefit determination to be included on the monthly report form.

* * * * *

(i) *Verification.* Each month the household shall verify information for those items designated by the State agency. The State agency may require verification of any additional items included in the monthly report that appear questionable.

(j) *State agency action on reports.*

(1) *Processing.* * * *

(ii) * * *

(B) It is not accompanied by verification required by the State agency on the monthly report;

(C) It omits information required by the State agency on the monthly report necessary either to determine the household's eligibility or to compute the household's level of food stamp benefits.

* * * * *

(vii) * * *

(A) * * * If the State agency elects to convert weekly or biweekly income for MRRB households, it shall do so for all households in its MRRB caseload. The State agency may convert or average income in the beginning months and use actual earned or unearned income received in the budget month following the beginning months of participation.

(B) * * *

A State agency which elects to use the PA grant to be paid in the issuance month shall implement mass changes in accordance with the procedures at § 273.12(e)(2).

* * * * *

(k) *Issuance of benefits.* * * *

(2) *Delayed issuance.* * * *

(ii) * * * If the household has requested a fair hearing on the basis that a complete monthly report was filed, the State agency shall reinstate the household if a completed monthly report is filed before the end of the issuance month.

* * * * *

(l) *Other reporting requirements.*

(1) *Information reported on the monthly report.* The monthly report shall be the sole reporting requirement for information required to be included in the monthly report. Changes in household circumstances not subject to monthly reporting shall be reported in accordance with § 273.12.

* * * * *

(m) *Termination.* * * *

(2) * * *

(iv) * * * If termination is for failure to submit a monthly report and the household states that a monthly report has been filed, the notice must advise the household that a completed monthly report must be filed prior to the end of the issuance month as a condition for continued receipt of benefits.

* * * * *

(p) *Fair hearings.* * * *

(2) *Continuation of benefits.* (i) * * * If the State agency did not receive a monthly report from the household by the extended filing date and the household states that a monthly report was submitted, the household is entitled to continued benefits, *provided* That a completed report is submitted no later than the last day of the issuance month.

* * * * *

(iii) * * * If the fair hearing is with regard to termination for nonreceipt of the monthly report by the State agency, a completed monthly report for the month in question shall be submitted by the household no later than the last day of the issuance month.

* * * * *

(q) *Recertification.* * * *

(3) *Option One: Recertification form.* * * *

(ii) * * * The State agency shall either: Mail the recertification form along with the notice of expiration; use a recertification form which contains a notice of expiration; or mail the recertification form and the notice of expiration separately, as long as the forms are mailed at the same time.

* * * * *

(4) *Option Two: Monthly report and addendum.* * * *

(ii) The State agency shall either: Mail the monthly report form along with the notice of expiration; use a monthly report form which contains a notice of expiration; or mail the monthly report form and the notice of expiration separately, as long as the forms are mailed at the same time.

* * * * *

(r) *Procedures for households that change their reporting and budgeting status.* The State agency shall use one of the following procedures for households subject to change in reporting/budgeting status.

(1) *Households which become subject to MRRB.* The State agency may change the reporting/budgeting status of households which become subject to monthly reporting at any time following the change in household circumstances which results in the change in the household's reporting/budgeting status, subject to the following conditions:

(i) The State agency shall provide the household with information provided to MRRD households under paragraph (c) of this section. If the State agency elects to implement the change during the certification period, it may omit the oral explanation of MRRB required under paragraph (c)(1).

(ii) The State agency shall not require the household to submit a monthly report during any month in which the household was subject to the change reporting requirements of § 273.12.

(2) *Households which are no longer subject to MRRB.* The agency shall use one of the following procedures to remove households from the MRRB system.

(i) *Procedures for households exempt from MRRB.* For any household which becomes exempt from MRRB under paragraph (b) of this section, the State agency shall notify the household within 10 days of the date the State agency becomes aware of the change that the household has become exempt from monthly reporting and is no longer required to file any future monthly reports and has also become exempt from retrospective budgeting and when the change in budgeting will go into effect. The State agency shall begin determining the household's benefits prospectively in the first month that the household is no longer required to file a monthly report.

(ii) Other households moving from MRRB to change reporting and prospective budgeting. When a household is no longer subject to MRRB under a State agency's system, the State agency may begin determining the household's benefits prospectively in any month following the month the State agency becomes aware of the changed circumstances which necessitate the need to change the household's reporting/budgeting status. If the State agency elects to change the household's reporting/budgeting status prior recertification it shall provide the household with a notice explaining the change in the month prior to the month the change is effective. If the State agency elects to change the household's status at recertification it shall advise the household at the recertification interview that its reporting/budgeting status is being changed.

(iii) *Households moving from MRRB to retrospective budgeting and change reporting.* If a household's status necessitates changing it from a monthly reporter to a change reporter while continuing to be budgeted retrospectively, the State agency may change the household's status at any time. If the State agency elects to change the household immediately, the State agency shall provide the household with a notice that it is no longer subject to monthly reporting. The notice shall include information about the household's reporting requirements under § 273.12.

(s) *Implementation of Regulatory Changes.* The State agency shall implement changes in regulatory provisions for households subject to MRRB prospectively based on the effective date and implementation time frame published in the **Federal Register**. Rules are effective as of the same of date for all households regardless of the budgeting system.

Dated: November 27, 1991.

Betty Jo Nelsen,

Administrator.

[FR Doc. 91–29016 Filed 12–2–91; 10:32 am]

BILLING CODE 3410–30–M

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7 CFR Parts 272 and 273

[Amendment No. 337]

Food Stamp Program; Categorical Eligibility and Application Provisions of the Mickey Leland Memorial Domestic Hunger Relief Act

AGENCY: Food and Nutrition Service, USDA.

ACTION: Final rule.

SUMMARY: On August 13, 1991, the Department published a rulemaking at 56 FR 40156 which proposed several changes to the Food Stamp Program regulations as a result of certain provisions of the Mickey Leland Memorial Domestic Hunger Relief Act (title XVII, Pub. L. 101–624, enacted November 28, 1990). Comments were solicited on the provisions of the proposed rulemaking through September 12, 1991. This action officially amends

Food Stamp Program regulations to implement the provisions of the proposed rulemaking, taking into consideration comments received from the interested public. The provisions of Public Law 101–624 being implemented by this final action revise requirements for the placement of certain information on the food stamp application, require a combined food stamp and general assistance (GA) application in States that have a Statewide GA application, and extend categorical eligibility to households in which all members receive assistance from a State or local GA program which meets certain requirements.

DATES: The provisions of this action are effective and must be implemented on February 1, 1992; however, the provisions of the introductory text of § 273.2(j), §§ 273.2(j)(3) and (j)(4) only as they relate to categorical eligibility for recipients of local GA, are effective and must be implemented on August 1, 1992.

FOR FURTHER INFORMATION CONTACT: Questions regarding this rulemaking should be addressed to Judith M. Seymour, Supervisor, Eligiblity and Certification Regulations Section, Certification Policy Branch, Program Development Division, Food Stamp Program, Food and Nutrition Service, USDA, 3101 Park Center Drive, Alexandria, Virginia 22302, or by telephone at (703) 756–3496.

SUPPLEMENTARY INFORMATION:

Classification

Executive Order 12291 and Department Regulation 1512–1

This final rule has been reviewed under Executive Order 12291 and Department Regulation 1512–1. The Department has classified this action as not major because it does not meet any of the three criteria identified under the Executive Order. This action will not have an annual effect on the economy of $100 million or more, nor will it result in major increases in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions. It will not have significant adverse effects on competition, employment, investment, productivity, and innovation or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Executive Order 12372

The Food Stamp Program is listed in the Catalog of Federal Domestic Assistance under No. 10.551. For the reasons set forth in the final rule and related notice(s) of 7 CFR 3015, subpart V (48 FR 29115, June 24, 1983), this Program is excluded from the scope of Executive Order 12372, which requires intergovernmental consultation with State and local officials.

Regulatory Flexibility Act

This final rule has been reviewed in relation to the requirements of the Regulatory Flexibility Act of 1980 (5 U.S.C. 601 through 612). Betty Jo Nelsen, Administrator of the Food and Nutrition Service (FNS), has certified that this rule does not have a significant economic impact on a substantial number of small entities. The requirements affect food stamp applicants and recipients and the State and local agencies that administer the Food Stamp Program. The rule simplifies the application and certification process for households containing members who receive assistance from certain GA programs.

Paperwork Reduction Act

The reporting and recordkeeping burden associated with the food stamp application form (FNS–385) is currently approved by the Office of Management and Budget (OMB) under OMB No. 0584–0064. Public reporting burden for form FNS–385 is estimated to average 13.74 minutes per application. This includes time to review instructions, search existing data sources, gather and maintain the needed data, and complete and review the information. The provisions in 7 CFR 273.2(b) (2) and (3) of this rule which change the location of certain information on the form and clarify FNS approval of State-designed forms do not affect the burden estimates currently approved for form FNS–385. The provision of 7 CFR 273.2(j)(4)(i) regarding the certification of programs appropriate for categorical eligibility has a potential workload burden increase; however, the Department believes the burden would be negligible. The remaining provisions of this rule do not contain new or additional reporting or recordkeeping requirements subject to approval by the OMB under the Paperwork Reduction Act of 1980 (44 U.S.C. 3507).

Background

On August 13, 1991, the Department issued a proposed rule concerning three provisions of the Mickey Leland Memorial Domestic Hunger Relief Act, title XVII, Public Law 101–624, 104 Stat. 3359, November 28, 1990 (Leland Act). These Leland Act provisions revised requirements in the Food Stamp Act of 1977 (7 U.S.C. 2011 *et seq.*) (the Act), as amended, for the food stamp application form, required that the general assistance (GA) and food stamp application forms be combined in States that have a single Statewide GA application form, and extended categorical eligibility to households in which all members receive benefits from certain GA programs. The Department received a total of 12 comment letters on the proposed rule. Nine comment letters were from State social services agencies, and three were from advocacy groups. The Department reviewed all comments received, but only those issues that are pertinent and can be addressed by regulation are discussed in detail. For a full understanding of the provisions of this final rule, the reader should refer to the preamble of the proposed rule.

Food Stamp Program Application Form Requirements—7 CFR 273.2(b)

As explained in the preamble to the August 13, 1991 proposed rule, current regulations at 7 CFR 273.2(b)(1) (v), (vi) and (vii) require that the following information be displayed in plain and prominent language "on" the front page of the application form: notification of the household's right to immediately file an incomplete application form as long as it contains the applicant's name and address and signature; a description of the expedited service provisions; and notification that benefits are provided from the date of application. Pursuant to section 1736 of the Leland Act, the Department proposed to revise 7 CFR 273.2(b)(1) (v), (vi) and (vii) to require that certain information about the application process be located "on or near" the front page of the application form. The Department also proposed to amend 7 CFR 273.2(b)(3) to change the heading from "Deviations" to "Design", to add a reference to GA application forms, and to add a phrase to clarify that on-line application forms used in connection with automated systems are considered deviations from the national form and are subject to FNS approval.

Two commenters supported the change requiring certain information to be "on or near" rather than "on" the front page of the application form. Two commenters recommended that FNS defined "on or near" the front page. One of these commenters suggested that FNS specify that the term means on the front page, a tear-off page, or an attached cover sheet. As indicated in the preamble to the proposed rule, the intent of Congress in making the change was to give State agencies more flexibility in designing food stamp application forms so that the application forms could be integrated with those for assistance from other programs. The legislative

history (Congressional Record, October 23, 1990, page H11863) indicates that Congress intended the statements to be prominent and immediately apparent to an applicant at the beginning of the application process. Under the provisions of 7 CFR 273.2(b)(3), FNS is responsible for reviewing all State agency-designed food stamp application forms. In this review, FNS will be mindful of the Congressional intent that applicants be immediately aware of their right to receive benefits from the date of application, to file an incomplete application form, and to receive expedited service. FNS will monitor State agency food stamp application forms to ensure that they are in compliance with the Food Stamp Act and regulations. The Department believes that limiting State agency flexibility by regulating a definition of "near" would be counter to Congressional intent. Accordingly, the proposed amendment to 7 CFR 273.2(b)(1) (v), (vi) and (vii) is adopted as final by this action without change.

There were no comments on the proposed changes to 7 CFR 273.2(b)(3). The proposal to change the heading of 7 CFR 273.2(b)(3) from "Deviations" to "Design" was made inadvertently and is not included in this final rule. The Department intended to correct a typographical error in the first sentence of 7 CFR 273.2(b)(3). The word "designated" should read "designed" and this error is corrected by this final action. The Department also is taking this opportunity to add a phrase to the text of 7 CFR 273.2(b)(3) to clarify that FNS must approve any deviations from the model application form, including any State agency deviations in the design or the contents. The proposed amendment to 7 CFR 273.2(b)(3) to add a reference to GA application forms is not being adopted. Instead, this rule amends 7 CFR 273.2(b)(3) to provide that FNS must approve deviations from the model food stamp application to accommodate the use of "multi-program" application forms. The proposed amendment to 7 CFR 273.2(b)(3) to add a reference to on-line application forms is adopted as final without change.

Combined Application Form for General Assistance (GA) and Food Stamps—7 CFR 273.2(j)(3)

Section 1740 of the Leland Act modified the combined application form requirement in section 11(i)(3) of the Food Stamp Act to require a combined GA and food stamp application form only in States that have a single Statewide GA application form. The Leland Act also required that if there is more than one GA application form in a State, offices which administer both GA and the Food Stamp Program shall provide households a food stamp application form at the time of their application for GA, along with information concerning how to apply for food stamps. The legislative history (House Report 101–916, p. 1097) indicates that if separate offices provide the GA and food stamp benefits, there is no requirement to combine or provide both application forms.

Pursuant to section 1740 of the Leland Act and the relevant legislative history (House Report 101–916), the Department proposed to amend the introductory text of 7 CFR 273.2(j) and revise 7 CFR 273.2(j)(3)(iii) to require a combined food stamp and GA application form only in States with a single Statewide GA application form. For State agencies that do not have a single Statewide GA form but have offices in which the same agency administers both GA and food stamps, the Department proposed that these offices should provide households applying for GA with a food stamp application form at the time of their application for GA, along with information concerning how to apply for food stamps and information about possible categorical eligibility. If separate offices administer GA and food stamps, the Department proposed that the State agencies must advise all GA applicant households that they may be categorically eligible for food stamps and encourage the local agencies to provide applicant households with food stamp application forms.

One commenter indicated that local GA programs often operate autonomously from the State agency and the State agency is not in a position to ensure that GA applicant households are advised of potential food stamp eligibility. The commenter recommended that the requirement that State agencies advise GA households of their potential categorical eligibility for food stamps be removed from the final regulation.

The Department did not intend in the proposed rule to create a monitoring burden for State agencies. Rather, the Department wanted to indicate the importance of informing GA recipients of their potential categorical eligibility for food stamps. Therefore, we are adopting the commenter's suggestion and revising proposed § 273.2(j)(3)(iii)(C) to require State agencies to provide GA offices with food stamp application forms and encourage them to disseminate the forms and refer GA recipients to local food stamp offices and to advise GA applicants of their potential categorical eligibility for food stamps.

For clarification, the Department has also made minor editorial changes in the proposed provision, such as inserting the word "form" after "application," when the form itself, rather than the process, is meant. With these changes, the proposed amendments to the introductory text of 7 CFR 273.2(j) and 7 CFR 273.2(j)(3)(iii) are adopted as final.

Categorical Eligibility for GA Households—Section 273.2(j)(4)

Section 1714 of the Leland Act amended section 5(a) of the Food Stamp Act to extend categorical eligibility to recipients of GA from certain programs. The Act, as amended, requires that households in which each member receives benefits under a State or local GA program shall be eligible for food stamps if the GA program meets criteria established by the Secretary for ensuring that the program is appropriate for categorical treatment. These households are eligible for food stamps based on their receipt of GA, except that the provisions of section 6, section 16(e)(1), and the third sentence of section 3(i) of the Food Stamp Act would continue to apply. These sections prohibit participation by certain disqualified and ineligible households and individuals, household members who do not provide their social security numbers (SSNs), and institutionalized individuals.

Current regulations at 7 CFR 273.2(j) contain the categorical eligibility provisions for recipients of public assistance (PA) and Supplemental Security Income (SSI). The Department proposed to amend the introductory text of 7 CFR 273.2(j) and to revise 7 CFR 273.2(j) to add a new paragraph 273.2(j)(4) containing the requirements for GA categorical eligibility.

The preamble to the proposed rule discussed a number of issues in connection with categorical eligibility for GA households, including criteria for a GA program appropriate for conferring categorical eligibility on recipients of assistance from the program, legislative restrictions, combination households, verification and deemed requirements, the definition of "recipients" of GA, reactivation of denied cases, claims, and quality control. These issues and the comments received are discussed below.

Application Processing

One comment was received on the statement in the proposed amendment to 7 CFR 273.2(j) that "Jointly processed and categorically eligible households shall be certified in accordance with

food stamp program procedural, timeliness and notice requirements." The commenter was concerned that food stamp benefits might be delayed pending approval of a household for GA benefits. The Department would like to clarify that the intent of the categorical eligibility provision is to facilitate food stamp participation; it does not in any way reduce or delay the benefits of GA applicants. A household applying for food stamps and GA simultaneously would have the food stamp application processed using food stamp time frames in accordance with 7 CFR 273.2(j)(1) and the GA application would be processed under the GA program time frames. Food stamp benefits would not be delayed pending the disposition of the GA application, and the GA program would not have to expedite the GA application. To emphasize the requirement to apply the expedited and 30-day processing time frames to cases involving applicants who may be categorically eligible, the Department is adding a phrase to the revised introductory text of 7 CFR 273.2(j) to refer specifically to the 5-day and 30-day application processing requirements. With this change, the proposed changes to the introductory text of 7 CFR 273.2(j) are adopted as final.

Appropriate Programs

In § 273.2(j)(4)(i) (A) through (E) of the proposed rule, the Department specified the criteria State and local GA programs would have to meet in order to be considered "appropriate" for categorical eligibility. Programs meeting these criteria would be considered certified as appropriate programs without prior FNS review. The Department also proposed that State agencies submit to FNS requests for certification of programs that do not meet all the criteria. The Department proposed that appropriate programs must:

1. Have income and resource eligibility standards either separate from or included in the payment standard;

2. Serve a population whose gross income does not exceed 130 percent of the poverty level, based on the Federal income poverty levels established as provided in section 672(2) of the Community Services Block Grant Act, 42 U.S.C. 9902(2);

3. Serve a population whose resources, as determined by the GA program, do not exceed $2,000, including liquid resources and a portion of the value of automobiles (excluding, at the option of the GA program, the value of low-cost automobiles);

4. Provide benefits that meet the regulatory definition of GA; and

5. Provide benefits for at least three consecutive months without reapplication.

According to one commenter, monitoring the kinds of GA administered by local agencies would cause administrative difficulties for the State agency. Not all components of the GA programs within the State would meet the regulatory requirements, and implementation would require computer programming changes. The State agency recommended that GA categorical eligibility apply only to States that administer Statewide GA programs. The amended section 5(a) of the Act, however, specifically authorizes categorical eligibility for households in which each member receives "State or local" general assistance. In addition, according to the Conference Report for the Leland Act (House Report 101–916, page 412), "The Senate bill extends categorical eligibility ("automatic" eligibility for food stamps) to recipients of State or local general assistance (GA) benefits where the GA program meets standards set by the Secretary to assure that it serves primarily people appropriate to be categorically eligible * * *" The House provision had authorized categorical eligibility for recipients under State general assistance programs. The Conference Committee adopted the Senate provision. Therefore, the Department has no discretion in requiring that recipients of GA from appropriate local GA programs be categorically eligible.

The Department received numerous comments objecting to the proposed income, resource, or benefit period criteria for an appropriate program. One commenter pointed out that in high-cost areas, some GA programs may have income limits comparable to limits in the Aid to Families with Dependent Children (AFDC) program which bases income eligibility on a certain standard of need and which would allow participation by some households whose income exceeds 130 percent of the poverty level. Under current regulations for PA and SSI categorical eligibility, recipients of AFDC in these areas are categorically eligible, even though their income exceeds 130 percent of the poverty level. Under the proposed GA categorical eligibility rules, recipients of GA would not be categorically eligible if the GA program allowed participation by households whose income exceeds 130 percent of the poverty level.

Another commenter felt that the proposed rule was vague in its specification of resource limits and questioned the meaning of the term "portion of the value of automobiles." Another commenter indicated that the conditions were far too stringent and should be revised to test whether the program predominantly serves a population that would fit the food stamp income and resource guidelines. Several commenters indicated the criterion in proposed § 273.2(j)(4)(i)(E) that appropriate GA programs must provide benefits for at least three months without a new application was too restrictive. A commenter suggested that the statement in the preamble to the proposed rulemaking that "* * * programs providing emergency assistance limited to one or two months are not appropriate for conferring categorical eligibility on recipients of the assistance * * *" be substituted as a criterion for an appropriate program in place of proposed § 273.2(j)(4)(i)(E).

In response to the comments received on the proposed rule, the Department has reviewed and modified the proposed criteria for an appropriate program. In place of the requirement that appropriate programs serve a population whose income does not exceed 130 percent of the poverty level, this final rule provides that eligibility standards for an appropriate GA program must not exceed those of the food stamp, AFDC or SSI programs. This will ensure that the GA programs are appropriate for conferring categorical eligibility while extending automatic certification of GA programs to those that use standards comparable to the food stamp, AFDC or SSI standards. The rules of the GA program, including those governing automobiles, would determine which income and resources would be counted. The specific reference to automobiles as a resource has been deleted in the final rule.

The food stamp limits for elderly or nonelderly households would apply, as appropriate.

Although most GA programs will automatically be certified as appropriate for categorical eligibility because their income and resource standards are lower than those for good stamps, AFDC, or SSI, there may be some programs with standards that exceed these limits. In order to provide flexibility in determining which programs are appropriate for categorical eligibility, this final rule allows State agencies to ask FNS to certify programs that do not automatically meet the criteria specified for an appropriate program. If a GA program allows participation by some individuals whose income or resources exceed the food stamp limits because of special circumstances or high costs in the area, the Department would take these factors into account in determining whether or

not the program is appropriate for categorical eligibility.

Also, after reviewing the comments received, the Department believes it is not necessary to restrict categorical eligibility to programs that provide ongoing assistance for a minimum of three months without a new application. The Department intended that receipt of aid for a one-time emergency would not make a GA recipient categorically eligible for food stamps and proposed the three-month limitation as a way to avoid that result. Commenters agreed that recipients of emergency assistance should not be categorically eligible but indicated that the criterion would prevent recipients of ongoing assistance from some GA programs from being categorically eligible. Therefore, the Department has revised this criterion to require that the program provide assistance that is not limited to emergency assistance, without specifying a time period for which the asistance must be provided.

The final action provides the following criteria for an appropriate program in 7 CFR 273.2(j)(4)(i)(A) through (C):

1. The program must have income and resource eligibility standards which may be separate from or included in the benefit computation and which do not exceed those of the food stamp, AFDC, or SSI programs;

2. The program must provide GA benefits as defined in 7 CFR 271.2; and

3. The program must provide assistance that is not limited to emergency assistance.

In proposed § 273.2(j)(4)(i), the Department proposed that if a State agency is not sure that a program meets all the criteria, it may submit a program description to FNS for certification as an appropriate program. The Department proposed that the State agency submit a description of the program containing the type of assistance provided, the income and resource eligibility limits, and the period for which the GA is provided. There were no comments on this provision, and it is adopted as final without change.

Legislative Restrictions

In accordance with section 1714 of the Leland Act, the Department proposed in § 273.2(j)(4)(iv) that the following individuals may not participate as a member of a categorically eligible GA household: an individual disqualified for intentional program violation; an individual (not the head of household) disqualified for failure to comply with the work requirements of 7 CFR 273.7; an individual who fails to provide or apply for an SSN; and individuals who are ineligible aliens, ineligible students, SSI recipients in a cashout State, or individuals institutionalized in a nonexempt facility. The Department proposed in § 273.2(j)(4)(v) that the disqualifications for households that refuse to cooperate, transfer resources, or contain a striking member would apply to GA households who would otherwise be categorically eligible. In addition, households in which the head of household fails to comply with a work requirement of 7 CFR 273.7 could not be categorically eligible. In the preamble to the proposed rule, the Department indicated that the exceptions to categorical eligibility listed in the Leland Act for GA recipients differed from the exceptions in the Food Security Act of 1985 (Pub. L. 99–198, December 23, 1985) for PA and SSI categorical eligibility.

The Department received several comments relating to the inconsistencies in these exemptions for GA, PA and SSI households. One commenter strongly recommended that the categorical eligibility determination be uniform for the three programs. Another said the Department should consider collapsing the provisions for categorical eligibility for GA recipients into those for PA recipients. The third recommended that the provisions regarding combination households should be clarified to ensure that PA or SSI households need not meet the GA restrictions.

In response to these comments, the Department reexamined the legislation and the legislative history surrounding the PA/SSI and GA categorical eligibility provisions. As explained in the preamble to regulations authorizing PA/SSI categorical eligibility (51 FR 28197, August 5, 1986), Congress specified in the Food Security Act that the provisions of sections 6(b) (intentional program violation), 6(d)(2)(work registration exemptions), 6(g), (SSI recipients in cash-out States), and 3(i) (institutionalized individuals) would continue to apply to recipients of PA and or SSI who would otherwise be categorically eligible. The PA and SSI categorical eligibility regulations issued August 5, 1986 included some of the disqualifications in section 6 of the Food Stamp Act in addition to those Congress specifically cited in the Food Security Act. These exemptions from categorical eligibility were based on the legislative history (Senate Report 99–145, pp. 243–244; House Report 99–271, pp. 141–2 and House Conference Report 99–447, p. 521), which indicated Congressional intent that no household disqualified from food stamp participation because of violation of program rules would be reinstated through categorical eligibility. The rationale for the exemptions from PA and SSI categorical eligibility is more fully explained in the preamble to the interim regulations published August 5, 1986. The disqualification in 7 CFR 273.22 for households containing a member who fails to comply with a workfare requirement was added to the final regulation (54 FR 24510, June 7, 1989).

In authorizing categorical eligibility for recipients of assistance from certain GA programs, Congress specified that all the reasons for ineligibility or disqualification in section 6 of the Food Stamp Act would apply to GA recipients who would otherwise be categorically eligible. The Department understands the concerns of State agencies that requirements for categorical eligibility for recipients of PA, SSI, and GA be uniform.

However, the Department believes that such a change should first be published in a proposed rulemaking and adopted only after comments are considered. Therefore, provisions of proposed § 273.2(j)(4) (iv) and (v) regarding ineligible household members and ineligible households are adopted as final without change.

Combination Households

The Department proposes in § 273.2(j)(4)(vi) that households consisting entirely of a combination of recipients of PA, SSI, or GA would be categorically eligible, unless one of the restrictions in 7 CFR 273.2(j)(2) or proposed § 273.2(j)(4) applies. The Department also proposed that in a combination PA/SSI/GA household, the provisions regarding ineligible households and members in 7 CFR 273.2(j)(2) (iii) and (v) would apply to the recipients of PA or SSI. The provisions of proposed § 273.2(j)(4)(iv) and § 273.2(j)(4)(v) would apply to the GA recipients. A commenter suggested that the regulatory language be clarified to ensure that the rules governing GA recipients would not be applied to recipients of PA or SSI. In this final rule, the Department has reworded § 273.2(j)(4)(vi) for clarification.

Verification and Deemed Food Stamp Requirements

In § 273.2(j)(4)(ii) of the proposed rule, the Department proposed to require State agencies to verify that each household member receives GA from a program that meets the criteria for a program appropriate for categorical treatment or that the household contains only recipients of PA, SSI, or GA from an appropriate program. The State agency would also verify that the

household includes no individuals who have been disqualified as provided in 7 CFR 273.2(j)(2)(v) or proposed § 273.2(j)(4)(iv). If household composition were questionable, it would be verified in accordance with 7 CFR 273.2(f). The Department also proposed to identify in § 273.2(j)(4)(iii) those factors of eligibility that are deemed to be satisfied for categorically eligible GA households. Those factors are: resources (except in the case of transferred resources), gross and net income amounts, residency, and sponsored alien information. All other program requirements, including the requirement to provide or apply for an SSN, would apply to categorically eligible GA households. Because GA programs may not routinely require or verify SSNs, GA household members would be required to provide their SSNs in accordance with 7 CFR 273.6. The State agency would verify the numbers by submitting them to the Social Security Administration, as required at 7 CFR 273.2(f)(1)(v), unless the numbers had been verified through the Income and Eligibility Verification System. No comments were received on this provisions and it is adopted as final without change.

The Department proposed to make conforming amendments at 7 CFR 273.8(a) and 7 CFR 273.9(a) to provide that households categorically eligible as defined in proposed § 273.2(j)(4) do not have to meet the resource limits and definitions or the gross and net income eligibility standards. The proposed rule also include a conforming amendment at 7 CFR 273.10(g)(1)(ii) to provide that a potentially eligible household whose food stamp case is denied shall be asked to inform the State agency if it is approved to receive PA and/or SSI benefits or benefits from a GA program. The State agency will determine if the GA program meets the criteria for a program appropriate for conferring categorical eligibility on the household. The Department received no comments on these proposed changes, and the conforming amendments to 7 CFR 273.8(a), 7 CFR 273.9(a), and 7 CFR 273.10(g)(1)(ii) are adopted as final without change.

Recipients and Reactivation of Denied Cases

Section 1714 of the Leland Act provides that households in which each member receives benefits under an appropriate State or local GA program shall be eligible for food stamps, with the exceptions noted above. The Department proposed in revised 7 CFR 273.2(j) that "recipients" include individuals whose benefits are suspended or recouped, who are authorized to receive GA but have not yet received payment, and who are entitled to GA benefits but who are not paid such benefits because the grant is less than a specified minimum payment. The Department also proposed to add to 7 CFR 273.2(j)(3) (i) and (ii) a reference to the effective date of categorical eligibility for GA households.

A commenter indicated that the definition of "recipients" in the proposed rule differs from the definition of a recipient who can qualify for a medical deduction, but it conforms to the definition used for a disabled individual. The definition of "elderly or disabled member" in 7 CFR 271.2 indicates that an individual must be "receiving" benefits from specified programs in order to be considered disabled. However, Policy Memo 89–16, August 21, 1989, clarifies that a household member is considered disabled if the person has been certified to receive disability benefits but the initial payments have not yet been received. The commenter may be referring to the statement in 7 CFR 273.9(d)(3) that "* * * persons receiving emergency SSI benefits based on presumptive eligibility are eligible for" the medical deduction. These individuals are receiving SSI benefits, so they meet the definition in 7 CFR 271.2 of a disabled person. The Department sees no need to change the proposed definition of a PA, SSI or GA recipient as it pertains to categorical eligibility, and the proposed definition is adopted as final. The proposed addition to 7 CFR 273.2(j)(3) (i) and (ii) has been modified to specify the effective date of categorical eligibility for recipients of State and local GA. With that change, the proposed amendment to 7 CFR 273.2(j)(3) (i) and (ii) is adopted as final without change.

Suspension of Cases Entitled to Zero Benefits

Current regulations at 7 CFR 273.2(j)(2)(vii)(F) provide that the provisions of 7 CFR 273.10(e)(iii)(A) do not apply to categorically eligible PA and SSI households. Section 273.10(e)(2)(iii) gives State agencies two options for handling the cases of households of three or more members who are eligible but not entitled to any benefits because their net income exceeds the level at which benefits are provided. Under 7 CFR 273.10(e)(2)(iii)(A), State agencies may deny the applications of these households. Since the agency cannot deny the application of a categorically eligible household, this option cannot be applied. Therefore, State agencies must follow the option in 7 CFR 273.10(e)(2)(iii)(B), which is to suspend the households. The Department proposed in § 273.2(j)(4)(iii)(C) to provide that the denial option in 7 CFR 273.10(e)(2)(iii)(A) could not be applied to categorically eligible GA households. There were no comments on this provisions, and it is adopted as final.

Claims

Current regulations at 7 CFR 273.18(a)(2) and (b)(2)(vi) provide that a claim will be handled as an administrative error claim if the overissuance was caused by State agency action or failure to take action which resulted in an incorrect determination of eligibility for PA, provided a claim can be calculated based on a change in net income and/or household size. The Department proposed to amend 7 CFR 273.18(a)(2), 7 CFR 273.18(b)(1)(iv) and 7 CFR 273.18(b)(2)(vi) to expand the provisions for categorical eligibility to include GA as well as PA and SSI. No comments were received on the proposed provision, and it is adopted as final without change.

Quality Control (QC)

The Department proposed to adopt for GA categorical eligibility the same policy regarding QC variances that applies to PA/SSI categorically eligible cases. There were no comments on the provision, and the proposed procedure is adopted as final. A QC variance will be cited if a household received an incorrect food stamp allotment based on incorrect information from State or local GA offices. QC reviewers are responsible for verifying the earned and unearned income the household actually received, including the amount of GA benefits, even if the income has already been verified by the GA worker. If the agency providing the GA benefits provides incorrect information which results in an incorrect allotment, a variance will be cited. However, variances are not cited if incorrect information is provided by a Federal agency. Regulations at 7 CFR 275.12(d)(v) provide that a variance resulting from State agency use of information concerning households or individuals received from any Federal source is excluded from the error determination, provided the information is correctly processed by the State agency.

Technical Amendments—Section 273.2(j)

The Department proposed a technical amendment to add a new

§ 273.2(j)(2)(v)(E) to 7 CFR 273.2(j)(2)(v) to address the disqualification of a household member for failure to comply with a work requirement. The Department also proposed to amend 7 CFR 273.2(j)(2)(v)(D) to correct an error in the reference. There were no comments on these provisions, and they are adopted in this final rule without change.

The Department proposed to correct an error in 7 CFR 273.2(j)(1)(iv) by removing the last three sentences. No comments were received, and the correction is adopted as final by this rule. In addition, the Department is taking this opportunity to correct an erroneous reference in 7 CFR 273.12(f)(1) That was overlooked. The reference to § 273.2(j)(2) in the last sentence of 7 CFR 273.12(f)(1) should read "273.2(j)(3)" and is hereby corrected.

Implementation

Section 1781 of the Leland Act requires that the provisions of this rulemaking be effective and implemented the first day of the month beginning 120 days after publication of implementing regulations and requires that regulations be published by specified dates. The law provides that implementing regulations for changes in the food stamp application form and requiring combined food stamp and GA application forms for certain households be published not later than October 1, 1991. The law also requires that regulations implementing the categorical eligibility requirement for recipients of State GA be issued not later than October 1, 1991 and for recipients of local GA not later than April 1, 1992. There were no comments on the implementation dates. The Department has no discretion in this area. Therefore, all provisions except categorical eligibility for recipients of assistance from local GA program are effective and must be implemented on February 1, 1992. Categorical eligibility for recipients of assistance from a local GA program is effective and must be implemented on August 1, 1992. A State GA program is one that is administered by the State; a local GA program is one administered by a county, township, or other local political entity.

One commenter was concerned that State agencies might be required to conduct "desk reviews" to implement the categorical eligibility provision for recipients of State-funded assistance which would qualify them for categorical eligibility. The commenter asked FNS to clarify that State agencies are not required to perform a desk review and that for ongoing cases, the provision would apply at the next redetermination. The implementation provision of this final rule provides that the current caseload shall be converted at household request, at the time of recertification, or when the case is next reviewed, whichever occurs first.

List of Subjects

7 CFR Part 272

Alaska, Civil rights, food stamps, Grant programs-social programs, Reporting and recordkeeping requirements.

7 CFR Part 273

Administrative practice and procedure, Aliens, Claims, Food Stamps, Fraud, Grant programs-social programs, Penalties, Reporting and recordkeeping requirements, Social Security, Students.

Accordingly, 7 CFR parts 272 and 273 are amended as follows:

1. The authority citation for parts 272 and 273 continues to read as follows:

Authority: 7 U.S.C. 2011–2031.

PART 272—REQUIREMENTS FOR PARTICIPATING STATE AGENCIES

2. In § 272.1, a new paragraph (g)(122) is added to read as follows:

§ 272.1 General terms and conditions.

* * * * *

(g) *Implementation.* * * *

(122) *Amendment No. 337.* The provisions of Amendment No. 337 are effective and must be implemented as follows:

(i) State agencies shall implement the provisions of *Amendment No. 337* on February 1, 1992, except as provided in paragraph (g)(122)(ii) of this section.

(ii) The amendments to revise the introductory text of § 273.2(j) and § 273.2(j)(3) as they relate to categorical eligibility and the amendment adding § 273.2(j)(4) are effective and must be implemented February 1, 1992 for recipients of GA from a State program. They are effective and must be implemented August 1, 1992 for recipients of GA from a local program.

(iii) Any variance resulting from implementation of the provisions of this amendment shall be excluded from error analysis in accordance with 7 CFR 275.12(d)(2)(vii) for 90 days from the required implementation date. The provisions must be implemented for all households that newly apply for Program benefits on or after the required implementation date. If for any reason a State agency fails to implement on the required implementation date, restored benefits shall be provided, if appropriate, back to the required implementation date, the date of the food stamp application or the date the household was determined categorically eligible in accordance with § 273.2(j)(4), whichever is later.

(iv) The current caseload shall be converted to these provisions at household request, at the time of recertification, or when the case is next reviewed, whichever occurs first. The State agency must provide restored benefits back to the required implementation date.

PART 273—CERTIFICATION OF ELIGIBLE HOUSEHOLDS

§ 273.2 [Amended]

3. In § 273.2:

a. Paragraphs (b)(1)(v), (b)(1)(vi), and (b)(1)(vii) are amended by adding the words "or near" between the word "on" and the words "the front page" in each paragraph;

b. The first sentence of paragraph (b)(3) is amended by removing the word "designated" and adding "designed" in its place and the second sentence of paragraph (b)(3) is amended by adding after the word "deviation" the words "(design/contents)", by removing the words "combined PA/food stamp" and adding in their place the words "multi-program" and by adding after the words "computer system" the words "(including the use of on-line applications)";

c. The second through the tenth sentences of the introductory text of paragraph (j) are removed and ten new sentences are added.

d. Paragraph (j)(1)(iv) is amended by removing the last three sentences;

e. The heading of paragraph (j)(2) is revised;

f. Paragraph (j)(2)(v)(D) is amended by removing the regulatory citation "273.2" and adding in its place the citation "273.1(e)";

g. A new paragraph (j)(2)(v)(E) is added;

h. The heading of paragraph (j)(3), the introductory text of paragraph (j)(3)(i), paragraphs (j)(3)(ii) and (j)(3)(iii) are revised, and paragraph (j)(3)(iv) is redesignated as paragraph (j)(3)(iii)(D).

i. Newly designated paragraph (j)(3)(iii)(D) is amended by revising the first sentence.

j. Paragraph (j)(4) is redesignated as paragraph (j)(5), and new paragraph (j)(4) is added.

The revisions and additions read as follows:

§ 273.2 Application processing.

* * * * *

(j) PA, GA, and categorically eligible households. * * * The applications of these households shall be processed in

accordance with the requirements of paragraph (j)(1) of this section, and their eligibility shall be based solely on food stamp eligibility criteria unless the household is categorically eligible, as provided in paragraph (j)(2) of this section. If a State has a single Statewide GA application form, households in which all members are included in a State or local GA grant shall have their application for food stamps included in the GA application form. State agencies shall use the joint application processing procedures described in paragraph (j)(1) of this section for GA recipients in accordance with paragraph (j)(3) of this section. The eligibility of jointly processed GA households shall be based solely on food stamp eligibility criteria unless the household is categorically eligible as provided in paragraph (j)(4) of this section. The benefit levels of all households shall be based solely on food stamp criteria. Jointly processed and categorically eligible households shall be certified in accordance with food stamp procedural, timeliness, and notice requirements, including the 5-day expedited service provisions of § 273.2(i) and normal 30-day application processing standards of § 273.2(g). Individuals authorized to receive PA, SSI, or GA benefits but who have not yet received payment are considered recipients of benefits from those programs. In addition, individuals are considered recipients of PA, SSI, or GA if their PA, SSI, or GA benefits are suspended or recouped. Individuals entitled to PA, SSI, or GA benefits but who are not paid such benefits because the grant is less than a minimum benefit are also considered recipients. Individuals not receiving GA, PA, or SSI benefits who are entitled to Medicaid only shall not be considered recipients.

* * * * *

(2) *Categorically eligible PA, SSI, and GA households.* * * *

(v) * * *

(E) Ineligible because of failure to comply with a work requirement of § 273.7.

* * * * *

(3) *Applicant GA households.* (i) State agencies shall use the joint application processing procedures in paragraph (j)(1) of this section for GA households, except for the effective date of categorical eligibility, when the criteria in paragraphs (j)(3)(i) (A) and (B) of this section are met. Benefits for GA households that are categorically eligible, as provided in paragraph (j)(4) of this section, shall be provided from the date of the original food stamp application, the beginning of the period for which GA benefits are authorized, or the effective date of State GA categorical eligibility (August 1, 1992), whichever is later:

* * * * *

(ii) State agencies in which different eligibility workers process applications for GA benefits and PA or food stamp benefits, but procedures otherwise meet the criteria in paragraph (j)(3)(i) of this section may, with FNS approval, jointly process GA and food stamp applications. If approved, State agencies shall adhere to the joint application processing procedures in paragraph (j)(1) of this section, except for the effective date of categorical eligibility for GA households. Benefits shall be provided GA households that are categorically eligible, as provided in paragraph (j)(4) of this section, from the date of the original food stamp application, the beginning of the period for which GA benefits are authorized, or the effective date of State GA categorical eligibility (February 1, 1992) or local GA categorical eligibility (August 1, 1992), whichever is later.

(iii) Requirements for combining the GA and food stamp application forms or providing food stamp application forms to GA applicant households depend on the extent to which application forms and administration of the GA and food stamp programs are integrated.

(A) State agencies that have a single Statewide GA application form shall include the food stamp application form in the GA application form and shall inform GA applicant households that they may be categorically eligible for food stamps. The joint GA and food stamp application form shall clearly indicate that the household is providing information for both programs and is subject to the criminal penalties of both programs for making false statements. The application form must also notify the household that if food stamp benefits are issued before the GA is approved, the food stamp benefits may be reduced without further notice when the GA assistance is approved (as specified in § 273.2(j)(1)(iv) and § 273.13(b)(6)). With FNS approval, the joint GA and food stamp application form may be used for households applying only for food stamps.

(B) State agencies that do not have a single Statewide GA application form but have local offices in which the same agency administers both the GA program and the Food Stamp Program shall provide households applying for a local GA grant with a food stamp application form at the time of their application for GA, along with information concerning how to apply for food stamps, and information about possible categorical eligibility.

(C) If GA and the Food Stamp Program are administered by separate offices and a single application form is not required, the State agency shall encourage the agencies administering GA to refer GA applicants to the local food stamp office or provide applicant households with food stamp application forms and inform GA applicants of their potential categorical eligibility for food stamps. State agencies may allow GA applicants to leave a food stamp application form at the GA office which contains, at a minimum, the applicant's name, address and signature. If the GA office accepts a food stamp application form, it is responsible for forwarding the application form the same day to the appropriate food stamp office for processing. The procedural and timeliness requirements that apply to the application process shall begin when the food stamp office receives the application form. The GA office may advise households that they may receive faster service if they take the application form directly to the food stamp office.

(D) In areas where GA programs are administered by agencies such as the Bureau of Indian Affairs of the Department of the Interior, the State agency shall endeavor to gain the cooperation of the agencies in referring GA applicants to the food stamp office. * * *

(4) *Categorically eligible GA households.* Households in which each member receives benefits from a State or local GA program which meets the criteria for conferring categorical eligibility in paragraph (j)(4)(i) of this section shall be categorically eligible for food stamps unless the individual or household is ineligible as specified in paragraph (j)(4)(iv) and (j)(4)(v) of this section.

(i) *Certification of appropriate programs.* Programs that meet the criteria in paragraphs (j)(4)(i) (A) through (C) of this section shall be considered appropriate for conferring categorical eligibility upon recipients of benefits from the programs. If a program does not meet all of these criteria, the State agency may request certification of the program by FNS as one that is appropriate for categorical eligibility. In requesting certification, the State agency shall submit to the appropriate FNS regional office a description of the program containing, at a minimum, the type of assistance provided, the income and resource eligibility limits, and the period for which the GA is provided.

(A) The program must have income and resource standards which may be separate from or included in the benefit computation and which do not exceed the limits for income and resources of the food stamp, AFDC, or SSI programs. The rules of the GA program apply in determining countable income and resources.

(B) The program must provide GA benefits as defined in § 271.2 of this part.

(C) The program must provide ongoing benefits which are not limited to emergency assistance.

(ii) *Verification requirements.* In determining whether a household is categorically eligible, the State agency shall verify that each member receives PA benefits, SSI, or GA from a program that meets the criteria in paragraph (j)(4)(i) section or that has been certified by FNS as an appropriate program and that it includes no individuals who have been disqualified as provided in paragraph (j)(4)(iv) or (j)(2)(v) of this section. The State agency shall also verify household composition if it is questionable, in accordance with § 273.2(f), in order to determine that the household meets the definition of a household in § 273.1(a).

(iii) *Deemed eligibility factors.* When determining eligibility for a categorically eligible household, all Food Stamp Program requirements apply except the following:

(A) Resources. None of the provisions of § 273.8 apply to categorically eligible households except the second sentence of § 273.8(a) pertaining to categorical eligibility and § 273.8(i) concerning transfer of resources. The provision on § 273.10(b) regarding resources available the time of the interview does not apply to categorically eligible households.

(B) Gross and net income limits. None of the provisions in § 273.9(a) relating to income eligibility standards apply to categorically eligible households, except the fourth sentence pertaining to categorical eligibility. The provisions in §§ 273.10(a)(1)(i) and 273.10(c) relating to the income eligibility determining also do not apply to categorically eligible households.

(C) Zero benefit households. The provision of § 273.10(e)(2)(iii)(A) which allows a State agency to deny the application of a household with three or more members entitled to no benefits because its net income exceeds the level at which benefits are issued does not apply to categorically eligible households. All eligible households of one or two persons must be provided the minimum benefit, as required by § 273.10(e)(2)(ii)(C).

(D) Residency.

(E) Sponsored alien information.

(iv) *Ineligible household members.* No person shall be included as a member of an otherwise categorically eligible household if that person is:

(A) An eligible alien, as defined in § 273.4;

(B) An ineligible student, as defined in § 273.5;

(C) Disqualified for failure to provide or apply for an SSN, as required by § 273.6;

(D) A household member, not the head of household, disqualified for failure to comply with a work requirement of § 273.7;

(E) Disqualified for intentional program violation, as required by § 273.16;

(F) An SSI recipient in a cash-out State, as defined in § 273.20; or

(G) An individual who is institutionalized in a nonexempt facility, as defined in § 273.1(e).

(v) *Ineligible households.* A household shall not be considered categorically eligible if:

(A) It refuses to cooperate in providing information to the State agency that is necessary for making a determination of its eligibility or for completing any subsequent review of its eligibility, as described in § 273.2(d) and § 273.21(m)(1)(ii);

(B) The household is disqualified because the head of household fails to comply with a work requirement of § 273.7;

(C) The household is ineligible under the striker provisions of § 273.1(g); or

(D) The household is ineligible because it knowingly transferred resources for the purpose of qualifying or attempting to qualify for the Program, as provided in § 273.8(i).

(vi) *Combination households.* Households consisting entirely of recipients of PA, SSI and/or GA from a program that meets the requirements of § 273.2(j)(4)(i) shall be categorically eligible in accordance with the provisions for paragraphs (j)(2)(iii) and (j)(2)(v) of this section for members receiving PA and SSI or provisions of paragraphs (j)(4) (iv) and (v) of this section for members receiving GA.

* * * * *

§ 273.8 [Amended]

4. In § 273.8, the second sentence of paragraph (a) is amended by adding the words "or 273.2(j)(4)" after the regulatory citation "§ 273.2(j)(2)".

§ 273.9 [Amended]

5. In § 273.9, the fourth sentence of the introductory text of paragraph (a) is amended by adding the words "or 273.2(j)(4)" after the regulatory citation "§ 273.2(j)(2)".

§ 273.10 [Amended]

6. In § 273.10, the third sentence of paragraph (g)(1)(ii) is amended by removing the words "NPA food stamps are" and adding in their place the words "food stamp application is" and by adding the words "or benefits from a State or local GA program" after the words "PA and/or SSI benefits."

§ 273.12 [Amended]

7. In § 273.12, the last sentence of (f)(1) is amended by removing the reference to "§ 273.2(j)(2)" and adding a reference to "§ 273.2(j)(3)" in its place.

§ 273.18 [Amended]

6. In § 273.18:

a. Paragraph (a)(2) is amended by adding the words "or general assistance" after the words "public assistance."

b. Paragraph (b)(1)(iv) is amended by adding ", or GA" after "PA"; and

c. Paragraph (b)(2)(vi) is amended by adding the words "or GA" after "PA."

Dated: November 27, 1991.

Betty Jo Nelsen,

Administrator.

[FR Doc. 91-29014 Filed 12-2-91; 10:33 am]

BILLING CODE 3410-30-M

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7 CFR Parts 272, 273, 274, and 280

[Amendment No. 338]

Food Stamp Program; Deduction and Disaster Provisions From the Mickey Leland Memorial Domestic Hunger Relief Act

AGENCY: Food and Nutrition Service, USDA.

ACTION: Final rule.

SUMMARY: The Department published a proposed rulemaking at 56 FR 40164, on August 13, 1991, which proposed amendments to the Food Stamp Program regulations to implement three Program provisions contained in the Mickey Leland Memorial Domestic Hunger Relief Act (title XVII, Pub. L. 101-624, 104 Stat. 3783, November 28, 1990). This action makes final only two of the provisions of the Leland Act: (1) Using a standard shelter expense estimate in lieu of verification for homeless households with shelter costs and (2) providing for issuance of food stamp benefits in disasters. The third provision of the Leland Act regarding simplifying resource and eligibility determinations by more specifically defining criteria by which a resource can be considered

inaccessible will be reproposed in a future rulemaking. The Department has decided that it is necessary to seek additional comments on a revised version of this provision because of confusion concerning the original proposal.

EFFECTIVE DATE: The provisions of this rule are effective and must be implemented on February 1, 1992.

FOR FURTHER INFORMATION CONTACT: Judith M. Seymour, Eligibility and Certification Regulation Section, Certification Policy Branch, Program Development Division, Food Stamp Program, Food and Nutrition Service, USDA, 3101 Park Center Drive, Alexandria, Virginia 22302.

SUPPLEMENTARY INFORMATION:

Classification

Executive Order 12291/Secretary's Memorandum 1521–1

This final rule has been reviewed under Executive Order 12291 and the Secretary of Agriculture Memorandum No. 1521–1. The Department has classified this rule as nonmajor. The rule will not have an annual effect on the economy of $100 million or more. The rule will have little or no effect on costs or prices for consumers, individual industries, Federal, State or local government agencies or geographic regions. Further, the rule will not have significant adverse effects on competition, employment, investment, productivity, innovation or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Executive Order 12372

The Food Stamp Program is listed in the Catalog of Federal Domestic Assistance under No. 10.551. For the reasons set forth in the final rule and related notice(s) to 7 CFR 3015, subpart V (48 FR 29115, June 24, 1983), this Program is excluded from the scope of Executive Order 12372 which requires intergovernmental consultation with State and local officials.

Regulatory Flexibility Act

This action has been reviewed with regard to the requirements of the Regulatory Flexibility Act of 1980 (5 U.S.C. 601–612). Betty Jo Nelsen, Administrator of the Food and Nutrition Service (FNS), has certified that this action will not have a significant economic impact on a substantial number of small entities. State and local agencies that administer the Program will be the most affected. The rule increases benefits for certain households that incur shelter expenses or lose food in a disaster.

Paperwork Reduction Act

The provision in § 273.9(d)(5)(i) of this final action which establishes a special shelter deduction for homeless households will result in a change to form FNS–387, Application Worksheet. The "Shelter Deduction" section of Form FNS–387 will need to be revised to reflect that there are now two methods of computing a shelter deduction. Current burden estimates of form FNS–387 are based on an average national caseload and assume that all households will be entitled to a shelter deduction. Although the new procedures for computing a shelter deduction for homeless households will result in a decrease in burden for such households, the procedure does not alter the methodologies used for determining overall burden associated with FNS–387 and therefore, the procedure does not result in a change to the burden estimates currently approved. Separating the "Shelter Deduction" portion of the form in this manner does not significantly alter the current burden estimates for form FNS–387 as approved under OMB No. 0584–0064. The remaining provision of this final action does not contain reporting or recordkeeping requirements subject to approval by the OMB under the Paperwork Reduction Act of 1990 (44 U.S.C. 3507).

Background

On August 13, 1991 at 56 FR 40164, the Department published a proposed rulemaking which would amend the Food Stamp Program regulations to reflect several sections of the Mickey Leland Memorial Domestic Hunger Relief Act (hereafter called the Leland Act). The proposed rule affected FNS regulations at 7 CFR 273.8, 273.9, and 280.1. A minor amendment was proposed for 7 CFR 274.6. The Department accepted comments on the proposed rule through September 12, 1991. A total of twenty comments were received. Fifteen comment letters were received from State agencies; one letter was received from a County agency, and four letters were received from advocate groups. All comments were reviewed and given full consideration for inclusion in this final rulemaking. Comments which suggested legislative changes or were unclear or not pertinent to this rulemaking are not addressed in this preamble. For a full understanding of the provisions of this final rule, the reader should refer to the preamble of the proposed rule. Because of confusion concerning the proposed rule affecting 7 CFR 273.8 (setting forth criteria for determining when a resource is inaccessible), the Department is separating this provision from the final rulemaking. The Department intends to re-propose an amendment to 7 CFR 273.8 to implement this Leland Act provision in a separate rulemaking.

Estimates in Lieu of Verification for Homeless Households With Shelter Costs—7 CFR 273.9

In the August 13th rulemaking, the Department proposed to implement Section 1737 of the Leland Act by amending 7 CFR 273.9(d) to require State agencies to use a standard estimate of the shelter expenses that may reasonably be expected to be incurred by households in which all members are homeless but that are not receiving free shelter throughout the month. The proposed rule also provided that State agencies may opt to develop the estimate provided the estimate is consistent with costs incurred by homeless people for shelter. If the State agency does not develop their own standard estimate, the Department proposed that the standard estimate amount be equal to 50 percent of the Food Stamp Program's FY 1991 maximum shelter cap for non-elderly/non-disabled households ($93). Households which receive free housing and utilities throughout the month would *not* be eligible for the standard estimate. Moreover, homeless households with shelter costs higher than the standard estimate would be able to claim these higher costs if they can be reasonably verified. If there is no such verification, the standard estimate would be used. Finally, the proposal provided that homeless households with extremely low shelter costs would also be allowed to claim the standard estimate.

The Department received several comments on this provision. Two commenters included in their correspondence an example of a situation experienced by certain homeless households and explained how section 1737 of the Leland Act was written to address this type of situation. The commenters suggested the example be included in the preamble of the final rule so State agencies could understand the intent of the provision. The Department agrees and is including the example as follows: In some parts of the country, homeless individuals receive general assistance (GA) benefits and use these benefits for part of the month to rent a room on a daily or weekly basis. Part of the way through the month, the GA payment is likely to be used up and the individual is then back

on the street or in a homeless shelter. Since the individual has no lease and does not rent a room on an ongoing basis, the individual often cannot document ongoing shelter costs that he/she has paid for shelter for part of the month.

Several comments received by the Department discussed the problems homeless households face in providing verification for shelter expenses. As the previously discussed example shows, homeless individuals can move around during a month and there is a possibility that needed verification could never be obtained. The question that is raised is how can homeless households verify shelter costs under circumstances cited in the above example. Current regulations at 7 CFR 273.2(f) provide information on verification requirements and must be used when appropriate. The Department believes that the need for a specific type of verification for shelter costs can be evaluated on a case-by-case basis and that a caseworker's judgment is important in these cases. For example, if a homeless individual claims to have incurred shelter costs for several nights and the costs are comparable to costs incurred by homeless people for shelter, the State agency may decide to accept this information as adequate verification and not require further verification. If the shelter costs reported seem questionable and there is no other documentation to support the household's shelter costs, collateral contacts (such as a landlord, relative, etc.) can be used. In order to emphasize that caseworkers should use their own judgment in verifying shelter costs for homeless households, the Department is including such a provision in the final rule. Several commenters asked whether a homeless household can be eligible for a standard utility allowance (SUA). A homeless household which uses the special standard estimate is not entitled to the SUA since average utility costs are included in the estimate. Depending on their circumstances, other homeless households may be entitled to the SUA, as provided in 7 CFR 273.9(d)(6).

Another issue raised by commenters was the ability of homeless households to predict if they will have shelter expenses in future months. Several commenters were of the opinion that it is unreasonable to expect homeless households to know whether they will have shelter expenses at some future time. One commenter asked about a homeless household that does not have any shelter expenses in the 30 days prior to the food stamp certification interview but expects to have some shelter costs in the future. The Department wishes to point out that homeless households must be prospectively budgeted; thus, the household's shelter expenses must be projected over the length of the certification period and appropriate benefits issued. If a homeless household cannot predict with any certainty what future shelter costs will be, 7 CFR 273.10(f) requires that households be assigned the longest certification periods based on the predictability of the household's circumstances. The State agency has the right to certify the household for three months and can continue to do so until some kind of pattern regarding shelter costs can be observed. Once there is a noticeable pattern to a homeless household's shelter costs, the certification period can be adjusted accordingly. Moreover, homeless households are still required to report changes in their circumstances, including shelter costs, in accordance with 7 CFR 273.12(a)(iii) and State agencies must act upon reported changes within the timeframes of 7 CFR 273.12(c).

Based on the above discussion, the Department believes current regulations adequately address the issue of predicting future shelter expenses for homeless households. Section 1737 of the Leland Act also requires State agencies to use shelter expenses "* * * that may reasonably be expected to be incurred * * *" by homeless households when they develop their own shelter estimate. The Department is revising the proposed rule to state that homeless households that incur or reasonably expect to incur shelter costs throughout the month shall be eligible for the estimate. This change will more closely align the final rule to the Leland Act.

Several commenters questioned the adequacy of $93 as the standard estimate for homeless households, particularly in those states where the cost of housing varies by geographic areas of the state. Further, limiting the shelter estimate to $93 does not allow the amount to increase in the future as shelter costs rise.

The Department has considered the commenters' concerns and has reexamined the entire provision. In developing an alternate standard estimate for the final rule, the Department analyzed the full quality control data base for Fiscal Year (FY) 1989 for all non-elderly one-person households with an identifiable shelter expense. To derive a figure for FY 1992, the Department then updated this expense by using the same increase in the shelter, fuel, and utilities component of the Consumer Price Index (CPI) that were used in adjusting the standard shelter deduction between FY 1989 and FY 1992. For non-elderly one-person households, the adjusted national average monthly shelter expense is $255.12 per month. Since the standard shelter estimate is intended for homeless households which do not incur shelter expenses for the whole month, the Department is using half of the national average shelter expenses for non-elderly one-person households, which is $127.56, rounded up to $128.00 per month. This figure will be updated annually when the shelter cap is adjusted using the same method that is used in indexing the shelter cap. State agencies will be notified by memorandum.The Department would emphasize that homeless households who can show that they incur expenses greater than the shelter estimate will be able to claim the actual shelter expenses in calculating the shelter deduction.

The Department is also keeping the option from the proposed rule that State agencies may develop their own shelter estimates for homeless households who have some shelter costs during the month while not incurring expenses for the entire month. While keeping the option, the Department is further revising the option by adding a provision that any methodology or database developed by a State agency in calculating its shelter estimate shall be submitted to FNS for approval. Since this is a new area, the Department wants to ensure consistency in the development of the estimates.

One commenter suggested changes in the proposed rule to help States in developing their own standard estimate by having State agencies use the average costs for housing purchased by the day or week in their jurisdiction. Another commenter suggested States use the Aid to Families with Dependent Children (AFDC) shelter component as a guideline in developing a standard estimate; another suggested using the Department of Housing and Urban Development (HUD) fair market rent. The Department believes that all these suggestions can be used by State agencies in developing their own estimates as long as the State agency shows the correlation between the estimates and local data on homeless people's shelter costs. In particular, the final rule makes clear that State agencies may develop estimates based on geographic areas and approval by the Department would mean that there could be several estimates in a State. Overall, though, the Department does not wish to limit State agencies to a

particular method of developing their own estimate and data. The Department believes that State agencies need the greatest flexibility possible in order to develop an estimate that meets their needs. Therefore, the final rule does not contain any further changes regarding estimate methodology.

If a State agency submits data that show shelter costs higher than the FNS shelter estimate for homeless households, the State agency may use its higher shelter estimate amount since the $128 estimate provided by the Department is not a cap. Likewise, if the State agency shelter estimate is lower than the FNS estimate, then the State estimate may be used at the State's option. The Department does not anticipate that any State will choose such an option; however, it is permitted by law and therefore must be allowed as a contingency.

Because use of a standard shelter estimate for the homeless is new, the Department intends to review data received from State agencies relating to homeless shelter estimates. If warranted, the Department may propose future rulemaking.

In its proposed rulemaking, the Department proposed to add the new provision to the end of 7 CFR 273.9(d)(5). The Department now believes it would be more effective if the final provision appears at the beginning of 7 CFR 273.9(d)(5) and has changed the final rule accordingly.

Disaster Provision of the Leland Act

Section 1720 of the Leland Act and the subsequent August 13th rule proposed to amend 7 CFR 280.1 to allow the Secretary to issue emergency allotments to eligible households to replace food destroyed in a disaster. The emergency allotments would be equal to the value of food actually lost in a disaster but not greater than the applicable maximum monthly allotment for the household size. Proposed conforming language was added to 7 CFR 274.6(b)(3).

The Department received only three comments regarding this proposed regulation. A commenter felt the Department failed to adjust reporting and other requirements in the proposed rule in order to carry out Congressional intent to provide emergency assistance to disaster victims. The Department wishes to point out that the proposed rule addressed that part of section 1720 of the Leland Act which amended section 5(h)(3)(A) of the Food Stamp Act. Section 5(h)(3)(A) is concerned solely with the issue of replacing food destroyed in a disaster. Other issues involved in disasters, such as reporting requirements and verification procedures, will be addressed in a forthcoming comprehensive rule on disasters. Therefore, the proposed rule is adopted without change.

The Department would point out that the Leland Act amendment to section 5(h)(3)(B) of the Food Stamp Act reflects current practice. Any time there is a request from a State agency for a disaster declaration, the Department carefully considers each request and approves the use of special disaster certification procedures if warranted. Factors involved in the determination process include such things as accessibility of grocery stores, as well as power interruptions. In fact, in the past two to three years, special disaster procedures have been used following a variety of natural disasters. These disasters included such instances as the destruction caused by Hurricane Hugo in 1989; the Lomo Prieta earthquake in California, also in 1989; and devastation to some small communities in Kansas in 1990 caused by a tornado. Each disaster approval is handled individually and procedures are adjusted to meet the needs of the specific disaster. In all instances the Food Stamp application process, including reporting requirements, is greatly streamlined.

Another commenter disagreed with the provision that requires replacement food stamp allotments to "equal to the value of food actually lost". The commenter felt it would be impossible for a household affected by a disaster to accurately estimate the value of food lost in the disaster and suggested the rule be modified to define the value of the emergency allotment as equal to, but not greater than, the applicable maximum monthly food stamp allotment for the household size. The Department reviewed the suggestion and believes the language of the proposed rule clearly reflects the language of section 1720 of the Leland Act. Therefore, the proposed language is adopted without change.

Implementation

Section 1781 of the Leland Act requires that the provisions of this final rulemaking be effective and implemented the first day of the month beginning 120 days after publication of implementing regulations or from October 1, 1991, whichever is earlier. (The Leland Act mandates October 1, 1991 as the required publication date of these regulations.) Thus, the provisions are effective and must be implemented on February 1, 1992. Variances resulting from implementation of the provisions of this rule shall be excluded from error analysis for 90 days from the required implementation date, in accordance with 7 CFR 275.12(d)(2)(vii). These provisions must be implemented for all households that newly apply on or after February 1, 1992. The current caseload must be converted to the new provision at recertification, at household request, or when the case is next reviewed, whichever occurs first. If, for any reason, a State agency fails to implement on the required implementation date, restored benefits must be provided back to the required implementation date or the date of the food stamp application, whichever is later. The Department is amending 7 CFR 272.1(g) to finalize the implementation requirements provided in the Leland Act.

List of Subjects

7 CFR Part 272

Alaska, Civil Rights, Food Stamps, Grant programs-social programs, Reporting and recordkeeping requirements.

7 CFR Part 273

Administrative practice and procedure, Aliens, Claims, Food stamps, Fraud, Grant programs-social programs, Penalties, Records, Reporting and recordkeeping requirements, Social security, Students.

7 CFR Part 274

Administrative practice and procedure, Food stamps, Fraud, Grant program-social programs, Reporting and recordkeeping requirements.

7 CFR Part 280

Disaster assistance, Food stamps, Grant programs-social programs, Indians.

Accordingly, 7 CFR parts 272, 273, 274, and 280 are amended as follows:

1. The authority citation for parts 272, 273, 274, and 280 continues to read as follows:

Authority: 7 U.S.C. 2011–2031.

PART 272—REQUIREMENTS FOR PARTICIPATING STATE AGENCIES

2. In § 272.1, a new paragraph (g)(123) is added to read as follows:

§ 272.1 General terms and conditions.

* * * * *

(g) *Implementation.* * * *

(123) *Amendment No. 338.* The provisions of *Amendment No. 338* are effective and must be implemented on February 1, 1992. The provisions must be implemented for all households that newly apply for Program benefits on or after the required implementation date of February 1, 1992. The current caseload shall be converted to these

provisions at household request, at the time of recertification, or when the case is next reviewed, whichever occurs first. If, for any reason, a State agency fails to implement by the required implementation date, restored benefits shall be provided, if appropriate, back to the required implementation date or the date of the food stamp application, whichever is later. Any variances resulting from implementation of the provisions of this amendment shall be excluded from error analysis for 90 days from this required implementation date in accordance with 7 CFR 275.12(d)(2)(vii).

PART 273—CERTIFICATION OF ELIGIBLE HOUSEHOLDS

3. In § 273.9, paragraph (d)(5) introductory text and paragraphs (d)(5)(i)–(v) are redesignated as (d)(5)(ii) introductory text and paragraphs (d)(5)(ii)(A)–(E); a new paragraph (d)(5)(i) is added; and a heading is added to newly redesignated paragraph (d)(5)(ii).

The additions read as follows:

§ 273.9 Income and deductions.

* * * * *

(d) *Income deductions.* * * *

(5) *Shelter costs.*

(i) *Homeless households.* State agencies shall use a standard estimate of the shelter expenses for households in which all members are homeless and are not receiving free shelter throughout the calendar month. If State agencies opt to develop their own estimate, the estimate must be consistent with costs incurred by homeless people for shelter and the methodology and database used in developing the State estimate shall be submitted to FNS for approval. If a State agency finds that area shelter costs differ by geographic areas, the State agency may develop specific estimates by geographic areas. If a State agency submits data that show shelter costs for most homeless households are higher than the FNS shelter estimate, the higher shelter estimate shall be used. If State agencies do not wish to develop their own estimate, then the State agency shall use the estimate provided by the Department. The Department's shelter estimate for FY 92 is $128. The Department will update this figure annually when the shelter cap is adjusted using the same method as is used in indexing the shelter cap. All homeless households which incur or reasonably expect to incur shelter costs during a month shall be eligible for the estimate unless higher shelter costs are verified at which point, the household may use actual shelter costs rather than the estimate. If a homeless household has difficulty in obtaining traditional types of verification of shelter costs, the caseworker shall use prudent judgment in determining if verification obtained is adequate. For example, if a homeless individual claims to have incurred shelter costs for several nights and the costs are comparable to costs incurred by homeless people for shelter, the caseworker may decide to accept this information as adequate verification and not require further verification. Homeless households which incur no shelter costs during the month shall *not* be eligible for the standard estimate.

(ii) *Other households.* * * *

* * * * *

PART 274—ISSUANCE AND USE OF COUPONS

§ 274.6 [Amended]

5. In § 274.6, paragraph (b)(3) is amended by adding the words "Except for households certified under 7 CFR part 280," to the beginning of the first sentence and lower-casing the word "Replacement."

PART 280—EMERGENCY FOOD ASSISTANCE FOR VICTIMS OF DISASTERS

6. Section 280.1 is amended by adding two new sentences to the end of the section to read as follows:

§ 280.1 Interim disaster procedures.

* * * In addition to establishing temporary emergency standards of eligibility, the Secretary shall provide for emergency allotments to eligible households to replace food destroyed in a disaster. Such emergency allotments would be equal to the value of the food actually lost in such disaster but not greater than the applicable maximum monthly allotment for the household size.

Dated: November 27, 1991.

Betty Jo Nelsen,

Administrator.

[FR Doc. 91–29015 Filed 12–2–91; 10:34 am]

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Federal Register

Wednesday
December 4, 1991

Part VII

The President

Proclamation 6386—National Pearl Harbor Remembrance Day, 1991

Digest

Presidential

Federal Register
Vol. 56, No. 233
Wednesday, December 4, 1991

Presidential Documents

Title 3—

The President

Proclamation 6386 of November 29, 1991

National Pearl Harbor Remembrance Day, 1991

By the President of the United States of America

A Proclamation

At 7:55 a.m. on December 7, 1941, air and naval forces of Imperial Japan launched a surprise attack against United States military installations at Pearl Harbor, Hawaii. More than 2,400 Americans were dead or missing after the attack, including 68 civilians. Another 1,178 people lay wounded. Two U.S. battleships were destroyed; another six were severely damaged. On the same day, attacks against U.S. installations in Guam, the Philippines, and elsewhere in the Pacific left a similar trail of death and destruction. Less than 24 hours later, after an impassioned address by President Franklin D. Roosevelt, the Congress declared that a state of war existed between the United States and the Empire of Japan. Thus, America became engaged in World War II, a conflict that would change the course of history, ending forever America's isolation from world events.

Across the United States, people rallied to the cry of "Remember Pearl Harbor!" While millions of brave and selfless Americans took up arms in the struggle for freedom, countless others labored and sacrificed on the home front. On our Nation's farms and in its factories, millions of workers rushed to increase production. In homes, schools, and churches, citizens of every age and every walk of life prayed for victory while making every contribution they could to the war effort. Yet this tremendous display of patriotism and resolve was more than a response to the outrage of Pearl Harbor. As President Roosevelt said:

> When we resort to force, as we now must, we are determined that this force shall be directed toward ultimate good, as well as against immediate evil . . . . We are now in the midst of a war, not for conquest, not for vengeance, but for a world in which this Nation, and all that this Nation represents, will be safe for our children.

Six years after World War II began, and four years after the attack on Pearl Harbor, the United States and its Allies secured the unconditional surrender of Nazi Germany and Imperial Japan. By the end of the war, there had been more than 1,000,000 American casualties. Some 400,000 Americans had died so that others might live in freedom. Our Nation will always be grateful for their courage and sacrifices.

When we remember those who served our country during World War II, we also recall President Truman's observation that the Allied victory was "a victory of more than arms alone." Indeed, while our farms, factories, mines, and shipyards produced tons of raw materials and finished goods that were essential to the war effort, as President Truman said, "back of it all were the will and spirit and determination of a free people—who know what freedom is and who know that it is worth whatever price they had to pay to preserve it."

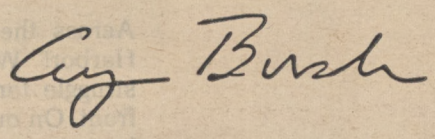
On this occasion, we reaffirm the solemn commitment that President Truman made when he declared, "We shall not forget Pearl Harbor." During the past five decades, that commitment has gone hand in hand with the unending task that President Roosevelt had earlier described as winning the peace. America's determination to remember the lessons of World War II and our continuing vigilance and resolve in the defense of freedom have helped to bring about the triumph of democratic ideals around the globe. Today Japan stands second to none as our ally and friend.

As we mark the 50th anniversary of the attack on Pearl Harbor, let us remember in prayer all those who died on that day and throughout World War II. Let us also honor all those World War II veterans who are still living, especially the infirm and the hospitalized. Finally, let us give thanks for the great blessings of freedom our World War II veterans helped to secure.

The Congress, by Public Law 102–68, has designated December 7, 1991, as "National Pearl Harbor Remembrance Day."

NOW, THEREFORE, I, GEORGE BUSH, President of the United States of America, do hereby proclaim December 7, 1991, as National Pearl Harbor Remembrance Day. I call upon all Americans to observe this day with appropriate programs, ceremonies, and activities.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-ninth day of November, in the year of our Lord nineteen hundred and ninety-one, and of the Independence of the United States of America the two hundred and sixteenth.



[FR Doc. 91–29258
Filed 12–3–91; 10:59 am]
Billing code 3195–01–M

federal register

Wednesday
December 4, 1991

Part VIII

Department of Defense

Department of the Army

Environmental Assessment, Extended Range Intercept Technology (ERINT) Program; Notice

DEPARTMENT OF DEFENSE

Department of the Army

Environmental Assessment, Extended Range Intercept Technology (ERINT) Program

AGENCY: U.S. Army Strategic Defense Command (USASDC), DoD.

ACTION: Notice of availability of finding of no significant impact.

SUMMARY: Pursuant to the Council on Environmental Quality regulations for implementing the procedural provisions of the National Environmental Policy Act (40 CFR parts 1500–1508), Department of Defense Directive 6050.1 and Army Regulation 200–2, the USASDC has conducted an assessment of the potential environmental consequences of the ERINT program in support of the Strategic Defense Initiative. A no-action alternative was also considered. The USASDC has the responsibility for conducting the ERINT program, which is intended to demonstrate a pre-prototype missile and launch control system technology for tactical missile defense application.

EFFECTIVE DATE: December 4, 1991.

POINT OF CONTACT: An Environmental Assessment supporting a Finding of No Significant Impact is available for review at the White Sands Missile Range (WSMR) Environmental Services Division (Building T–150), the WSMR Visitor's Center (Public Affairs, Building 122), and the public library in the area this notice is published. All are invited to submit written comments within 15 days of this notice. Comments and questions should be addressed to either of the following: Commander, U.S. Army White Sands Missile Range, ATTN: STEWS–ES–E, White Sands Missile Range, New Mexico 88002, FAX: (505) 678–7665 or U.S. Army Strategic Defense Command, ATTN: Sharon Mitchell, CSSD–EN, P.O. Box 1500, Huntsville, Alabama 35807–3801, FAX: (205) 955–3958.

SUPPLEMENTARY INFORMATION: The ERINT activities would include developing and flight testing of the ERINT interceptor missile and the ERINT Target System (ETC) missile. Two types of ETS missiles would be developed and tested: A ballistic tactical missile target and a maneuvering tactical missile target. An existing air-breathing target would also be used for some flight tests. Two targets developed for ETS would also carry a nonhazardous chemical simulant payload to qualify theater missile defense (TMD) lethality against chemical warheads.

The locations and activities required for the ERINT development and flight test activities, which have been evaluated in the ERINT Environmental Assessment (EA), are listed in Table 1. This decision covers the first six flight tests scheduled to be conducted at White Sands Missile Range (WSMR) beginning in late 1991 and continuing through 1992. Later flights will be covered by a decision following further environmental documentation as information becomes available. To assess the significance of potential environmental impacts, a list of the activities necessary to accomplish the proposed action first developed. The affected environment at each ERINT program location was then described. Next, those activities with the potential for environmental consequences were identified. Each of the environmental components for which this potential was identified was subsequently evaluated in greater detail (see Table 1). If a proposed activity was determined to present a potential for environmental impact, then the activity was evaluated in terms of the potential for significant environmental impact by considering the intensity, extent, and context in which the impact would occur. As a result of the evaluation, impacts were assigned to one of three categories: Not significant, potentially significant but mitigable, or potentially significant.

Findings

The environmental consequences of all ERINT program activities evaluated for the first six flight tests were determined to be not significant for all locations. Two issues were evaluated in greater detail during the analysis due to preliminary concerns expressed by environmental regulators early in the evaluation process: (1) Flight test trajectories have been adjusted to minimize debris impacts in the San Andres National Wildlife Refuge, habitat of a sensitive population of desert bighorn sheep. Analyses of the probability of debris striking a sheep indicates a very low risk of occurrence. Therefore, the potential for impact to the bighorn sheep is not significant. (2) The components of the chemical simulant are not listed as hazardous substances, and is expected to evaporate or disperse to the extent that little, if any, of the simulant will be deposited on the ground. Therefore, the environmental effects of the nonhazardous simulant will not be significant when used as proposed for the ERINT testing activities.

Kenneth L. Denton,

Army Federal Register Liaison Officer.

BILLING CODE 3710-08-M

TABLE 1 - ERINT ACTIVITIES, LOCATIONS AND ENVIRONMENTAL COMPONENTS EVALUATED IN DETAIL IN THE ENVIRONMENTAL ASSESSMENT

FACILITY/LOCATION	ACTIVITY	Air Quality	Biological Resources	Cultural Resources	Hazardous Materials	Health & Safety	Infra-structure	Land Use	Noise	Physical Resources	Socio-economics	Water Resources
LTV Missiles & Electronics Group Grand Prairie, Texas	ERINT-1 flight test missile development				X-1	X-1						
Rockwell International Anaheim, California	fabrication of beryllium components for the ERINT-1 missle	X-1			X-1	X-1						
L.A. Gauge Sun Valley, California	fabrication of beryllium components for the ERINT-1 missile	X-1			X-1	X-1						
Holloman Air Force Base New Mexico	rocket sled tests for ERINT-1 missile radome	X-1	X-1		X-1	X-1			X-1			
Atlantic Research Corporation Gainesville,Virginia	attitude control motor and rocket motor development				X-1	X-1						
Atlantic Research Corporation Orange County, Virginia	rocket motor development and static tests	X-1			X-1	X-1			X-1			
Atlantic Research Corporation Camden, Arkansas	rocket motor static tests	X-1			X-1	X-1			X-1			
Aerotherm Mountain View, California	ETS target development				X-1	X-1						
Orbital Sciences, Space Data Div Chandler, Arizona	ETS missile development				X-1	X-1						
Hill Air Force Base Utah	ETS rocket motor refurbishment/ inspection (M57A-1)				X-1	X-1						
Pueblo Depot Activity Colorado	ETS rocket motor inspection (XM-100)				X-1	X-1						
Battelle, Columbus Division West Jefferson, Ohio	chemical simulant preparartion				X-1	X-1						
White Sands Missile Range New Mexico	flight preparation (ERINT-1 & ETS)	X-1	X-1	X-1	X-1	X-1			X-1			
	flight testing (ERINT-1 & ETS)	X-1	X-1	X-1	X-1	X-1		X-1	X-1			X-1

NOTE: All environmental components were evaluated for each location. An X denotes components for which potential environmental consequences were identified and then evaluated in greater detail to determine significance. The significance determination is noted as follows: 1 = no significant impact, 2 = potentially significant but mitigable, 3 = potentially significant.

[FR Doc. 91-29257 Filed 12-3-91; 11:03 am]

BILLING CODE 3710-08-C

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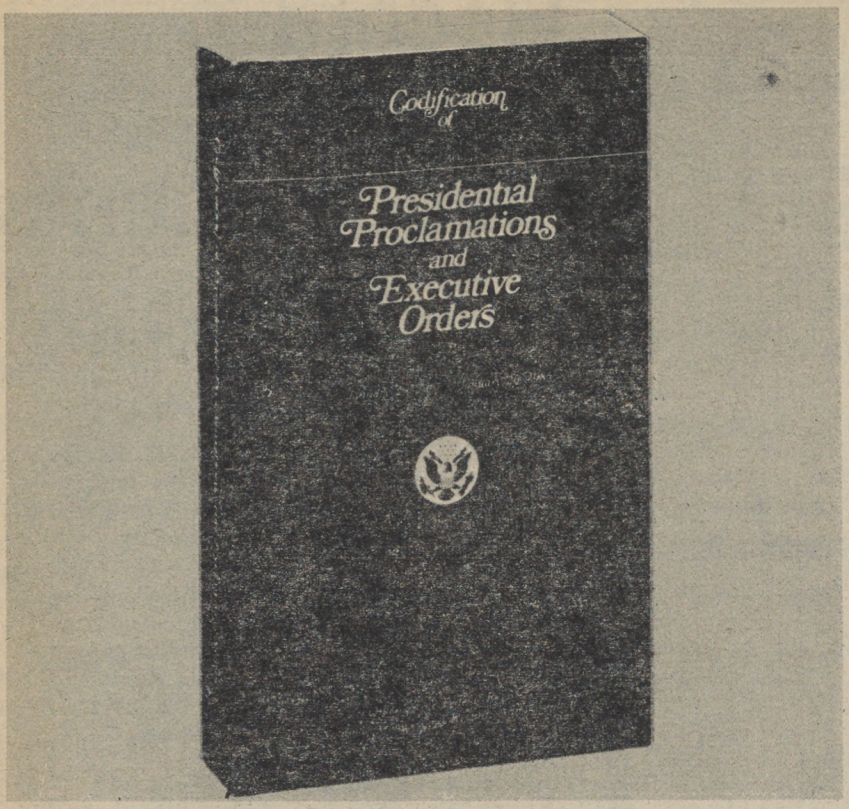

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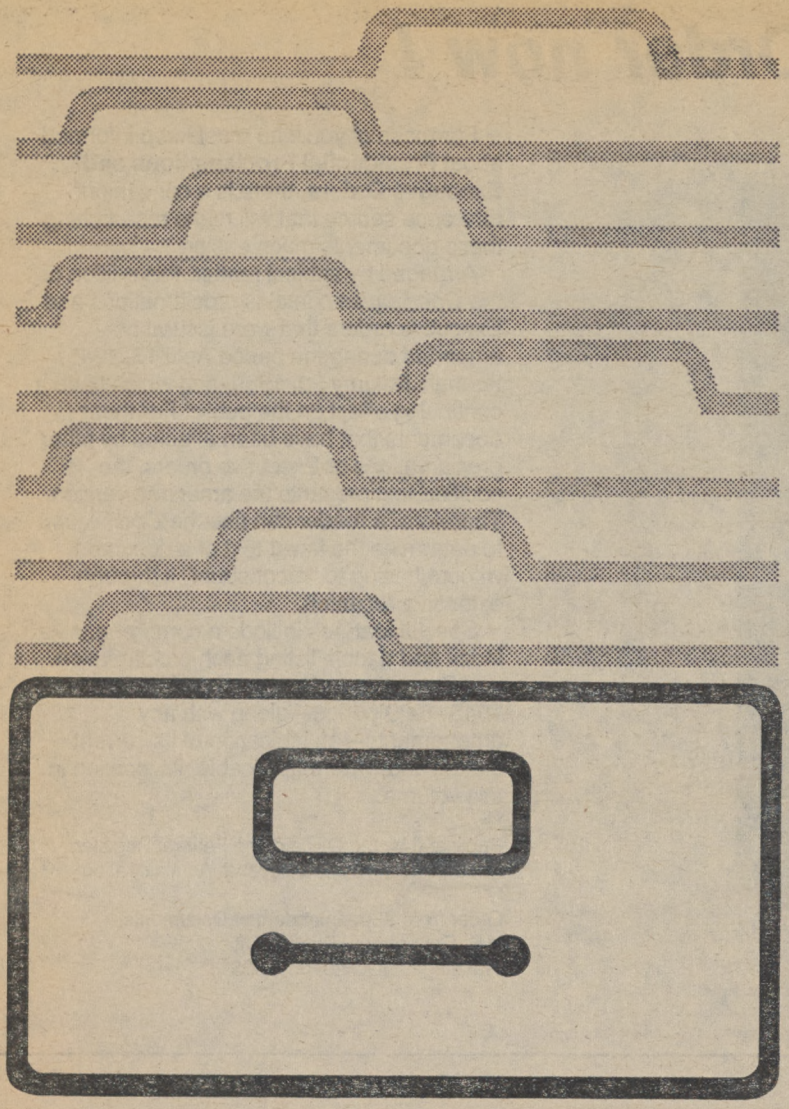

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in the Code of Federal Regulations (CFR)

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